

UNITED STATES DEPARTMENT OF EDUCATION

In the Matter of Arbitration Between:

Case No. R-S/15-16

LLOYD CHADWICK HOOKS, Petitioner vs

**STATE OF NORTH CAROLINA DIVISION OF SERVICES FOR THE BLIND,
Respondent**

APPEARANCES:

For the Petitioner:

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For the Respondent:

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I. BACKGROUND

This case arose under the federal Randolph-Sheppard Act (R-S Act) and the North Carolina statutory and regulatory requirements for the state as the state licensing agency (SLA) under the act. The North Carolina Division of Services for the Blind serves as the state agency administering the Business Enterprise Program (BEP) under the federal act

On June 26, 2014 the division posted an advertisement for a vending vacancy at the I-85 Davidson County Rest Area. The petitioner applied for the vacancy along with seven (7) other applicants. He participated in the agency's selection process, However, another applicant was selected for the position. The petitioner filed a grievance with the Elected Committee of Vendors. The committee heard the petitioner's grievance required under the R-S Act on October 17, 2014. The petitioner appealed the committee's decision to the Division Director on October 27,

2014. This appeal was denied by the Director on November 25, 2014.

On December 10, 2014 the petitioner requested a state "Full Evidentiary Hearing" required by 20 U.S.C. §107d-1(a). The evidentiary hearing was held on March 25, 2015 before a hearing officer appointed by the state agency. He rendered his decision denying the appeal on May 4, 2015. This decision concluded the state's dispute resolution procedures.

On July 2, 2015 the petitioner filed a federal complaint with the Secretary of Education requesting arbitration of this case under 20 U.S.C. §107d-2(a). In making this determination the secretary's designee relied on, in part, the *Revised Interim Policies and Procedures for Covering and Conducting an Arbitration Pursuant to Section 5(b) and 6 of the Randolph-Sheppard Act as Amended*. The convening letter stated.

. . . the Secretary authorizes the convening of an arbitration panel to hear and render a decision on the case raised in the complaint. The central issue is whether the SLA violated the R-S Act, implementing regulations and state rules by failing to award Mr. Hooks the I-85 Davidson Area County Rest Area.

Arb. Tab 1, p. 000001

The parties proceeded to select their respective arbitrators who then selected the neutral chair under 20 U.S.C. §107d-2(b) 1.

The arbitration panel held a pre-arbitration conference and issued a pre-hearing memorandum. The parties acknowledged that arbitration under the Act is a de novo proceeding. Transcripts of testimony and exhibits in the grievance hearing and the full evidentiary hearing was the record on which the complaint to convene and the decision to convene this arbitration were based. To expedite these proceeding these same transcripts and exhibits were incorporated into the evidentiary record in this arbitration.

As a de-novo process this arbitration is not an appellate process limited to reviewing the grievance committee's decision or the state's evidentiary hearing officer's decision. The positions the parties advocated in those earlier proceedings evolved with further understanding of the evidence and applicable principles.

In the convening letter the Secretary recognized the arbitration panel was to determine whether the R-S Act and its implementing regulations and/or state rules and regulation were violated when the petitioner was not selected for the advertised vacancy. The panel's function is not to determine whether the grievance committee or the hearing officer erred. It is to determine if applicable federal and/or state laws were violated during the selection process.

An arbitration hearing was held on May 25, 2017. The issues presented in the hearing were as follows:

1. Were the points awarded the petitioner by grader Eller for questions 2, 3, and 6 arbitrary and/or unsupported by the evidence and, if so, what shall be the remedy?
2. Were the discretionary points awarded to the petitioner by grader Eller and the method for determining scores violations of state regulations and/or due process and, if so, what shall be the remedy?

A transcript of the arbitration hearing was taken and prepared by Margaret Blumenthal. Transcripts and documents from the prior with exhibits and testimony presented at the hearing. The parties submitted written briefs before the August 15, 2017 filing date. The award filing date was extended to September 29, 2017.

II. FINDINGS

a. (a) Past Practices

For many years the North Carolina Division of Services for the Blind, as the state licensing agency (SLA), has followed the same or similar practices in the selection of applicants for filling advertised vacancies under the Business Enterprise Program (BEP). This program is administered by the Chief of Business Enterprises. The Elected Committee of Vendors is, as the name implies, elected by all of the blind operators from regions throughout the state. The committee then elects a Chairman and Vice Chairman. The SLA has a staff of BEP counselors. Every vending location has a BEP counselor assigned to it.

Whenever a vacancy occurs a three-person selection panel is established. The Chief of the BEP always serves on the panel as does the Vice Chair of the Elected Committee of Vendors. The third panel member is the BEP Counselor assigned to the vacant location. The Chief and the elected Vice Chairs, therefore, are

regular selection panel members while the BEP Counselor member varies with the vacancy location.

The selection panel uses a system of points to grade applicants. Three categories of points are used in this system. The BEP Counselor on a panel prepares an "Incoming points" total based on an applicant's record for sanitation, financial analysis/operating standards, customer and building management relations and seniority. These points are reviewed and agreed to by each applicant. Accumulating these "incoming points" is the first step in the selection process for each applicant.

The second step for the panel is to select and agree upon ten (10) questions covering knowledge that qualified operators should know about performing the work at a vacant location. At least one question must involve a mathematical calculation. Each panel member then verbally asks every applicant the same question and records their answers. Each panel member independently asks these questions in a one on one setting. The panel member then awards up to two points on a scorecard based on the following criteria:

1. (1.0 point) - demonstrating basic knowledge;
2. (1.5 points) - demonstrating above average knowledge;
3. (2.0 points) - demonstrating exceptional knowledge;

10A N.C.A.C. 63C. 0204(d)

For the ten (1) questions the total possible points are twenty (20) for each applicant.

The final step in the selection process is to award up to ten (10) discretionary points with the minimum being (5) points for a licensee qualified to perform the work at the advertised location. The discretionary points awarded then are entered on a scorecard for each applicant.

After these three steps are completed the Chief collects the scorecards from his co-panel members. He then averages the points awarded for each question by the three panel members. The average for each question becomes the final score for each applicant on that question. An applicants' averages for each question are added together giving a ten (10) question total score for each applicant.

The same calculation is followed for discretionary points awarded to each applicant. The discretionary points awarded by the three panel members are averaged. An applicant's discretionary point score then is the average of the three members' scores.

The selection process is completed by totaling the points awarded at each step in the system: (1) Step one - incoming points; (2) Step 2 - questions points and (3) Step 3 - discretionary points. The applicant with the highest total points is selected to fill an advertised vacancy.

In this case the petitioner introduced evidence to show grader Eller, serving as Vice Chair of the Elected Committee of Vendors, was arbitrary in awarding points for three (3) of the ten (10) questions and the awarded points for those questions were not supported by substantial evidence:

b. Oral Exam Points

Question 2

Question 2 asked of all applicant was as follows:

For vending machine purposes, what is a recycler and what are its advantages and disadvantages?

Arb. Tab 17, p. 000142

The petitioner answered the question as follows:

MR. HOOKS: Well actually, I have recyclers on my snack machines, and the big advantages are that you can take tens and twenties, and your customers aren't getting a pocket full of quarters or dollar coins. They're getting fives and dollar coins to go along with that. Say, if they put in a - - if they want to buy a bag of chips, they're going to get three fives and four dollar coins back.

The disadvantages, they do jam once in a while. And when they're jammed, you won't take any dollar bills, I mean, because it jams up your whole validator. So you've got to keep a check on it once in a while.

One thing I like about with my credit card readers on mine, it kind of gives me a heads up because I get an e-mail each morning letting me know what my sales are, and I can see if - - at night, if my - - if that validator jammed up or the recycler jammed up,

I can say, "Wait a minute. I didn't have any sales on that machine after 8:00 o'clock. I better check it because they might be a jam on it."

Arb. Tab 17, 000142-143

Panel member Eller awarded 1.5 points for the petitioner's answer.

Arb. Tab 12, p. 000114.

Applicant Weadon's answer to question 2 is as follows:

MR. WEADON: A recycler. Recycler - - the main advantage of a recycler is it gives - - it gives your customer actually, what, change - - one, five, tens, twenties - - five different methods - - give different means of paying for product for change. \$1 bill, \$5 bill, tens and twenties. And that - - that is the biggest advantage to a recycler.

Now, the - - the advantages, sometimes the fives tend - - tends to stick a little more, and - - if you don't watch out, it could be out of order.

But the - - the advantages more than outweigh the disadvantages to a recycler because it will increase your sales and your gross profit and - - of course, your bottom line.

Arb. Tab 14, p. 000120-121

Panel member Eller awarded applicant Weadon 2 points for his answer to question 2. Arb. Tab 12, p. 000114.

Applicant Little's answer to question 2 is as follows:

MR. LITTLE: Okay. A recycler would be a device that recycles bills, which means it will take fives, tens, up to twenties, and it - - people can get change. And, therefore, more people can make more selections if - - your recycler's working, but if it ever breaks down and it kinks of like - - you could lose money off of it.

Arb. Tab 20, p. 000170

Panel member Eller awarded applicant Little 2 points for his question 2 answer. Arb. Tab 12, p. 000114.

Applicant Pezzimenti's answer to question 2 is as follows:

MR. PEZZIMENTI: We just got one this week. A recycler allows customers to use up to a \$20 bill and that's great for the customer. The customer is allowed to - - can put a \$20 bill in if they don't have proper change and get change back.

The disadvantage, of course, to the operator is you've got to keep maintaining the number of fives and [inaudible] dollars and that kind of thing and making sure that the machine is full and with the proper funds to - - to give the customer back their proper change. And so they're - -

For the customer, it's great because if they're stuck with a twenty and they want to buy something, they can buy it. For the operator, they have to be on top of it to make sure they've got proper change and enough change to satisfy the customers.

Arb. Tab. 24, p. 000206-207

Panel member Eller awarded applicant Pezzimenti 2 points for his question 2 answer. Arb. Tab. 12, p. 000114.

Question 3

Question 3 asked of all applicants was as follows:

What are the main sanitation concerns related to a highway vending facility?

Arb. Tab. 17, p. 000143

The petitioner answered question 3 as follows:

MR. HOOKS: I touched on this earlier related to the bugs, related to leaves, pollen. Also, when you're - - when you're transporting your food to and from Sam's or wherever you're getting it, if you're carrying sandwiches, of course, you need to keep those in a controlled environment, whether it be a cooler, to maintain the proper temperature on that.

Also, say, if you mop the floor, you want to make sure you have "Wet" signs out to make sure people are aware of the floor might be a little slick. I know on mine it's real slick even when it rains. The wind blows through the doors a little bit. And the

last thing you want is somebody to fall down from being - - you know, having a slick floor.

Also, you know, another thing would be, like I said earlier, the coffee machine just making sure that you keep it extra clean to where it doesn't attract bugs, especially in the heat - - the warmer parts of the year.

Arb. Tab. 17 p. 000143-144

Panel member Eller awarded the petitioner 1.5 points for his question 3 answer. Arb. Tab. 12, p. 000114.

Applicant's Weadon's answer to question 3 is as follows:

MR. WEADON: Now, that - - that is - - In a location like mine, that is a seasonal thing. In the spring when the wind is blowing, you've got pollen all over the place. So - - so keeping the machines clean in the spring is - - a huge thing. In the fall, leaves, trash, when the wind's blowing, all that stuff just blows right in, and - -and so keep - - keeping all that, all the trash and debris out of the vending area is - - is extremely important.

Arb. Tab. 14, p. 000121

Panel member Eller awarded applicant Weadon 1.5 points for his question 3 answer. Arb. Tab. 12, p. 000114. Grader Eller did not award 2.0 points to any of the other applicants.

Question 6

The question 6 asked of all the applicants was as follows:

Describe the difference in gross profit and net profit and how each is affected by operating expenses.

Arb. Tab. 17, p. 000146

The petitioner's answer to question 6 was as follows:

MR. HOOKS: Well, your gross profit is actually before your expenses are taken out, and your net profit is the amount of money that is left over after your expenses are removed. And these are affected because the more your expenses are, the lesser your net profits would be. The - - Let me make sure I said that

right. The - - more your expenses are, the less your net profit would be, and the less your expenses are, the more your net profit would be. So, therefore, they're totally in relationship to each other.

Arb. Tab. 17, p. 000146

Panel member Eller awarded the petitioner 1.5 points for his question 6 answer. Arb. Tab. 12, p. 000114.

Applicant Weadon's answer to question 6 was as follows:

MR. WEADON: The gross profit - - gross - - profit - -You want the gross profit, not the gross profit percentage.

THE INTERVIEWER: Yeah. It says, "Describe the difference in gross profit and net profit." - - -

MR. WEADON: Okay. Now - - -

THE INTERVIEWER: So dollar amounts.

MR. WEADON: Right. Gross profit is - - after - - after your purchase - - after your cost of goods sold. You take your total sales[inaudible] cost of goods sold, giving you gross profit. Now, the only thing affects that is the cost of goods sold.

Now, your net profit comes after all of your expenses. And let me see what else? Yeah, after all the expenses - - you subtract all your expenses from your gross profit, giving you your net profit.

Arb. Tab. 14, p. 000123-12

Panel member Eller awarded applicant Weaver 2 points for his question 6 answer. Arb. Tab. 12, p. 000114.

Applicant Pezzimeti's answer to question 6 is as follows:

MR. PEZZIMENTI: Well, gross profit doesn't have anything to do with operating expenses. It is strictly the sales minus the cost. And net profit is - - is the sales minus the cost minus operating expenses, so operating out of the net profit is directly connected to operating expenses.

Arb. Tab. 24, p. 000201-209

Panel member Eller awarded applicant Pizzimenti 2 points for his question 6 answer. Arb. Tab. 12, p. 000114.

Applicant Gibbs' answer to question 6 is as follows:

MR. GIBBS: Okay. Your gross profit and your net profit and how each is - -

THE INTERVIEWER: - - - is affected by

MR. GIBBS: Okay. Okay. Your gross profit is - - is not directly affected by your - - any of your expenses. Your gross profit is mainly going to be your sales that you have in the facility. And then that's going to - - you know, you would subtract your purchases from that. And then that would give you your gross profit.

The net profit on the other hand is directly affected by any expenses that you have because you would subtract all of your expenses, your employment, your wages, your administrative costs, your janitorial supplies, from your gross profit in order to receive your net profit.

Arb. Tab. 27, p. 000228-229

Panel member Eller awarded applicant Gibbs 2 points for her question 6 answer. Arb. Tab 12, p. 000114.

c. Interview Points

In addition to contesting the points awarded under the three cited questions, the petitioner presented evidence in an effort to show panel member Eller used a method of determining discretionary points that violated state regulations and due process.

Grader Eller testified about how he arrived at his discretionary points for the petitioner:

Q. . . .What is your understanding of how you get to arriving at what discretionary points you're going to award?

A. The experience of the person, their work experience, things that they've done since they've been in the program. I don't put myself - -I don't put, you know, everything into an oral exam.

Q. Okay. What else goes into your calculations, your personal calculations for discretionary points, if anything?

A. That's basically it.

Q. Okay. And when you experience, work experience, things they've done since being in the program, where does your knowledge of those things come from? Is that from in the interview or things you know or where do you get that information?

A. Things that I know, the good and the bad.

Q. Okay. So that - - so it comes from outside of the interview then?

A. Yes. We don't discuss it in the interview.

Q. Okay. But it's knowledge you brought into the interview?

A. Knowledge that I had when I came to the interview, yes.

Q. Okay. So it's not information you got during the interview?

A. No.

Arb. Tab. 44, p. 000413-414

Later in his testimony Grader Eller acknowledged that he probably considered that he heard the petitioner had purchased Gatorade at a Sam's Club for his vending facility. Arb. Tab. 44, p. 000422-423. He also considered recalling that the petitioner had said he had been away from his location for a month. He also was concerned about the petitioner's sanitation grade because the grader was an easy grader. Eller admitted he did not discuss these concerns with the petitioner before awarding discretionary points. Arb. Tab. 44, p. 000422-423. As a result of this method grader Eller awarded 5 discretionary points to the petitioner. Arb. Tab. 12, p. 000114.

The respondent's evidence did not contradict Grader Eller's method of arriving at his discretionary point award for the petitioner. No witness testified that his failure to discuss his concerns with the petitioner was inconsistent with past practices in awarding discretionary points. At the end of the oral questions applicants may submit letters of recommendation, certificates and other documents that may aid the panel in

awarding discretionary points. They typically are asked if they had anything else to discuss.

When the selection process was completed and the points totaled, applicant Weadon had the highest point total and was awarded the I-85 Davidson facility. The petitioner had the second highest total. Their points were as follows:

Selection Steps	Weadon	Hooks
Incoming Points	63.75	61.00
Oral Questions Points	14.33	18.00
Discretionary Points	7.33	6.33
Total	85.42	85.33

Arb. Tab. 12, p. 000114

These totals show the petitioner missed tying applicant Weadon by 0.09 points and having the highest point total by 0.10 points.

The petitioner introduced damage evidence in support of his claim. However, the agency only would provide the gross sales of the I-85 Davidson County facility for the following periods:

Period	Gross Sales
2012	\$160.136
2013	\$169,263
Jan-May 2014	\$ 56,407

Arb. Tab. 46, p. 000508

The agency declined to provide any additional financial data on the grounds that such information was confidential under federal and state regulations. Also, the arbitration panel was prohibited from issuing subpoenas to obtain such documents.

The petitioner did introduce evidence to show the gross and net income he produced at his current facility on I-73 in Randolph County:

Period	Gross Income	Net Income	Profit %
2014	\$149,769	\$62,067.20	41.44%
2015	\$154,124	\$65,169.71	42.28%
2016	\$173.899	\$72,344.90	42.28%

Arb. Tab. 45, p. 000499-505

Petitioner Hooks testified that the I-85 Davidson County facility was ". . . almost a mirror image. . ." of his present facility. He would be buying the same products. His payroll would be the same. His costs would be similar. It would be on a busier highway. Tr. p. 111.

He further testified he visited the I-85 Davidson County several times. Tr. p. 112. It would have more traffic. The facility is nicer and is air conditioned. All of the machines are located in one air conditioned room with a large closet. He testified his current facility is outside in the heat. Tr. p. 115.

Based on this evidentiary record the petitioner contends grader Eller's scores on questions 2, 3 and 6 were arbitrary and not supported by substantial evidence. He further contends the discretionary points awarded by grader Eller were determined by using a method that violated state regulations and due process. The respondent based on the same evidentiary record maintains grader Eller's awarded points on the three questions were not arbitrary and were supported by substantial evidence. The respondent further contends grader Eller's award of discretionary points was in accordance with the method followed over many years and the regulations.

III. DISCUSSION

Several federal statutory and implementing regulations are applicable in this case. Under the Randolph-Sheppard Act several provisions are controlling.

107-2 Arbitration

d. Notice and hearing

Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall c convene an ad hoc arbitration panel as provided in subsection (b) of this section. Such panel shall, in accordance with the provisions of subchapter 11 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
(Emphasis Added)

107b-1 Access to information with state licensing agencies. . .

In addition to other requirements imposed in this title and in this chapter upon state licensing agencies, such agencies shall

1. provide to each licensee access to all relevant financial data, including quarterly and annual financial reports, on the operation of the State vending facility program;

20 U.S.C. §107b-1
(Emphasis Added)

This provision is the subject of the following Code of Federal Regulations section:

§395.12 Access to program and financial information

Each blind vendor under this part shall be provided access to all financial data of the State licensing agency relevant to the operation of the State vending facility program, including quarterly and annual financial reports, provided that such disclosure does not violate applicable Federal or State laws pertaining to the disclosure of confidential information. Insofar as practicable, such data shall be made available in braille or recorded tape. At the request of a blind vendor State licensing agency staff shall arrange a convenient time to assist in the interpretation of such financial data.

34 C.F.R. §395.12
(Emphasis Added)

Under the Revised Interim Policies and Procedures for Convening and Conducting an Arbitration Pursuant to Section 5 (b) and 6 of the Randolph Sheppard-Act as Amended the federal agency provided under policy section 9 that:

(c) the arbitration panel does not have the authority to compel by subpoena the production of witnesses, papers, or other evidence.

In terms of an arbitration award being reviewed as an agency's final action, the federal Administrative Procedure Act (APA) includes the following provision:

706-Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law,

interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) omitted

(2) hold unlawful and set aside agency action, findings and conclusions found to be -

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) - (D) omitted

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this titles or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) omitted

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. §706(2)

The state agency adopted several regulations applicable to this case:

10A N.C.A.C. §63C.0206
Confidential Information

All information and records pertaining to handicapped persons served by this program shall be considered confidential and may not be revealed except in the administration of the program or by the consent of the handicapped person.

(Emphasis Added)

10A N.C.A.C. §63C.0204 Filling Vacancies

(a) - (e) omitted

(d)(1) - (4) omitted

(d)(5) Oral Exam/Interview:

- (A) 30 points maximum.
- (B) Interview shall be face to face (no conference calls).
- (C) All applicants shall be interviewed.
- (D) The Interview Committee shall consist of:
 - (i) The Chief of Business Enterprises, or Deputy Chief or Assistant Director of Programs and Facilities as designated by Chief,
 - (ii) The Area Rehabilitation Supervisor or B.E. Counselor for the area in which the vacancy occurs, and
 - (iii) The Vice-Chairman of the Elected Committee of Vendors or the Chairman in his absence of the Chairman, the Chairman of the Transfer and

Promotion subcommittee.

(E) The Oral Exam part shall consist of 10 questions drawn either from a pool of standard questions or developed by the Interview Committee prior to the interview. The oral exam questions shall relate to any special needs of the vacant facility as well as standard responsibilities and knowledge areas of Business Enterprise operators. Each member of the Interview Committee shall evaluate the applicant's response to each question in the oral exam. The applicant shall receive one point by demonstrating the basic knowledge, the applicant shall receive one and one-half points for demonstrating above average knowledge, and the applicant shall be awarded two points for demonstrating exceptional knowledge for each interview question. There shall be at least one question involving a calculation and a talking calculator shall be provided, although applicants may bring their own. The oral exam shall yield a possible 20 points.

(F) The interview part shall consist of a variety of questions in a give and take format. Each member of the Interview Committee shall evaluate the applicant's response to the interview questions and shall award up to 10 additional points based on the applicant's previous food service experience, knowledge and financial performance. If the applicant meets the requirements for the facility, the applicant shall receive five additional points. If the applicant's qualifications exceed the requirements of the facility, he may be awarded up to ten additional points. The interview shall include the following

elements: questions related to business philosophy to promote general discussion to enable the interview panel to evaluate the applicant's expertise, maturity, experience and ability; a discussion of any related work experience outside the Business Enterprise Program; at least two business math questions. Since points are awarded for seniority, time in the Business Enterprise Program shall not be considered as a reason to award points; however, relevant work experience in the Business Enterprise Program may be discussed and taken into consideration. Applicants may bring letters of recommendation, certificates, and other documents that would aid the Interview Committee in awarding its discretionary points.

(G) Each interviewer shall award discretionary points individually and the total score of Oral Exam and Interview points from each interviewer shall be averaged and added to the applicant's points from the other Sections.

(Emphasis Added)

These various statutory and regulatory provisions are applicable in this case.

e. Arbitral Authority and State Sovereign Immunity

The threshold issue in this case is whether a state's sovereign immunity under the Eleventh Amendment limits arbitral authority under the Randolph-Sheppard Act? This issue has been addressed by the third, sixth and eighth circuits. The ninth circuit reviewed these prior cases and held that the Eleventh Amendment did not apply to arbitration under the R-S Act. *Premo v. Martin*, 119 F 3d 764 (9th Cir. 1997). The court reasoned the state had waived its sovereign immunity under the Act. A waiver is a relinquishment of a known right. The R-S Act clearly designates arbitration as the dispute resolution process to be followed by the states and licensees. In the event of a dispute between a state and any federal agency, the state is required to file a complaint with the R-S Act agency and submit a dispute to arbitration. 20 U.S.C. §107d.1(b). If a licensee has a dispute with an SLA, the licensee is required to file a complaint with the R-S Act agency and submit his/her dispute to arbitration. 20 U.S.C §107d-1(a). This language is clear and unambiguous. A state that voluntarily agrees to be an SLA consents to arbitration as the dispute resolution system under the R-S Act,

thereby, waiving its sovereign immunity. Once immunity is waived, arbitration controls the processing of disputes.

The status of arbitration under the R-S Act has not been decided in the Fourth Circuit. The SLA contends otherwise, citing *Federal Maritime Comm.n v. South Carolina Ports Authority*, 535 U.S.743 (2002). In that case a commercial vessel owner was denied dockage by the South Caroling State Port Authority (SCSPA). The owner filed a complaint with the Federal Maritime Commission (FMC) contending the port authority violated the Shipping Act of 1984. The case was referred to an ALJ who found that the port authority as an arm of the state had sovereign immunity and dismissed the case. The ALJ was reversed by the FMC. The SCSPA appealed to the Fourth Circuit which held that sovereign immunity precluded FMC from adjudicating the complaint. The Supreme Court upheld the Fourth Circuit's decision. Unlike the R-S Act, the Shipping Act of 1984 contained no language which would support any finding that the state waived its sovereign immunity. *Maritime* simply was not a waiver of sovereign immunity case.

Having by passed the Eleventh Amendment via the waiver route, the arbitration process moves forward with the authority to render an opinion and award that becomes the agency's final action subject to appeal and review. 20 U.S.C. §107d-2(a).

f. Questions 2, 3, & 6 Points

The petitioner claims the SLA grading of questions 2, 3, and 6 were biased or arbitrary and not supported by substantial evidence. This claim is based only on grader Eller's scores awarded to the petitioner on each of three questions. Before the matter of arbitrary or biased decision making can be addressed, the issue of relevant evidence must be considered. Arbitrariness or bias must be based on relevant evidence. What is the relevant evidence for analyzing grader Eller's scoring of the petitioner's answers? That issue is best answered by determining what evidence is not relevant.

The relevancy of evidence is determined by the context of the SLA's selection system. This system clearly envisions three independent graders individually awarding points to each candidate for each of the ten questions. 10A N.C.A.C. §63C.0204(a)(5)(G).

This independent scoring is based on each panel member's judgment about what criteria constitutes a 1, 1.5 or 2.0 points for an applicant's answer to each question. Often graders of direct

questions establish written criteria establishing the basis for awarding points of differing amounts. In this case the criteria would be for awarding points for: basic knowledge (1.0 point); above average knowledge (1.5 points); exceptional knowledge (2.0 points). 10A N.C.A.P. §63C.0204(d)(5)(E). Neither grader Eller nor his co-graders testified they had any pre-determined criteria for awarding points for basic, average and exceptional answers. They simply made grading decisions on their unspoken or undisclosed criteria. The only disclosed criteria for grading answers were the actual points awarded each applicant for each question by each grader. The only relevant points and answers were determinations made by an individual grader, not those of other graders. Each grader acted independently. The points awarded and answers given other graders are irrelevant for assessing any arbitrariness of an individual grader. The SLA's arbitrariness in decision making only can be determined by assessing the points and answers of each individual grader. Those individual assessments then would determine whether an SLA filling of a vacancy was arbitrary.

The relevant evidence for assessing grader Eller's scoring must be based on the actual answers and points awarded by him to other applicants for the same question. Their answers and Eller's points awarded to them compared to the answers and points awarded to the petitioner will either show or not show arbitrariness in his scoring. This relevant evidence will show or not show Eller's scoring was not supported by substantial evidence.

Given the relevant evidence, when does it show the awarding of points was arbitrary? The meaning of "arbitrary," in a legal context, in Nolo's Plain-English Law Dictionary is an exercise of discretion that is ". . . not supported by fair or substantial cause or reason." <https://www.law.cornell.edu.wex/arbitrary> A decision is "arbitrary" if there is no "rational connection between the facts found and choice made." *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 966 F. 2d 1292 (9th Cir. 1992) citing *Sierra Pacific Indus.* 866 F. 2d 1099, 1105 (9th Cir. 1989) (citing *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. In. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 443 (1983).

In this case did the points awarded to the petitioner for each question by grader Eller have a ". . . rational connection between the facts found and (the) choice made?" The facts found in this case are undisputed. The record includes transcripts of answers to the three questions by every applicant graded by Eller. The relevant answers are those that were graded higher by

Eller than the points awarded the petitioner for each question. The higher graded answers set the standard or criteria for the points awarded. The question then becomes whether the petitioner's answer met the standard or criteria for the higher points. The question then becomes whether the petitioner's answer met the de facto standard or criteria established by Eller's higher grading for other applicants' answers. Each question must be analyzed separately on this basis.

Question 2 was "What is a recycler and what are its advantages and disadvantages?" Three applicants were awarded 2.0 points for their answers. Applicant Weadon's answer included three elements: (1) advantage for a customer in using bills to purchase merchandise; 2) disadvantage was that the device sometimes sticks; 3) advantages outweigh disadvantages. Applicant Little's answer contained two elements: 1) advantage customer make more selections; 2) disadvantage if breaks down then lose money. Applicant Pezzimenti's answer included two elements: 1) advantage for customer using bills to make purchases; 2) disadvantage is operator make sure machine is loaded with proper funds. In other words, two of the 2.0 point answers included one advantage and one disadvantage. Applicant Weadon's answer included a third element by opining the advantages outweighed the disadvantages. The difficulty with counting this third element is the fact the question did not ask for weighing of advantages versus disadvantages. The answers of the three applicants show that one advantage and one disadvantage of a recycler warranted 2 points by grader Eller.

Now, did the petitioner's answer include the same or similar elements warranting 2.0 points rather than the 1.5 points he was awarded? The petitioner's answer included two elements: 1) advantage convenience for customers; 2) disadvantage they jam up. He also opined that his credit card reader e-mail gives me a heads up, "letting me know what my sales are, and "I can see. . . if that validator jammed up or the recycler jammed up. . ." Arb. Tab 17, 000143. In other words the petitioner's answer tied a credit card validator to a cash recycler device. No evidence was presented to show the validator e-mail feature was designed to monitor recyclers in the same or similar manner. No evidence was presented to show a validator and recycler "talked to each other." Without such evidence the petitioner erred in tying the two devices together under the validator's e-mail feature. The evidence does not show a validator sales e-mail also included recycler sales. The relationship between a credit card validator and a recycler was not asked in question 2. Certainly an operator should check on a no sales validator and as a practice may check

on a recycler at the same time. Such a regular inspection may discover a recycler problem. Other than such a practice, a credit card validator has no relationship to a recycler device. Given this evidence grader Eller could score the petitioner lower for an answer that was, in part, erroneous. His 1.5 point score for the petitioner's question 2 answer was not arbitrary and is supported by substantial evidence.

Question 3 was "What are the main sanitation concerns related to a highway vending facility?" Grader Eller scored the petitioner's answer 1.5 points. Applicant Weadon also was awarded 1.5 points for his answer. No applicants were awarded 2.0 points by grader Eller. Without any 2.0 point awards from Eller no relevant evidence exists in the record to support the petitioner's question 3 claim. No pre-determined model answers or criteria were established for 1.0, 1.5 or 2.0 awards by grader Eller. Without relevant evidence to support the petitioner's claim, Grader Eller's scoring question 3 could not be proven to be arbitrary or without substantial evidence.

Question 6 was "Describe the difference in gross profit and net profit and how each is affected by operating expenses." This question involved three elements: 1) Gross profit equals gross sales minus cost of goods sold; 2) Gross profit minus overhead expenses equals net profit and; 3) Overhead expenses only affects net profit, not gross profit. The three elements were present in applicants' Pizzinenti and Gibbs answers to question 6. They both were awarded 2.0 points for their answers. Applicant Weadon also was awarded 2.0 points for his answer. His answer correctly described gross profit and net profit. In response to the partial question of "how each is affected by operating expenses," He responded, ". . . the only thing affects that (gross profit) is the cost of goods sold." Arb. Tab 14, p.000124. By implication expenses only affect net profit, not gross profit. Grader Eller awarded 2.0 points for Weadon's answer.

The petitioner's answer did not define gross profit as the difference between gross sales and the cost of goods sold, i.e. purchases. He failed to mention cost of goods sold or purchases in his answer. He correctly defined net profit and that expenses affect net profit. Given his omission of one of the required elements, grader Eller's 1.5 point award was supported by undisputed evidence and was not arbitrary.

g. Past Practices and Interview Points

The petitioner contends the practices followed in awarding discretionary points and grader Eller's awarding of points violated SLA regulations 10A N.C.A.C. §63C.0204 (d)(5)(F). The regulations separate the selection process into three parts. First subsection (d)(1-4) specifies the range for sanitation, seniority, performance, customer and building management relations scoring. The SLA practice is to call the sum of these scores as "incoming points." They are calculated by the BE Counselor for the vacant facility. This practice is not disputed by the parties.

Subsection (d)(5) is titled "Oral Exam/Interview." The forward slash in this context means "or." englishclub.com. The title addresses "Oral Exam" or "Interview" as separate parts. Subsection (5) specifies the next two parts. Subsection (5)(E) describes "The Oral Exam part" as consisting of the ten standard and/or developed questions that yield a possible twenty points. All of these questions are direct, meaning they test applicants' knowledge of a subject. The questioner simply asks the same question of each applicant and scores their answers. A questioner does not or should not prompt any applicant, ask for clarifications of answers or otherwise attempt to engage applicants in any kind of verbal exchange or conversation. The SLA's practices are in accord with this reading of subsection (5)(E). The petitioner does not contest the SLA's method of conducting these oral exams.

Subsection 5(F) describes "The interview part" as consisting ". . . of a variety of questions in a give and take format." This language distinguishes the oral exam part from the interview part. The former employs direct questions to solicit answers with no discussion, while the latter involves "a give and take format" in which a panel member asks questions, listens to responses, asks additional questions based on applicant responses etc. In other words panel members are expected to carry on discussions with each applicant. They are expected to conduct an interview compared to being passive examiners who simply score answers for subject matter content. The 5(F) regulation is ambiguous in certain respects. Up to ten additional points may be awarded ". . . based on the applicant's previous food experience, knowledge and financial performance." It then states that an applicant ". . . shall receive five additional points" if he or she ". . . meets the requirements for the facility." These two scores would be up to a possible 15 points. Then it states that if an applicant exceeds the requirements, he or she may be awarded up to ten additional

points. With that added, the total possible points would be 25 (10 + 5 + 10). An applicant who did well in answering the oral examination questions and was awarded up to or near the 25 interview points would have a score that exceeded the 30 point maximum score permitted for both the oral exam and interview parts under subsection (5)(A). In effect, the interviewing part would have "bonus points" to reach the maximum allowable 30 points under subsection (5)(A). The regulations may or may not have intended such a reading. This language is ambiguous. The agency has exercised its discretion by adopting the interpretation that 5 points are awarded an applicant who is qualified and up to 5 points for the remaining points. In adopting this scoring practice, the SLA simply is exercising its discretion to interpret its ambiguous regulation.

Subsection (5)(F) is ambiguous in another respect. It provides the interview committee shall award points based on an applicant's "knowledge and financial performance." Yet, the purpose of the oral exams is to test an applicant's knowledge. With respect to an applicant's financial performance, points already have been awarded for performance under subsection (d)(3). The same can be said for requiring two business math questions that are covered in oral exam questions. These subjects already were addressed. Did the SLA intend to count these evaluations twice? Later the SLA expressly stated since seniority was considered for incoming points it was not to be a basis for interview points. These positions are ambiguous at best.

The purpose of non-directed give and take interviews is to explore an applicant's thinking process. Subsection (5)(F) adopts a similar purpose. Questions should allow the panel "to evaluate the applicant's expertise, maturity, experience and ability." To accomplish this purpose questions should "promote general discussion." Topics to cover include, but are not limited to an applicant's "business philosophy" and "related outside work experience in the Business Enterprise Program." Applicants "may bring letters of recommendation, certificates and other documents" that may aid the panel. No doubt conducting such a non-directed give and take interview requires skilled interviewers. Nevertheless, the SLA has considerable discretion setting up and administering a "give and take" interview. An agency has considerable discretion to resolve such ambiguities.

However, the SLA has no discretion to conduct or not conduct a "give and take" discussion interview. Subsection (5)(F) has no ambiguity in that regard. A "give and take" interview is

required under the regulations. The SLA is obligated to conduct such interviews and award interview points. The purpose of the interview is to assess an "applicant's expertise, maturity, experience and ability." The subjects to cover are listed in subsection (5)(F). Letters of recommendation, certificates and other documents may be sources of inquiry. Personal knowledge of an interviewee may be a subject of discussion.

The regulations are clear, however. The awarding of points must be based on matters covered during an interview. No provision exists for ex parte or undisclosed considerations. No provision exists that dispenses with this interview process.

The SLA followed its long standing practice of simply awarding 5 points when an applicant was qualified and up to 5 discretionary points were recorded on a panel member's score sheet. These scores were awarded immediately after completing the oral exam without any actual "give and take" interview. The failure to actually conduct an interview is a violation of subsection (5)(F), not the "5 and 5" scoring practice totaling a possible 10 points..

No doubt grader Eller also violated subsection (5)(F) when he considered a Gatorade incident, an occasion when the petitioner was away from his facility as well as his sanitation grade. These considerations were acceptable under the SLA's past practices. Undisclosed considerations are not acceptable under subsection (5)(F). Interview points must be based on what is discussed during the interview,

Since the SLA violated its own regulations by ignoring the subsection (5)(F) interview requirement, no further discussion of grader Eller's scoring considerations is necessary. His scoring as well as that of the other panel members was the result of a defective (5)(F) process. This past practice of disregarding the (5)(F) interview requirement is arbitrary and unsupported by any rational reading of the regulations. The SLA is bound to follow its own rules and regulations. Given this conclusion the panel sees no need to reach the petitioner's due process contention.

h. Remedies

Given the SLA's violation of subsection (5)(F), what is the remedy? Under any remedy the points awarded under the noncomplying practice must be deleted. By cancelling the discretionary points awarded the petitioner, the selected as well as other candidates means only oral exam and incoming points

would be counted. Under that calculation the petitioner would have 79 total points (18.00 + 61.00 = 79) and the selected candidate would have 78.08 total points (14.33 + 63.75 = 78.08). See: Arb. Tab. 12. p. 000114. The petitioner then would have a higher point total than the selected candidate. The difficulty with this alternative is its' noncompliance with subsection (5)(F). This noncompliance would be a subsection (5)(F) violation, albeit in a different form. The only remedy for noncompliance is compliance. The SLA is obligated to conduct interviews in compliance with the provisions in subsection (5)(F). The purpose of the interview process is to evaluate an applicant's expertise, maturity, experience and ability. Several areas of discussion are identified in subsection (5)(F). Other unnamed areas may be explored in discussions. Applicants may submit any documents they believe would help the interview process or an interviewer may request such documents. They may stimulate discussions that may aid the panel. At the end of the interview each panel member shall score each applicant based on the interview discussion using the 5 plus 5 total point practice.

The original panel that followed the noncomplying past practice must be reconstituted to conduct (5)(F) interviews with each of the applicants seeking a valid point total. Prior (5)(F) points shall be deleted from the total score of each applicant. The reconstituted panel shall conduct interviews with and award points to all eight applicants and award points in accordance with subsection (5)(F). Each applicant's total score must be recalculated. Then the applicant with the highest score must be awarded the I-85 Davidson Facility.

To monitor compliance with (5)(F) as well as applicable statutes and other regulations this arbitration panel shall retain jurisdiction. To make a reviewable record every interview shall be recorded and transcribed with copies for the parties. The petitioner has alleged and presented some evidence to show grader Eller was biased in his scoring. Such alleged bias was not shown in the questions 2, 3 and 6 scoring. It may or may not occur during the scoring of the reconstituted interview process. In any event, the petitioner's previous bias evidence as well as all other evidence remains in the record. In the event the interview and/or scoring are contested by either party, both parties may present additional evidence in support of their respective positions. In the event a retained jurisdiction hearing is necessary all evidence in the current record may be relied upon along with additional evidence presented by the parties.

The petitioner further contends he is entitled to compensatory damages. He claims he is entitled to the net profit he would have earned during the period the selected applicant has worked at the I-85 Davidson Facility. The usual standard for measuring damages would require the disclosure of gross sales, cost of goods sold, gross profit, overhead expenses and net profit financial data for the I-85 Davidson facility. The respondent denied the petitioner access to such financial data on the grounds that federal and state regulations consider such information as confidential. State regulations provide that information pertaining to handicap persons in the SLA program is confidential ". . . except in the administration of the program. . . ." 10A N.C.A.C. §63C.0206. One could argue that filling vacancies and related financial information involves administering the program and, therefore, falls within the exception. For the purposes of analysis, facility financial data will be considered confidential. The federal regulation provides that state financial data may be disclosed as long as it doesn't violate federal or state confidential disclosure laws. 34 C.F.R. §395.12. For the purposes of this case the state regulation is presumed to prohibit disclosure and, therefore, falls within the federal regulation honoring such restrictions. In other words, federal and state regulations prohibit disclosure of financial information under confidentiality provisions. Yet, the R-S Act provides that SLA licensees are entitled to ". . .access to all relevant financial data. . .on the operation of the state vending facility program." 20 U.S.C. §107b-1. This language is clear and unambiguous. It is not limited to quarterly and annual financial reports. The punctuation tells the story:

1. provide to each blind licensee access to all relevant financial data, including quarterly and annual reports, on the operation of the State vending facility program.

(Emphasis Added)

The "including" phrase is set off by commas so a licensee has "access to all relevant financial data . . . on the operation of the State vending facility program." The context of a licensee applying for a vacancy supports this interpretation as the only rational reading of the language. Whether a licensee applies for a vacant facility to a large extent depends on the financial history of that facility. As an independent contractor, a licensee is "buying" into a facility. Yet, an applicant only is informed of gross sales, not gross profit, cost of goods sold,

overhead expenses or net profit. Without such financial data a licensee may be making a financial mistake. The applicant may be seeking a "pig in a poke." It would be like someone applying for and accepting a job without knowing their compensation. Congress did not intend to take advantage of blind handicapped persons under the R-S Act.

In a nutshell, both federal and state regulations conflict with the statute. The regulations simply are not in accord with the statutory language. The regulations prohibiting licensee access to facility financial data must be set aside. See: *Brown v. Gardner*, 513 U.S. 115 (1994) (setting aside a regulation for violating a clear and unambiguous statute). The SLA must perform its statutory duty and disclose all relevant data for the I-85 Davidson Facility as well as during the filling of other vacancies.

The federal agency has promulgated a rule prohibiting arbitrators from issuing subpoenas for the "production of witnesses, papers, or other evidence." *Revised Interim, Policies and Procedures for Convening and Conducting an Arbitration Pursuant to Sections 5(a) and 6 of the Randolph-Sheppard Act*. §9(c). This rule conflicts with the Federal Arbitration Act. 9 U.S.C. §§1-16. Subsection 7 provides that "The Arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may deemed material as evidence in the case." 9 U.S.C. §7. The Administrative Procedure Act (APA) provides that ". . .employees presiding at hearings may issue subpoenas authorized by laws. . . ." 20 U.S.C. §556(c)(2). Although arbitrators arguably are not "employees," but rather "independent contractors" the intent for an agency is to provide subpoena power is clear. Subpoena power, of course, is essential to obtain relevant evidence to conduct a fair and impartial hearing. The R-S Act not only calls for arbitration, it also provides that an arbitration opinion and award is to be viewed as ". . . subject to appeal and review as a final agency action. . . ." 5 U.S.C. §107d 2(a). By adopting its' no subpoena rule, the agency is stripping blind licensees of access to legitimate arbitration recognized under the Federal Arbitration Act. Without subpoena power the "so called arbitration" required under the R-S Act is illusory or even a sham. 5 U.S.C. §107d 1-2. Arbitration is a dispute resolution process allowing parties to select arbitrators who they believe are experienced in deciding disputes and by virtue of that experience are able to produce a fair and prompt

result. Arbitration should not be undermined by "slicing and dicing" the process. In this case the agency already is under a statutory duty to provide access to relevant financial data. Under the Federal Arbitration Act an application to the court would be necessary to obtain a court order to comply with the financial data statute and/or a subpoena. Since an order to set aside conflicting regulations would be permanent for this case as well as others, a separate subpoena order to obtain the same financial data is unnecessary. Nevertheless, the subpoena prohibition conflicts with the statutory arbitration mandate. An arbitration is not an arbitration when subpoena powers are destroyed by an administrative rule. The rule must be set aside.

Financial data for the I-85 Davidson County facility is needed to calculate compensatory damages if the petitioner's point total is the highest after a (5)(F) interview is conducted and scored. The petitioner claims he is entitled to the net profit he would have earned during the time the selected applicant has worked at the facility. In the absence of having the actual financial data, the petitioner is estimating damages based on his net profit from his current facility. The generally recognized measure of damages is based on actual, not presumed, financial data when it is available. In making his damage estimate the petitioner assumes the sought after I-85 Davidson facility would be added to his current facility. If that is the case, he would be entitled to the net profit during the relevant period. On the other hand, if he had to surrender his current facility to accept the I-85 Davidson facility, he only would be entitled to the difference between the net profits from the I-85 facility minus the net profits from his current facility. The record is unclear whether the SLA allows or treats more than one location as a facility for assignment purposes. The issue in the record must be resolved before a determination is made about calculating any compensatory damages.

The petitioner also seeks to recover attorney fees. This claim raises a fundamental difference between arbitral remedial decision making and judicial remedial decisions. Judicial forums look for precedent or other authority as the basis for awarding attorney fees. The SLA has cited authority supporting the American Rule which provides that parties pay their own attorney fees in the absence of express statutory authorization or a contractual provision. *Schlank v. Williams*, 572 A. 2d 101 (D.C. Cir. 1990). No statutory authorization to recover attorney fees exists in the R-S Act. Nevertheless, arbitral decisions awarding attorney fees have been upheld as consistent with the R-S Act. *Delaware Dept. of Health and Social Services Div. for the*

Visually Impaired v. U.S. Dept. of Education. Unlike a judicial forum, arbitral forums are not bound to historical precedent of dubious fairness and justification. Make whole remedies include numerous financial elements: material costs; labor costs; cost of services; maintenance costs; travel expenses; royalty payments; interest payments; lost profits and on ad infinitum. Liability for or payment for such costs all are included when relevant. A rational cost accountant would be hard pressed to argue attorney fees and court costs are not a part of a make whole remedy. Payment to other professionals are part of make whole remedies. Why not attorneys? The petitioner has cited two typical cases in which arbitrators have awarded attorney fees under the R-S Act. *Jerry Bird v. Oregon Commission for the Blind*, R-S/07-2 (decision rendered July 17, 2009) and *Billie Ruth Schlank v. District of Columbia Dept. of Human Services, Rehabilitation Services Administration*, (Docket No. R-S/04-6) (decision rendered November 1, 2005). Faced with arbitration attorney fee awards, the agency has not changed its regulations or rules to prohibit the recovery of attorney fees. Such a change would be another example of "slicing and dicing" the arbitration process. In any the event the petitioner as the prevailing party is entitled to recover attorney fees.

The agency under its *Policies and Procedures for Convening an Arbitration Panel* agrees to pay the reasonable costs of arbitration including compensating the arbitrators for their fees and expenses under section 16 (a) & (b). Yet, the agency follows a practice of estimating the cost of arbitrator fees and expenses without knowing the study, analysis, panel communication, and writing time needed to render a comprehensive and impartial opinion and award. At the same time persons asked to serve as arbitrators have no knowledge about the complexity of a case or the time needed to render a comprehensive and impartial decision. Arbitrary limits on arbitrator fees, by setting a maximum budget, undermines the opportunity for arbitrators to render comprehensive and impartial opinions and awards. Yet, arbitrators still are responsible for rendering such opinions and awards. No doubt the agency can set an hourly, a per diem or other fee rates, but not a maximum budget under its section 16 (a) & (b). The agency must comply with its own policy.

In this case the party appointed arbitrators selected a neutral arbitrator with more than 50 years of experience as an arbitrator, but no experience as an R-S Act arbitrator. The learning curve for the neutral has been steep. An arbitrator must understand how the R-S Act is structured, its relationships to the states, North Carolina's implementing system as well as

the judicial system's treatment of arbitration under the act. Once the R-S Act system is understood, conventional arbitration principles are followed to produce a comprehensive and impartial opinion and award. In any event, the agency's original representation of the amount of time needed to produce such an opinion and award was inaccurate. If the agency is to comply with its Section 16(a) & (b) policy promising to pay arbitrator fees and expenses, then its provision limiting fees and expenses must be amended to comply with its own policies and practices.

i. Summary

In summary, the arbitration panel finds that grader Eller's scoring of oral exam questions 2, 3, and 6 was not arbitrary or unsupported by the evidence under 5 U.S.C. §706(2)(A) & (E). The arbitration panel did find the SLA violated its (5)(F) give and take interview regulations by not conducting an actual interview according to its terms. As a result, the SLA is ordered to conduct a (5)(F) interview with the same selection panel and the same applicants. The arbitration panel further finds the federal agency and SLA regulations violated 20 U.S.C. §107b-1 by preventing licensees from having access to all relevant financial data. As a result, the agency and SLA are ordered to set aside regulations that prevent licensees from having access to relevant financial data and provide such access to the petitioner. The panel further finds that compensatory damages must be based on actual I-85 Davidson financial data to be provided by the SLA. The measure of damages shall be the difference between the net profit of the I-85 Davidson facility and the petitioner's net profit from his current facility for the relevant period. Or, if the petitioner is not required to surrender his current facility, damages would be measured by the net profit of the I-85 Davidson facility during the relevant period. The relevant period begins on the date the selected applicant began work and the date the petitioner begins work at the I-85 Davidson Facility. As the prevailing party the petitioner is entitled to recover attorney fees as part of a make whole remedy. With respect to arbitrator fees and expenses the agency shall compensate the arbitrators in accordance with Policies and Procedures Section 16 (a) & (b). Finally, the arbitrators retain jurisdiction to hear any dispute arising out of or relating to, the implementation of this award.

IV. AWARD

In accordance with the reasoning in the opinion, the arbitration panel awards as follows:

1. The petitioner's claim that the SLA scoring of oral exam questions 2, 3, and 6 was biased, arbitrary and not supported by substantial evidence under the Administrative Procedure Act are denied;

2. The petitioner's claim that the SLA failed to conduct a give and take interview as a basis for awarding discretionary points violated 10A N.C.A.C §63C.0204(d)(5)(F) is sustained;

3. All of the discretionary points awarded for filling the I-85 Davidson County facility under subsection (5)(F) shall be deleted from the scoring records of all applicants;

4. The SLA shall reconstitute the original interview panel with the same members, interview all of the original eight applicants, record and transcribe all interviews as well as award points in accordance with subsection (5)(F) and its 5 + 5 practice;

5. The SLA shall conduct the reconstituted interview within sixty (60) days following its receipt of this opinion and award from the agency;

6. The SLA shall provide licensees with access to all relevant financial data including, but not limited to, gross sales, gross profit, costs of goods sold, overhead expenses and net profit for the I-85 Davidson County facility in accordance with 20 U.S.C §107b-1;

7. The Agency and the SLA shall set aside all regulations prohibiting or restricting licensee access to relevant financial data under 20 U.S.C. §107b-1;

8. In the event the petitioner has the highest point total after points are awarded by the reconstituted interview panel, he shall be assigned the I-85 Davidson County facility and recover compensatory damages from the SLA;

9. The Agency rule prohibiting the arbitration panel from issuing subpoenas conflicts with 20 U.S.C. §107d-1 & 2 and the Federal Arbitration Act, 9 U.S.C. §7, and, therefore, shall be deleted from any provisions for conducting arbitrations;

10. As the prevailing party in his section (5)(F) claim, the petitioner shall recover attorney fees. He shall submit a motion with supporting documents within ten (10) days following his

receipt of this opinion and award from the Agency. The SLA shall submit its response within ten (10) days following its receipt of petitioner's motion;

11. The Agency shall compensate the arbitrators in accordance with its Policies and Procedures section 16 (a) & (b).

12. The arbitration panel hereby retains jurisdiction to hear any dispute arising out of or relating to the implementation of this award.

This the 26th day of September, 2017.

Robert G. Williams
Neutral Arbitrator

Susan R. Gashel
Concurring
Petitioner Appointed Arbitrator

Buren R. Shields, III
Dissenting
Agency Appointed Arbitrator

Hooks v. North Carolina
Case No. R-S/15/16
By Susan Rockwood Gashel

Concurring opinion

I concur wholeheartedly with the majority opinion, and write this opinion to explain why I conclude that Mr. Hooks established that grader Eller, as Vice Chair of the Elected Committee of Vendors award of points on questions 2 and 3 to Petitioner Hooks was not supported by substantial evidence.

j. Question 2:

In my opinion, the practice of checking on both devices (a credit card validator and a cash recycler device) at the same time is precisely what Mr. Hooks does. This practice allows a vendor to better keep his machines working, and not interrupt sales. Accordingly, he should have been awarded 2.0 points for his answer to question no. 2.

k. Question 3:

Petitioner's response to the sanitation question involved 5 elements: bugs, leaves, pollen, and refrigeration of sandwiches, keep bugs out of coffee machine. Thus, Eller's failure to give 2 points was not supported by substantial evidence.

It has been a pleasure to work on this panel with my fellow arbitrators.

September 21, 2017
Susan R. Gashel,
Concurring
Petitioner Appointed Arbitrator

Hooks v. State of North Carolina, Division of Services for the Blind, Case No. R-S 15-16

Opinion of Buren R. Shields, III, State Licensing Agency appointed arbitrator, concurring in part and dissenting in part in the opinion of Chairman Williams:

Sections I. Background and II. Findings.

I concur in these sections. However, I would add to the findings: The Petitioner makes clear he does not claim Mr. Eller's subjective evaluation of his answers to Oral Exam questions or award of discretionary points was motivated by a factor prohibited by law, such as race, religion, etc., or by any personal animus against him. Arb. T., pp. 17-18, 70-71. Mr. Eller denies that he knew the scores of other interviewers, on either Oral Exam questions or in determining "discretionary" points, when he scored Petitioner.

He denies he was trying, by his scoring, to determine the outcome of the site selection.

P. Ex. 44, p. 97. There is no contrary evidence.

At every level of the State Licensing Agency (SLA) appeal process, it was determined that SLA regulations and rules were complied with in this interview and site award process. Arb. T. at 169-170; P. Ex. 38 (ORC grievance decision), P. Ex. 40 (Director, State Services for the Blind); P. Ex. 44, pp. 10-25. The procedure followed in this site award, including that related to Mr. Eller's award of discretionary points, complied with what has been the consistent SLA interpretation of its regulations and rules for the last 15-31years. Arb. T. at 121, 128; P. Ex. 44, pp. 16-25, 26-56, 68, 90, 100. There is no contrary evidence.

1. Section III, Discussion:

I concur in this section down to the subtitle "Arbitral Activity and Sovereign Immunity." I disagree with the discussion under that subtitle. My full disagreement is set out below in my discussion under remedies regarding Eleventh Amendment sovereign immunity. My main points contrary to

this section are that, under current and better reasoned caselaw:

(1) Eleventh Amendment sovereign immunity applies to RSA arbitration panels; (2) consenting to arbitrate under the RSA does not waive that immunity; (3) whether the RSA waives sovereign immunity has not been directly addressed by the Fourth Circuit; and (4) however, under current Fourth Circuit law for determining whether a statute effects a waiver of sovereign

immunity, and the text of the statutes addressed by the Fourth Circuit in *FMC v. SPCA*, 243 F.3d 165 (4th Cir. 2001) and in *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006) in finding no waiver, it is clear that Fourth Circuit precedent would compel the same result when it addresses the RSA.

Questions 2, 3, & 6 Points.

I concur in Chairman Williams' holding that Petitioner has not shown Mr. Eller's grading of Petitioner's responses to Oral Exam Questions 2, 3 and 6 was arbitrary or not supported by substantial evidence. I agree the reasons stated by Chairman Williams alone compel that result.

However, I disagree that it is necessary or appropriate for this panel to substitute itself for the interview panel to this degree. Chairman Williams holds that, unless the arbitration panel can discern a difference in the answer to an Oral Exam question sufficient in their minds to support a different score (e.g., 1.5 versus 2.0), then a 1.5 Oral Exam question score by Mr. Eller is not supported by substantial evidence and is arbitrary. Under SLA implementing regulation, the only interview/oral exam scoring to which a BEP applicant is entitled is the individual subjective assessment, at the time of the interview, of the specific individuals designated in the SLA regulation to be on the interview panel. SLA regulations, and long practice, specify that three persons with particular roles and perspectives within the BEP will constitute the interview panel. By regulatory design, each brings different BEP related knowledge and perspective to the interview process.

.0204(d)(5)(D); P. Ex. 44, 26-29, 43.

Mr. Eller is a designated interviewer because he is the representative of the Elected Committee of Blind Vendors. He has specialized knowledge of the BEP from the perspective of the blind vendors. Arb. T. at 118-119. Mr. Eller has been in the BEP for eighteen years. He has been on the board of the North Carolina Council for the Blind for 20 years, and has served on the board of the National Organization of Randolph-Shepard Vendors of America for the last fourteen years. P. Ex. 44, pp. 27-28, 66-67, 87-89. Mr. Eller's BEP position gives him particular knowledge of how applicants have performed in the NC BEP program. 0204(d)(5)(D)(iii). SLA regulations do not authorize interview points to be determined by any person other than the designated interview panel members.

This interview structure brings diversified BEP experience to the assessment/scoring of Oral Exam answers. Arbitrators do not have this BEP experience. Based on their different BEP experience, interviewers honestly may evaluate and subjectively score answers that appear essentially the same to arbitrators differently than the arbitrators would. They also honestly may score them differently than other interviewers. In either case, there is no violation of SLA regulation.

SLA regulations do not include criteria to determine if an interviewer's scoring should be 1.5 points (above average BEP knowledge) rather than 2.0 (extraordinary BEP knowledge). By regulatory design, that is a subjective judgment left to each designated interviewer.

Thus, by regulatory design, it is foreseeable interviewers may score Oral Exam question answers differently. In recognition of this, and specifically to address it, SLA regulations have elected to provide sufficient fairness in a particular manner. To prevent one panel member's scores from having undue impact on the site award decision, SLA regulation specifies that each applicant's interview score is determined by the average of the total interview score given by the three panel members. 0204(d)(5)(G). Thus, any variation in scores on Oral Exam questions, or later on "discretionary" interview points, is averaged out. Arb. T. at 42-45.

It is important to remember, and to honor, that these SLA regulations and, in particular, this regulatory definition of non-arbitrary scoring, have been approved by the Secretary.

There is no evidence that this approved SLA protection against arbitrary scoring was not followed. Going behind this approved regulatory approach by having arbitrators assess the "correctness" of one interviewer's scoring, and on only selected questions Oral Exam questions, circumvents, and *de facto* nullifies, the Secretary's approval of this regulatory arbitrariness check. Given the arbitrators' lack of BEP experience, I find substituting arbitrator judgment on whether an Oral Exam question answer shows "above average" rather than "extraordinary" BEP knowledge is a judgment they are ill equipped to make and an inappropriate basis on which to circumvent the regulatory approach to arbitrariness approved by the Secretary.

I also disagree with the statement that the only evidence relevant to determine whether Mr. Eller's scores on these three questions was arbitrary are the scores issued by Mr. Eller to other applicants on these three questions. For example, the evidence shows that at least one of the other interviewers gave Petitioner a 1.5 (above average), rather than a 2.0 rating, on each Oral Exam question that Mr. Eller scored as a 1.5. (P. Ex. 11, pp. 000086-88, P. Ex. 12).

It also shows Mr. Eller's total interview score for Petitioner's Oral Exam answers was not out of line with that of the other two panel members, i.e., Pope (18.5), Noble (18) and Eller (17.5).

(*Id.*); Arb. T. at 124.

By comparison, the scoring on Mr. Weadon, the ultimate site awardee, was Pope (15), Eller (14.5), and Noble (13.5). P.Ex.12, p. 000114. Thus, even had the arbitrators not been able to identify a difference in the Oral Exam answers, I would hold that Mr. Eller's scoring on the Oral Exam questions is supported by substantial evidence and is not arbitrary.

Past Practices and Interview Points.

I disagree with Chairman Williams' reasoning and holdings as to Mr. Eller's award of "discretionary points" to Petitioner.

I disagree that the manner in which the SLA conducted the interview and awarded discretionary points violated the SLA regulation, RSA regulations or the RSA. I agree that the SLA, for many years, has interpreted and applied this regulation to permit conducting the interview portion, and the awarding of discretionary points, as was done in this case. I disagree Mr. Eller's award of "discretionary" points was otherwise arbitrary or not supported by substantial evidence.

I agree that subsection (d)(5)(F), addressing the award of "discretionary" points, is, on its face, ambiguous. However, when it is read in *pari materia* with subsection (d)(5)(E), I find it ambiguous in ways other than those identified by Chairman Williams. These regulatory provisions, read together, do not prohibit the SLA's long-standing interpretation of them, expressly or unambiguously.

Specifically, subsection (d)(5)(F) does not expressly, or unambiguously, prohibit an interviewer from considering his personal knowledge of an applicant's past BEP performance in awarding discretionary points. Likewise, nothing in it expressly or unambiguously prohibits considering such information unless the applicant is questioned about that information in the interview. This subsection also does not require panel members to ask additional "give and take" questions beyond those in the Oral Exam portion or, more importantly, beyond what additional was done here regarding the award of discretionary points to the Petitioner.

Subsection (d)(5)(F) must be read within the broader framework of subsection (d)(5), and in conjunction with subsection (d)(5)(E), in order to fully and fairly examine the regulatory basis for the longstanding SLA interpretation regarding the award of "discretionary" points. It is within this context that the pertinent ambiguity is clear and the reasonableness of that SLA interpretation manifest. Subsection (d)(5) refers to the Oral Exam questions and the awarding of "discretionary" points as "the oral exam/interview." (emphasis added). Among the reasonable interpretations of this reference is that of the SLA, i.e., that this is a single face-to-face event with two scoring components.

Under the SLA's interpretation, discretionary points were awarded on the appropriate "give and take." I disagree with the Chairman Williams' description of the "give and take" on which the awarding of "discretionary" points to Petitioner was based. Following the Oral Exam, and to continue the interview "give and take," Petitioner was asked if he had any additional matters for the interviewers to consider before awarding discretionary points. Petitioner's reply was extensive. He responded with an oral presentation that covered four pages of transcript. P. Ex. 17, pp. 12 - 16.

As additional "give and take," and in accord with SLA regulation (.0204(d)(5)(F)), Petitioner also submitted extensive written materials for the panel to consider. P. Ex. 18. Both kinds of additional information that the Petitioner "gave" much exceeded that "given" by other applicants. Finally, in further exploration of whether any additional "give and take," was needed for any interviewer to determine his discretionary points, each panel member was asked if he had additional questions for Petitioner. After Petitioner's extensive submissions, no panel member had any questions. (P. Ex. 17, p. 16). Based on this composite "give and take" during the entire "interview," i.e., including the Oral Exam, the interviewers each individually determined their "discretionary" points for Petitioner.

Mr. Eller's individual and subjective assessment of Petitioner was that he "meets the requirements for the facility." He awarded Petitioner the five "discretionary" points required under SLA regulation for that assessment. Mr. Eller explained his discretionary rating of Petitioner in an email submitting his discretionary points, and at the evidentiary hearing: "I have strong issues concerning Chad and his work ethics, which I know to be true. Therefore, I gave him a (5)." P. Ex. 11, p. 000089. Thus, Mr. Eller had, and articulated, a particular reason for his discretionary point assessment. His assessment clearly was based on specific information, was a reasoned one and, therefore, not arbitrary.

Mr. Eller's award of discretionary points to Petitioner was not otherwise in violation of the applicable SLA regulations and was in accord with longstanding SLA approved practice.

Mr. Eller, in determining his discretionary points for Petitioner, considered information known to him about Petitioner's relevant "work experience" in the BEP. Arb. T. at 49-55, 131-137, 144. By SLA regulation, Mr. Eller is appointed to the panel precisely because he is likely to have such knowledge. Arb. T. at 140- 142; .0204(d)(5)(D)(iii). Moreover, SLA regulation expressly authorizes consideration of such information - "relevant work experience in the [BEP] may be . . . taken into consideration."

.0204(d)(5)(F). Nothing in the SLA regulation expressly, or otherwise unambiguously, forbids an interviewer from considering such knowledge, or from determining its truth/value, in individually and subjectively determining appropriate "discretionary" points. Approved SLA regulation makes clear that it is Mr. Eller's evaluation in both regards, and not that rendered *ex post facto* by arbitrators without BEP experience and on a cold record, to which an applicant is entitled.

In the interview, Mr. Eller did not question the Petitioner about the negative information he considered about Petitioner in awarding his discretionary points. There is no evidence the SLA ever interpreted their regulations to require questions about, or disclosure of, such information before it could be considered. Mr. Pope, Chief of the BEP and another interview panel member, when asked what could be considered for "discretionary" points, stated: "the way I look at it is the way it goes in the rules . . . it is really at your discretion what they presented, what I know about them as an operator, how they've performed, that kind of thing." P.

Ex. 44, p. 52. Mr. Eller testified that he had participated in over 100 site award interviews and had previously considered information about an applicant's BEP performance known to him that he did not disclose in the interview. He understood SLA regulations did not prohibit consideration of such information in awarding "discretionary" interview points. P. Ex. 44, pp. 67-68, 82-83, 90, 100. There is no contrary evidence.

Neither the SLA grievance committee of Petitioner's peers nor the evidentiary hearing officer, after hearing Petitioner's assertion and the information Mr. Eller considered, found that this practice violated the SLA

regulation as consistently applied by the SLA. P. Ex. 44, pp. 68-86, 103-119, 122-131.

Nothing in subsection .0204(d)(5)(F) expressly states the information Mr. Eller considered about Petitioner may not be used in awarding discretionary points unless the applicant is questioned about that information in the interview.

Notably , this regulation expressly addresses such information.

But, it does so in a manner that either makes clear such discussion is not required or is ambiguous in that regard. Even, if only viewed as ambiguous, this regulation renders reasonable, and therefore allows, the SLA long-time interpretation that such information need not be discussed before being considered.

It does this, in part, in the ways it addresses using information related to work experience within, and without, the BEP in determining "discretionary" points. It provides: "The interview shall include the following elements:

questions relating to business philosophy to promote general discussion . . . ; a discussion of any related work experience outside the [BEP]" (emphasis added). "Questions" about business philosophy "shall be included." However, it is not "questions" about work experience outside the BEP, but only "discussion" that the regulation states "shall be included."

Moreover, stating that "questions" about a particular subject "shall be included" is distinctly different from stating that no information about that subject may be considered if not included in a question. It is only the latter Petitioner asserts denied him the site award.

This subsection addresses the type of information that Mr. Eller considered, but in yet a different way. That regulatory language does not require either "questions" or "discussion." Following a semicolon, it states: ". . . .

relevant work experience in the [BEP] may be discussed and taken into consideration." (emphasis added).

Thus, while information about performance outside the BEP "shall be discussed," "discussion" of work

experience within the BEP is not required, but is permitted, i.e., it "may be discussed." "May be discussed" is not "shall be discussed." It is not "shall include questions relating to."

In addition, the words "and taken into consideration" are not expressly, or unambiguously, limited to information "discussed." That is, "taken into consideration" is not limited by words such as "only if it is discussed or the applicant is questioned about it." Clearly, from this section, the SLA knew how to say "shall be included in questions" or "shall be discussed" if that was the regulatory intent. Clearly, it did not elect that approach as to the information Mr. Eller considered.

The SLA's longstanding interpretation that information not the subject of a question, or discussed, may be considered also finds support in the last sentence in this subsection. This sentence allows an applicant to bring documents for the panel to consider in awarding discretionary points. It does not require that any information in those documents be the subject of a "question" from a panel member, or be "discussed," before it may be considered.

Reading subsections (d)(5)(E) and (F) together discloses that the ambiguity present further supports this SLA interpretation. Subsection (d)(5)(E) states that "oral exam" questions shall relate to "any special needs of the vacant facility as well as standard responsibilities and knowledge of the Business Enterprise operators." The next sentence, explaining scoring on the Oral Exam questions, calls them "interview questions." ". . . [A]nd the applicant shall be awarded two points for demonstrating exceptional knowledge for each interview question."

(emphasis added).

Read with two sentences in subsection (d)(5)(F), this labeling of Oral Exam questions as "interview" questions further supports the SLA interpretation that the questions and answers during the Oral Exam are part of the "give and take" required in the "interview" and upon which discretionary points may be based.

The first sentence in subsection (d)(5)(F) states "The interview shall consist of a variety of questions in a give and take format." (emphasis added). The subsection goes on to address the basis for discretionary points and states each interviewer "shall evaluate the applicant's response to the interview questions and shall award up to 10 additional points." (emphasis added).

It also is relevant that Mr. Noble, another panel member, only gave Petitioner six discretionary points. P. Ex. 44, pp. 117-118; P. Ex. 11, p. 000088. Significantly, Mr. Noble was not aware of the "negative" information considered by Mr. Eller, yet his discretionary score was only one point higher. It is important to remember here, that the question is whether Mr.

Eller's scoring was "arbitrary." The answer to that question should not turn on whether just one point more would have given Petitioner the high score. That fact is not relevant. Thus, Mr. Noble's score supports that Mr. Eller's score was not "arbitrary."

For these reasons, I find the longstanding SLA interpretation of the applicable SLA regulations is supported by substantial evidence of record and is not arbitrary. I find that Mr. Eller's consideration of information about Petitioner he did not question Petitioner about during the interview in determining his "discretionary" points complied with the applicable SLA regulation, is supported by substantial evidence, and is not otherwise arbitrary.

m.

n. Federal Due Process of Law

Although Chairman Williams does not address this issue, I do.

Petitioner asserts that, even if it did not violate SLA regulation, Mr. Eller's failure to question him during the interview about the negative information he considered in awarding his "discretionary" points for Petitioner denied Petitioner an opportunity to respond to that information before the interview panel and, therefore, federal "Due Process."

Before federal Due Process applies to require procedure not imposed by agency regulation, Petitioner must show that he has a protected qualifying "property interest" that has been denied him. Petitioner was interviewing for a new job. He has no property interest in such a future prospect that activates the federal Due Process Clause. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Even if federal Due Process applied and overrode the approved SLA regulation (it did not), Petitioner has not proven by substantial evidence that he was denied Due Process. The decision that Petitioner appeals, and this panel considers, is the final SLA site award. At the SLA evidentiary hearing, all the information considered by Mr. Eller in awarding his discretionary points to which Petitioner objects was disclosed and examined. Petitioner was provided, through that hearing, a full opportunity to respond to that information and did so. This SLA hearing officer had the authority to overturn the site award if he determined it appropriate after hearing this evidence. Arb. T. at 170, 10A NCAC 63C.0403 (p), P. Ex. 7. He did not do so, but affirmed the award.

The decision of the evidentiary hearing officer constituted the final SLA site award decision.

10A NCAC 63C.0403 (r), P. Ex. 7. Thus, even had federal Due Process applied, Petitioner received all the process to which he would have been entitled before the final SLA site award decision. *Arnett v. Kennedy*, 416 U.S. 134, 157-58 (1974).

o. Remedies.

Although I do not find any error requiring relief for the Petitioner, I must address Chairman Williams' remedies.

p.

q. Damages.

Even if he had proven error (which he did not), Petitioner is not entitled to Chairman Williams' remedies. Current caselaw makes clear that an award by this panel of retroactive money damages, attorney's fees, or costs against the State Respondent is barred by Eleventh Amendment sovereign immunity. Older theories finding that the States agreed to these

consequences and, thus, implicitly waived their sovereign immunity are no longer good law. In the Fourth Circuit, they have been replaced by new standards for determining if a statute waives this immunity. The RSA does not satisfy these standards.

Thus, contrary tests reflected in older cases such as *Premo v. Martin*, 119 F.3d 764 (9th Cir 1997); *Tenn. DHS v. US DOE*, 979 F.2d 1162 (6th Cir. 1992); and *Delaware v. US DOE*, 772 F.2d 1123 (3rd Cir. 1985), allowing such awards on three theories: (1) Eleventh Amendment sovereign immunity only applies in Article III court; (2) at the time RSA arbitration was enacted, arbitrators traditionally awarded these remedies and, thus, by agreeing to arbitrate, the State implicitly consents to them; and (3) blind vendors are beneficiaries of the "contract" in the RSA between the State and US DOE agreeing to arbitrate and money damages is a traditional remedy for breach of contract claims, are no longer good law, particularly in the Fourth Circuit.

In *Federal Maritime Commission (FMC) v. South Carolina Ports Authority (SPCA)*, 535 U.S. 743 (2002), the plaintiff private shipping company sought a cease and desist order, damages, interest, and attorney's fees at the FMC for alleged violation of a federal program from the SPCA, a State agency. In the FMC grievance system, the complaint was heard by an administrative law judge (ALJ). The ALJ dismissed the claim on sovereign immunity grounds citing Fourth Circuit precedent, *Ristow v. SPCA*, 58 F.3d 1051 (4th Cir. 1995).

The FMC reversed and held sovereign immunity did not apply.

The Fourth Circuit in *FMC v. SPCA*, 243 F.3d 165 (4th Cir. 2001), ruled that sovereign immunity applied to federal agency

adjudication of rights in adversarial proceedings and barred this action against the SPCA, a state agency. The FMC appealed. The Supreme Court affirmed the Fourth Circuit and held that 11th Amendment sovereign immunity applied to proceedings before administrative tribunals convened by federal agencies and not just in Article III courts.

In *New Hampshire v. Ramsey* (suing as a member of the N.H. Committee of Blind Vendors), 366 F.3d 1 (1st Cir 2004), the court held that, under *Federal Maritime*, Eleventh Amendment sovereign immunity applied to proceedings before an RSA arbitration panel. Thus, *Federal Maritime* overruled the *Premo*, *Tenn. DHS* and *Delaware* decisions to the extent that they turned on sovereign immunity only applying in Article III courts.

In *New Hampshire*, the court held that, by voluntarily participating in the RSA program, the State waived its 11th Amendment immunity from an RSA arbitration panel awarding prospective equitable relief. 366 F.3d at 18. The court then turned to the question of whether sovereign immunity as to damage awards against the State also had been waived or abrogated. The court acknowledged that *Premo* (1997) and *Delaware* (1985) had relied on the "consent by agreeing to arbitrate" and "contract remedy" waiver theories. *Id.* at 21. The *New Hampshire* court declined to apply either of these theories. Rather, it cited to *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000), as setting the current legal standard. It then held that, if Congress intended to also waive sovereign immunity as to further relief, e.g. damages, "it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 22.

The *New Hampshire* court first reviewed the RSA under which the arbitration panel was convened. It noted the RSA statutory text did not state what remedies may be awarded against States in grievances brought by blind vendors.

Likewise, the implementing regulations promulgated by the Secretary of Education did not

address this. The Court observed that the only discussion of remedies in the RSA is in 20 U.S.C. § 107d- 2(b)(2), which applies only where the SLA is the Petitioner.

Even then, the only stated relief is prospective equitable, i.e., the federal department head "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." The court noted that even Section 107d-2(b)(2) does not expressly authorize an award of damages or expressly waive the federal government's immunity from damages. *Id.* at 21.

The *New Hampshire* court then applied the standard in *Vermont Agency* to the Surface Transportation Assistance Act (STA Act), 23 U.S.C. §§ 101 *et seq.*, the statute creating the priority for RSA blind vendors at issue. The court held "it is not clear whether Congress intended in § 111(b) of the STA Act to subject states to damage awards for violations found in R-S grievance procedures" and vacated the damage award from the RSA arbitration panel. *Id.*

Taking the *New Hampshire* court's accurate description of the pertinent provisions of the RSA and applying the standard in *Vermont Agency*, it is clear that Congress did not express in the RSA, in the now required "unmistakably clear language," its intent to go beyond waiving sovereign immunity as to prospective equitable relief and also waive it as to retroactive money damages or other monetary impact on the States.

Other aspects of the pertinent caselaw also have been sharpened significantly since the earlier decisions like *Premo* and *Delaware*. It now is clear that Congress may condition participation in a federal program upon a waiver of sovereign immunity from prospective equitable relief without also waiving sovereign immunity from monetary damage awards.

Nelson v.

Miller, 570 F.3d 868, 884-85 (7th Cir 2009) (citing *Lane v. Pena*, 518 U.S. 187, 196, (1996) (holding that "Congress is free to waive the Federal Government's sovereign immunity against liability without waiving its immunity from monetary

damages awards.")

Likewise, a State waives its sovereign immunity only to the extent "stated by the most express language or by such overwhelming implication from the text [of the statute] as will leave no room for any other reasonable construction.

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239-40 (1985). "In analyzing whether a sovereign has waived its immunity, we strictly construe the scope of any alleged waiver in favor of the sovereign. We may not enlarge the waiver beyond what the language [of the statute] requires." *Nelson*, 570 F.3d 868, 883- 84 (7th Cir.2009) (citing *Lane*, 518 U.S. at 192).

In *Wisc. v. US DOE*, 667 F. Supp.2d 1007,1013-1015 (W.D. Wi. 2009), the court declined to follow any of the older theories regarding relief available from RSA arbitration panels and specifically held that those panels are barred by sovereign immunity from awarding damages. The RSA requires States to consent to arbitration as a condition of their participation in the program. This means States can be found liable of violating the RSA and are subject to some form of relief. If they are subject to prospective equitable relief, this is sufficient to give meaning to the agreement to arbitrate. The RSA says nothing about what relief an RSA arbitration panel hearing a blind vendor's grievance may grant. It does not expressly authorize the award of damages. Thus, agreeing to arbitrate under the RSA does not mean the State is required to submit to awards beyond prospective equitable relief, e.g. money damages. This is because, under current sovereign immunity waiver law, that is not the only reasonable construction of the commitment to arbitrate in the RSA. *Id.* at 1015.

See Madison v. Virginia, 474 F.3d 118, 130-33 (4th Cir. 2006). In *Madison, supra*, the Fourth Circuit addressed the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc-1(a) (RLUIPA). RLUIPA conditioned State participation in a federal program upon agreement to allow private individuals with claims under the program to "obtain appropriate relief from a government." The Fourth Circuit held

this language effects a waiver of sovereign immunity from prospective equitable relief because consent to "appropriate relief" ordinarily includes it, but does not contain the "unequivocal textual expression" sufficient to extend the waiver to damage awards. *Id.* at 131.

Although this case did not address the RSA, the Fourth Circuit's sovereign immunity analysis makes clear it would find sovereign immunity was not waived by the RSA except as to prospective equitable relief. The Fourth Circuit clearly rejects earlier theories as to waiver of sovereign immunity and adopts the modern rule on not extending waivers to money damages and attorneys' fees.

"There can be no consent by implication or by use of ambiguous language. A waiver must be 'unequivocally expressed in statutory text.' For this reason, general participation in a federal program . . . is insufficient to waive sovereign immunity.

Congress must make its intention unmistakably clear in the language of the statute." 474 F.3d at 130 (citations omitted) "[To] sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims."

474 F.3d

at 131. The court noted that RLUIPA "makes no reference to monetary relief - or even to sovereign immunity generally." *Id.* It then added: "[w]hile particular phrasing may not be necessary to waive sovereign immunity for damages, an unequivocal textual waiver of immunity that 'extend[s] unambiguously to such monetary claims' is." 474 F.3d at 132.

Other caselaw supports this analysis and conclusion. See *McNabb v. US DOE*, 862 F.2d 681, 686-87 (8th Cir. 1988)(Doty, J., concurring and dissenting) (stating the RSA did not waive the States' sovereign immunity as to retroactive money damages and explaining that "[w]hen the Act is viewed against the backdrop of the eleventh amendment, it is seen that Congress only intended that the arbitration panel authorized by 20 U.S.C.

Sec. 107d-1(a) have the necessarily implied powers to grant prospective relief, and did not intend to abrogate the state's rights under the Constitution. This conclusion is reached because, in enacting the Randolph-Sheppard Act, Congress did not make it unambiguous that the state's participation in the blind vendors program would result in a waiver of its sovereign immunity or condition its participation on accepting all forms of monetary relief, including retroactive damages."

See Tenn. DHS v. US DOE, 979 F.2d 1162 (6th Cir. 1992),

where the petitioner blind vendor sought a determination that the State had violated the RSA, money damages, interest and attorneys' fees from the State. Until ordered by the federal district court to do so, the Secretary, US DOE, refused to convene a RSA arbitration panel on the grounds that 11th Amendment sovereign immunity precluded retroactive relief, including money damages. *Id.* at 1164. The Sixth Circuit first noted that the 11th Amendment bars "all types of suits for damages or retroactive relief for past wrongs," but was not "an effective barrier to forcing a state to prospectively comply with federal law." *Id.* at 1166. Relying on a 1980 8th Cir. case, the 6th Cir. then held that sovereign immunity applied only to proceedings in Article III courts and, for that reason, did not bar entry of money damages by the RSA arbitration panel.

Id. at 1166-67.

However, specifically rejecting any theory that Congress could implicitly abrogate a State's sovereign immunity, the Sixth Circuit held any such award could not be enforced in federal court because sovereign immunity applied there and: "[t]he text of the [RSA] reflects neither an unmistakable intention by Congress to abrogate the states' sovereign immunity nor a clear statement that participation in the program will constitute a waiver of immunity." *Id.* at 1168.

Thus, after the decision in *Federal Maritime Commission*, *supra*, the Sixth Circuit's reasoning here likely would lead them to conclude that an RSA arbitration panel is barred from awarding money damages

against the State by the Eleventh Amendment. See *Tenn. v. U.S. DOT*, 326 F.3d 729 (6th Cir. 2003).

Attorneys' Fees.

In *Tenn. DHS v. US DOE, supra*, the State and the Secretary, US DOE, citing to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), argued that, under the "American Rule" because there was no express statutory authorization in the RSA, RSA arbitration panels lack statutory authority to award attorneys' fees. 979 F.2d at 1169. The Sixth Circuit cited to *Skehan v. Board of Trustees of Bloomberg State College*, 538 F.2d 53, 58, (3rd Cir., *en banc*), *cert. denied*, 429 U.S. 979 (1976), for the proposition that, under the Eleventh Amendment, attorneys' fees "may not be awarded against an immune sovereign as damages because of pre-litigation obduracy." 979 F.2d at 1170.

In *Skehan*, the Third Circuit noted that, in *Alyeska Pipeline Service Co.*, *supra*, the Supreme Court held that, under the American Rule, absent "(1) a contract or statute granting a right to attorneys' fees; (2) . . . ; (3) willful disobedience of a court order; or (4) a finding that the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons, federal courts must apply the American Rule"

Based on that precedent, the *Tenn. DHS* court held: "[s]ince we already have determined the state . . . was immune from . . . the damage award . . . , the state also is immune from . . . the attorneys' fee award." 979 F.2d at 1170. See also *Nelson, supra*, at 570.

By the same reasoning expressed in the money damage sovereign immunity cases, and under *Skehan* and *Alyeska Pipeline Service Co.*, sovereign immunity prevents the award of attorneys' fees and other costs by RSA arbitration panels.

Statutory Authority.

Because of the refinement in the law regarding the interpretation of federal statutory provisions noted in the sovereign immunity cases above, I also do not agree that this panel has statutory authority under the RSA to award retroactive money damages, attorney's fees, or costs against the State Respondent.

As noted, nothing in the text of the RSA, expressly or by "overwhelming implication," Edelman v. Jordan, 415 U.S. 651, 673 (1974), states that the States' participation in the RSA program, or agreement to arbitrate blind vendor complaints, was conditioned upon them agreeing to pay retroactive damages, attorneys' fees, or costs to blind vendors dissatisfied with SLA site award decisions. As to arbitration of blind vendor complaints, the RSA says nothing about remedies and expressly authorizes no specific remedies. Section 107d-2(b)(2) dealing with arbitration of SLA complaints, is the only place that the RSA addresses remedies from arbitration. By doing so, it shows that Congress knew how to express its intent as to remedies in the RSA. However, even there Congress states only that the respondent: "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," i.e., only prospective equitable relief. Even there, Congress does not expressly authorize an award of damages, or attorneys' fees, or costs.

For many years, the Secretary of US DOE took the position in RSA litigation that neither compensatory relief nor attorneys' fees were contemplated in the RSA. See *McNabb v. Riley*, 29 F.3d 1303 (8th Cir. 1994); *McNabb v. US DOE*, 862 F.2d 681, 686-87 (8th Cir. 1988); and *Tenn. DHS v. US DOE*, 979 F.2d 1162, 1165 (6th Cir. 1992) (where the Secretary, US DOE urged the court to avoid having to address the 11th Amendment issue by finding that the RSA does not authorize an RSA arbitration panel to award retroactive damages against a state agency and argued the American Rule barred attorneys' fees under the RSA).

See *McNabb v. US DOE*, *supra* (holding that the RSA does not allow compensatory damages, but only prospective damages to blind operators). See also *McNabb v. US DOE*, *supra* (Fagg, J., concurring and dissenting) (stating "Congress in enacting the Randolph-Sheppard Act (the Act) has not conditioned the states' participation in the blind licensee program on their accepting responsibility for the payment of monetary relief later deemed appropriate to make a wronged licensee whole." 862 F.2d at 685-

86. He explained: "The type of obligation sought to be imposed . . . is permitted only if the Act clearly informs states considering participation that if they choose to enter the program, liability for money damages may result. . . . by its terms the Act does not adequately alert states to the risk of encountering monetary consequences at the hands of an arbitration panel convened by the Secretary if they join the program." 862 F.2d at 686. In explaining this conclusion, Judge Fagg noted there is no "express reference to monetary remedies" in the RSA and "the Act's legislative history is conspicuously silent on whether Congress intended arbitration panels to make monetary damage awards against participating states." *Id.*

Judge Fagg also specifically rejected the theory relied upon in *Del. DHS v. US DOE*, *supra*, to the effect that States implicitly consented to monetary damages in the RSA by agreeing to arbitrate simply because it was a remedy routinely used by arbitrators when RSA arbitration was enacted. He cited to *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1,17 (1981), where the Supreme Court stated: "[W]e may assume that Congress will not implicitly attempt to impose massive financial obligations on the States" and concluded: "A state's informed choice to accept an obligation to pay money damages cannot rest on an implied statutory authorization" because that is "entirely at odds with the principle that the congressional power to impose conditions on participating states rests on the indispensable requirement that its conditions are expressly articulated"). 862 F.2d at 686-87.

See also *Schlank v. Williams*, 572 A.2d 101,110 (D.C. App.

1990), citing to *F.D. Rich Co. v. U.S.*, 417 U.S. 116 (1974), and holding there is no statutory basis in the RSA to override the American Rule and allow an award of attorneys' fees to a complaining blind vendor. The court declined to follow the breach of contract remedy theory followed by the 3rd Cir. in *Del DHS v. US DOE*, *supra*.

Corrective Action by the SLA.

Chairman Williams directs that the original interview panel must be reconvened and redo only the interview portion of the site award for the I-85 Davidson facility. He also directs that this arbitration panel shall retain jurisdiction to insure compliance with this ruling. I disagree. The entire site award should be redone, not just the interview scores under section 5(F). The incoming points under section 5(E) should also be redone. This panel should only direct a "redo" in accord with in the interview panel composition set out in SLA regulation.

I believe the panel should calculate any award intended, including costs and attorneys' fees, and include that in its submitted decision which ends jurisdiction of this panel.

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he panel should issue an order requiring the Petitioner submit a motion for attorneys' fees and include his damage calculations within 10 days and allow the State Respondent 10 days to respond. I do not agree that this panel should retain jurisdiction after submitting its decision in order to police compliance. I believe that any potential failure of the SLA to follow the direction of this panel, as affirmed, would be appropriate either for consideration in federal court or a new blind vendor RSA complaint and new panel.

Setting Aside US DOE and North Carolina regulations.

Chairman Williams finds that a US DOE regulation implementing the RSA and a State confidentiality regulation prohibit disclosure to the Petitioner of certain financial data Chairman Williams believes is necessary to compute compensatory damages.

He finds that these regulations are in conflict with "clear and unambiguous" language in the RSA because they deny a Petitioner access to certain "facility" specific financial data. Therefore, he concludes both regulations must be "set aside" in resolving Petitioner's claim. I disagree.

U.S. DOE regulations implementing the RSA, specifically 34 C.F.R. section 395.12, provide that all financial data of the SLA "relevant to the operation of the State vending facility program" shall be provided to "each blind vendor," "provided that such disclosure" does "not violate applicable Federal or State" confidential disclosure laws. (emphasis added). The phrase in this Departmental regulation "relevant to the operation of the State vending facility program" is not defined. North Carolina confidentiality regulation, 10A N.C.A.C. 63C.0206, provides: "all information and records pertaining to handicapped persons served by this [BEP] program shall be considered confidential and may not be revealed except in the administration of the program or by the consent of the handicapped person." (emphasis added). Chairman Williams finds these regulations conflict with the RSA, 20 U.S.C. 107b-1, requiring that blind "licensees" be provided access to all "relevant financial data" on "the operation of the State vending facility program." (emphasis added).

Clearly, the information Chairman Williams focuses on are records that pertain "to handicapped persons served by this [BEP] program" i.e., those operating the I-85 Davidson facility. Thus, this information fits squarely within the identified NC confidentiality law. Likewise, there is no question that this State confidentiality regulation has the force of law and is within the exemption from disclosure set out in the cited U.S. DOE regulation. The Secretary of Education is charged with implementing the RSA. 20 U.S.C. 107a(a)(1). As such, his implementation of that statute is entitled to substantial deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The State regulation is valid and enforceable under the Secretary's regulation. Both are of long- standing.

RSA section 20 U.S.C. 107b-1 requires that blind licensees be provided access to all "relevant financial data" on "the operation of the State vending facility program." (emphasis added). The statute does not otherwise define the scope of information that must be disclosed. A reasonable interpretation of this language is that it means exactly what it says. That is, that the mandate refers only to information relating to operation of the vending facility program at the State level. The statutory text does not expressly, or otherwise unambiguously, extend to distinct non-program level data which discloses the business decisions that a particular blind operator has made in managing a specific BEP facility.

Thus, the Secretary's implementing regulation clarifies the scope of mandated disclosure in the RSA. It also balances the need for program level information against the confidentiality that, under existing law, must be afforded to the business decisions of individual blind operators - a balance not addressed by 20 U.S.C. 107b-1. Therefore, the Secretary's regulation is appropriate as an exercise of his implementing authority for the RSA. See Chevron, *supra*. I see no clear and unambiguous conflict with the RSA provision which compels, or justifies, invalidating these Federal and State regulations.

I am unaware that the Petitioner seeks facility specific information on operation of the I-85 Davidson site that is protected under the State confidentiality regulation in question unless the relevant BEP operator consents to such release. I see no evidence he has been denied information available to his fellow blind operators in the BEP. Petitioner already has significant data with which to project a damage claim. See P. Ex. 45.

At the hearing, Petitioner identified the net profit figures from that I-85 Davidson site as data he was not going to get because that data was confidential to Mr. Weadon under State law. Petitioner noted that he had not yet requested those particular figures from the State, but stated he would welcome that data if Mr. Weadon consented, i.e., if the State confidentiality regulation was complied with. Petitioner went

on to state that, even if he did get this particular data, he would still have to extrapolate because he did not want to be limited in his damage claim to the profit range that Mr. Weadon achieved at the Davidson site. Arb. T. at 96-101.

Chairman Williams also would set aside Rule 9(c) of the Secretary of Education's Revised Interim, Policies and Procedures for Convening and Conducting an Arbitration Pursuant to Sections 5(a) and 6 of the Randolph Sheppard Act.

This rule prohibits an arbitration panel convened under the RSA from issuing subpoenas for production of witnesses, papers and other evidence. Chairman Williams finds this Rule conflicts with section 9 of the Federal Arbitration Act, 9 U.S.C. 1, et seq. (FAA), which provides that Arbitrators may summon witnesses and, "in a proper case," direct them to bring documents that may be evidence. Thus, Chairman Williams concludes the Secretary's Rule must be "set aside."

I do not find any basis for taking such action in this case. The Secretary is charged with implementing the RSA. I see no authority for setting aside this RSA arbitration rule promulgated by the Secretary in that role. I note that this Rule has been in use for some time. I am unaware of the Petitioner having raised this issue or the Secretary having authorized this panel to address it.

I find no basis in statute for this action. The federal authority for this Rule is found in the federal Administrative Procedure Act (APA) and not the FAA. Section 107d-2(a) of the RSA states that the RSA arbitration panel shall conduct its hearing, and render its decision, "in accordance with the provisions of subchapter II of chapter 5 of Title 5, i.e., under the APA. Subchapter II contains section 556 entitled "Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision." Subsection (c)(2) therein states: "Subject to published rules of the agency and within its powers, employees presiding at hearings may - (2) issue subpoenas authorized by law." (emphasis added)

Thus, the governing APA provisions for RSA arbitrations

expressly make the issuing of subpoenas therein subject to the very published U.S. DOE rule Chairman Williams would "set aside."

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s. Summary

In accord with the above reasoning, I find that the Petitioner has failed to prove any of his three claims and, therefore and otherwise as stated, is not entitled to any relief from the SLA. I affirm the site selection award made by the SLA in this matter. Each party shall pay their own attorneys' fees.

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IV. Award

For the reasons stated, I disagree with paragraphs 1-10 and 12 stated in this section of Chairman Williams' opinion.

/s/Buren R. Shields, III

Buren R. Shields, III

State Licensing Agency Appointed Arbitrator

UNITED STATES DEPARTMENT OF EDUCATION

**First Supplemental Opinion and Award
Case No. R-S/15/16
In the Matter of Arbitration Between:**

**LLOYD CHADWICK HOOKS
Petitioner**

Vs

**STATE OF NORTH CAROLINA DIVISION OF SERVICES FOR THE BLIND
Respondent
APPEARANCES:**

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I. BACKGROUND

The undersigned Arbitrators issued an Opinion and Award (O & A) on September 26, 2017. In the award a majority of the Arbitrators ordered the following, in part:

1. Attorney fees to the petitioner as the prevailing party against the State of North Carolina as the state licensing agency (SLA) (See O & A, Para. 10, p. 51);
2. The U.S. Department of Education, as the agency, to compensate the Arbitrators in accordance with its Policies and Procedures section 16(a) & (b) (See: O & A, Para. 11, p.52) and;

3. The arbitration panel retained jurisdiction to hear any dispute arising out of or relating to the implementation of the award. (See: O & A, Para. 12, p.52).

In accordance with paragraph 10 of the award the Petitioner submitted his "Petitioner's Motion for Costs and Attorney Fees in the amount of \$61,996.25 along with a supporting affidavit from his attorney. The Respondent filed its response to the Petitioner's Motion for Costs and Attorney Fees. In that response the Respondent contended:

1. The award of attorney fees and costs are barred by the Eleventh Amendment and the controlling law in the Fourth Circuit and;
2. Asserted the same contentions in an attached complaint for judicial review under the Randolph-Sheppard Act (R-S Act) and the Administrative Procedure Act(ADA).

On the basis of these contentions the Respondent asked the court and presumably these arbitrators to deny the Petitioner's arbitration motion or in the alternative to stay any supplemental award pending judicial review.

In addition, disputes have arisen about the agency's responsibilities for paying arbitrator fees and expenses for past as well as future amounts payable to members of the arbitration panel. As stated in the initial award, the agency's Policies and Procedures section 16(a) & (b) control the payment of arbitrator fees and expenses.

Under its retained jurisdiction the arbitration panel is obligated to issue a First Supplemental Opinion and Award addressing these issues.

II. DISCUSSION

a. Respondent Riding the Wrong Horse

No doubt the parties as well as the agency are entitled to judicial review. The R-S Act clearly provides that an arbitration decision is ". . .subject to appeal and review as a final agency action for purposes of chapter 7 of such title 5." 20 U.S. Code §107-2. What does chapter 7 of title 5 say about the judicial review horse to ride?

Chapter 7 clearly restates that the parties and others adversely affected are entitled to judicial review. 5 U.S. Code §702. Although the agency is not named as a party, it certainly is a person adversely affected and entitled to judicial review under section 702. An arbitration decision is the agency action in a

case under the R-S Act. The agency then becomes a person aggrieved by any arbitration decision and has standing to contest any arbitration decision.

Chapter 7 recognizes multiple forms of judicial review. Review of agency actions may take different forms and venues. Section 703, Form and venue of proceeding, expressly provides: The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or in the absence or inadequacy thereof, any applicable form of legal action. . . .

(Emphasis Added)
5 U.S. Code §703

This language clearly recognizes any "special statutory review proceeding relevant to the subject matter. . ." The subject matter in this case is an "arbitration decision." Congress long ago established a special statutory review process for the judicial review of arbitration decisions. The judicial review of arbitration decisions is controlled by the Federal Arbitration Act (FAA). 9 U.S. Code §§1-16.

The FAA provides for judicial review and the enforcement of arbitration awards:

If the parties in their agreement have agreed that judgement of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court then . . . any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified. . . , then such application may be made to the United States court in and for the district within which such award was made. . . .

9 U.S. Code §9

When the State of North Carolina agreed to serve as a State Licensing Agency (SLA), it agreed to the Congressional arbitration terms and conditions specified in 20 U.S. Code §107-2 and 5 U.S. Code §§702 and 703. This language clearly shows the parties agreed that the court shall enter judgment on an arbitration award. Since no court was specified, a U.S. district court has jurisdiction.

The FAA further sets out the scope of review for the court:
§10 - Same; vacation; grounds; rehearing

- a. In any of the following cases the United States court in and for the district wherein the award was made may make an

order vacating the award upon the application of any party to the arbitration -

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators, or either of them;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

or;

4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) & (c) omitted

9 U.S. Code §10

This arbitration panel has not heard any evidence that showed or even hinted that "the . . . award was procured by corruption, fraud, or undue means." This arbitration panel has not heard any evidence that showed or even hinted that one or more of the arbitrators engaged in corruption or other misconduct under subsections 3 and 4. This panel is a tri-partite arbitration with party appointed arbitrators who select the Neutral Chair. The party appointed arbitrators were not intended to be totally impartial because they properly made certain their respective party's positions were presented to the arbitration panel. The panel unanimously agreed party appointed arbitrators could communicate with their respective parties about the arbitration proceedings. The Neutral Chair, of course, has remained impartial during the analysis of the case.

At no time during the arbitration proceeding have any of the parties asserted or claimed the arbitration panel did not have the power to decide this case. Since an arbitration award is deemed to be the federal agency's final action, the arbitration panel was required to do what the agency was required to do. Namely, follow the Congressional mandate requiring arbitration

as the dispute resolution system for resolving this and other disputes under 20 U.S. Code §107-2 Arbitration. Sadly, this agency has done the opposite. The arbitration panel had a choice - follow the agency's actions undermining the arbitration process or interpret and apply standards that implement the statutory language passed by Congress. The agency's pattern of abuse is discussed later. Since the sole process available to blind persons under the R-S Act is arbitration, only arbitrators have the power to address such abuses. To say arbitrators don't have the power to address such abuses would add another abuse to the list depriving blind persons of a fair and impartial arbitration process. In summary, the arbitration panel has heard no evidence that showed or even hinted that any grounds existed to vacate the award under the FAA.

The scope of judicial review is limited to the FAA grounds for vacating an award. Not even the parties can expand the scope of judicial review beyond the FAA scope of review. Not even the court is allowed to expand the scope of judicial review. *Hall Street Associated, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). The Supreme Court reasoned:

. . . the text compels a reading of the §§10 and 11 categories as exclusive. To begin with, even if we assumed §§10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally. Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality." "misconduct," "misbehavior," exceed[ing]. . . powers." "evident material and miscalculation," "evident material mistake," "award(s) upon a matter not submitted;" the only grounds with any softer focus is "imperfect[ions], and a court may correct those only if they go to "[a] matter of form not affecting the merits. . . ." . . . expanding the detailed categories would rub too much against the grain of the §9 language, whose provision for judicial confirmation carries no hint of flexibility. On application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant" which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies. . . . *Id* @ 586 and 587

In *Hall* an arbitration agreement stipulated that the court could override an arbitrator's decision if "the arbitrator's conclusions of law are erroneous." The Supreme Court rejected

such provisions as a basis for expanding judicial review beyond the confines of the FAA. In other words, the FAA's statutory language controls. Under *Hall* judicial review can not be expanded by parties or the court.

The FAA further provides the procedure for enforcing or contesting an arbitration award:

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.⁹ U.S. Code §6.

The Respondent clearly has not followed this FAA procedure or other provisions of the FAA.

Instead, the Respondent is attempting to re-litigate the issues addressed in the arbitration. The Respondent essentially is following a process as if the arbitration panel was an Administrative Law Judge or other hearing officer whose decisions are subject to judicial review under the Administrative Procedure Act (APA). The Respondent should be processing an FAA based motion, not an APA appeal. Simply stated, the Respondent is riding the wrong horse.

Note: In the initial opinion and award on page 21 the panel erroneously set out language from the APA, 5 U.S.C §706, as a basis for review when the quoted language should have been from the FAA. Other than quoting the language, the panel did not rely on the erroneously quoted language in making its initial decision.

b. Pattern of Agency Actions Abusing Blind Persons Under the R-S Act

As part of his justification for a modification of the purchase order for his services, Neutral Chairman Williams summarized the agency's pattern of actions undermining the arbitral process that abused blind persons under the R-S Act:

The agency may prefer the more familiar Administrative Law Judge (ALJ) system rather than the independent arbitration process for resolving blind person disputes under the Randolph-Sheppard Act (R-S Act). The choice of an ALJ versus Arbitration system to resolve blind person disputes was not within the agency's discretion. Nor did the agency have the discretion to undermine the arbitral process to show the ALJ system was preferable. Congress specified that blind person disputes were to be arbitrated and awards would be final agency actions. 20 U.S.C. 107-2, Arbitration. The agency's duty was to implement in good faith the arbitration intentions of Congress, not undermine them. The Opinion and Award (O&A) in this case addressed a

pattern of agency actions that undermine Congress's statute mandating arbitration as the dispute resolution system for blind persons covered by the R-S Act:

1. The agency undermined the arbitral process by failing to adopt a regulation or policy clearly providing that a state desiring to be a State Licensing Agency (SLA) under the R-S Act had to waive its sovereign immunity under the Eleventh Amendment and resolve disputes under the statute mandating arbitration. The omission meant arbitral authority would not be addressed as a threshold issue as is typical in an arbitration case. This omission meant arbitral authority was litigated in the federal courts including inconsistent decisions in the ninth, third, sixth and eighth circuits, all because the agency did not provide for the formal waiver of immunity and consent to arbitration as requirements for a state becoming an SLA. See O & A, pp. 26-26.
2. The agency undermined the arbitration process by adopting a regulation that violated 20 U.S.C. 107b-1 requiring SLAs to provide blind licensees with "all relevant financial data." The regulation allowed states to treat R-S Act financial data as confidential information not available to blind licensees. See: 34 C.F.R.395.12. This violation prohibited blind licensees from having access to the very financial data they needed to consider seeking a vacancy or prove compensatory damages. See: O & A, pp. 40-42.
3. The agency undermined the arbitration process by adopting a policy prohibiting arbitrators from issuing subpoenas for the "production of witnesses, papers, or other evidence." The Federal Arbitration Act (FAA) and the Administrative Procedure Act (APA) provide for the issuance of subpoenas. Under the agency's policy a party can "stonewall" an opposing party by not providing relevant evidence as occurred in this case. The agency is prohibiting access to the very evidence needed to prove or defend a case. See: O & A, pp. 43-45.
4. The agency is undermining the arbitration process by violating its published policy of compensating arbitrators for their fees and expenses under section 16 (a) & (b). When I asked Ms. Ryan about the basis for the purchase order (PO) sum, she said it was based on the

"average" case or words to that effect. The agency policy does not say arbitrators will be compensated on the basis of an "average" case. Arbitrators have no knowledge of the legal issues, evidentiary issues, hearing duration, research time, study time, drafting time etc. at the time of their appointment. They must rely on agency representations of the PO sum for a particular case. When an agency's PO representation is erroneous, an agency modifies a PO to cover actual fees and expenses. On the other hand, this agency expects an arbitrator to perform his or her services without compensation for his fees and expenses over an erroneous PO sum. Arbitrator requests for a modification in a contract sum are dismissed "out of hand" by this agency. This practice discourages experienced arbitrators from serving as neutrals. More importantly, it violates the agency's published policy to compensate arbitrators for their fees and expenses. See: O & A, pp. 47 & 48.

(Williams e-mail 11/17/2017)
(Attached as Appendix A)

Now, a fifth abuse can be added to this pattern of agency actions abusing blind persons. Namely, under the guise of an APA proceeding, the SLA and agency are trying to re-litigate the issues already decided in this arbitration. Such an effort is expressly prohibited under the FAA.

In addition to these five abuses, the SLA adopted a cumbersome system for evaluating blind person grievances seeking vacancies. A grievance must be filed and heard by a committee with an appeal to a Division Director followed by a "Full Evidentiary Hearing" before a hearing officer followed by administrative review and by a complaint to the federal agency seeking arbitration. This multiple step process can be compared to a typical objective and less costly process of a grievance being heard and decided by an administrator, then followed by an arbitration. The pattern of abuses and the SLA's lengthy and cumbersome system results in substantially higher representation costs as well as higher arbitrator fees and expenses compared to a typical grievance-arbitration process. Unfortunately, the arbitration panel and counsel are having to wade through these various issues to reach a fair and impartial resolution of the petitioner's claims as required by the FAA.

c. Petitioner's Motion for Costs and Attorney's Fees

The issue of arbitral authority and state sovereign immunity already was addressed in the panel's initial opinion and award. See: O & A, pp. 24-26. The panel concluded the state in accepting the SLA position waived its sovereign immunity. This conclusion empowers arbitrators to proceed with awarding compensatory damages including attorney fees as well as arbitrator fees and expenses. The panel's conclusion is not grounds for vacating any award in this case under the FAA and Supreme Court's ruling in *Hall*.

The issue of attorney fees and costs already was addressed in the panel's initial opinion and award. See: O & A, pp. 45-47 and 51. The arbitration panel followed the principle that recovering attorney fees and expenses is part of any rational cost accounting make whole remedy. In this case a majority of the arbitration panel followed this principle. In the initial O & A the panel majority awarded attorney fees. As submitted in Exhibits in support of his motion, the Respondent included expenses and costs. This submission was in accord with the panel's intent expressed in its "make whole" remedy. The total of attorney fees including expenses and costs is \$54,465.02 in the submitted exhibits. Under the FAA and Supreme Court's decision in *Hall*, this make whole remedy is not grounds for vacating an award. The Respondent has presented no evidence to rebut the Petitioner's amount of fees and expenses. In the absence of such evidence the Petitioner is entitled to an order awarding the amount of \$54,465.02.

d. Arbitrator Fees and Expenses

The agency has a written policy to compensate arbitrators for their fees and expenses. This policy was interpreted and discussed in the initial opinion and award. See: O & A, pp. 47, 48 & 52. The agency also issued a 1996 written policy in the Federal Register. FR-96-9335. It provides that "the Department has drawn guidance from information and data supplied by the FMCS in formulating these standards." FMCS roster arbitrators quote their fees on a per diem basis. FR-96 further provides that: Fees of Arbitrators - (1) Per Diem. The Department will pay a per diem fees to arbitration panel members who are not otherwise employed by the Federal or State Government... The per diem fee to be paid by the Department must be the lesser of

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- (i) The customary fee charged by the individual panel member; or

- (ii) The reasonable and customary fee charged by arbitrators in the locality where the arbitration will be held.

4. Notice. The customary per diem and predetermined fees charged by a panel member must be included in a biographical sketch that is to be sent to the Department following his or her appointment to the panel.

(FR-96-9335)

This FR-96 further clarifies the agency's written policy agreeing to compensate arbitrators for their fees and expenses. To compensate arbitrators, the FR-96 requires the agency to pay a per diem rate. The per diem rate is to be the lesser amount of either the customary fees charged by the panel member or the customary fee charged by arbitrators in the arbitration locality. Under subsection 4 "The customary per diem and predetermined fees charged by a panel member must be included in a biographical sketch" sent to the agency following his or her appointment to a panel." Under FR-96 an appointed panel member initially determines their customary per diem. That initial determination becomes the customary fee chargeable by a panel member unless the agency can show the customary fee for arbitrators in the locale is a lesser amount under FR-96. What did the agency do to the arbitrators in this case? The Neutral Chair was selected by the party appointed arbitrators from a list provided by the Federal Mediation and Conciliation Service (FMCS). The agency should have received the Chair's biographical sketch including his per diem charge. That charge is a per diem of \$900 for an 8 hour day with time charged in quarterly hour increments. Yet, the agency disregarded these per diem charges and terms. Instead, it issued a PO with a \$900 per diem, but omitted the quarterly increment charges. It also set caps of \$9,000 for fees and \$900 for expenses. The state SLA appointed arbitrator was issued a PO with an \$800 per diem and an 8 hour day as well as caps of \$8,000.00 for fees and \$800 for expenses. The agency offered no data to show the quoted PO was the customary fee for arbitrators in the locale. If it had followed a local rate under FR-96, the agency would have issued a PO that set an \$800 per diem, not a \$900 per diem for the other two arbitrators. The petitioner appointed arbitrator has had numerous experiences serving as an arbitrator and as counsel in R-S Act cases. She was aware of FR-96 and brought it to the attention of her co-arbitrators. She understood the agency was required to accept

an arbitrator's customary fee unless it could show the customary fee in the locale was a lesser per diem. The agency simply has not produced or even claimed it had such data. The petitioner arbitrator, therefore, charged her customary fee in accordance with FR-96. She also had a PO cap of \$9000 for fees and \$900 for expenses.

Nowhere in the agency's written policy or FR-96 is there a provision for capping arbitrator fees and expenses as was done in this case. A \$9000 cap was set for two of the arbitrators, while an \$8000 cap was set for the other arbitrator. The agency's written policy states that it will compensate arbitrators for their reasonable fees and expenses. FR-96 states it will compensate arbitrators on a per diem basis. The per diem is an arbitrator's customary per diem unless the customary per diem in the locale is proven to be less. No doubt the agency can set a PO budget amount based on an estimate. Cases differ in terms of the time needed to render a fair and impartial decision. A Neutral Chair's drafting work, as in this case, far exceeds the work of party appointed arbitrators. When an agency's budget amount is erroneous, a PO is modified to include all reasonable fees and expenses. No provision exists under the agency's policy or FR-96 for capping arbitrator fees and expenses without recognizing the need for modification in appropriate cases. In a nutshell the agency is not complying with its own policy and FR-96. The agency simply is not treating arbitrators with good faith compliance with its own policies and regulations. The remedy for noncompliance is a compliance award.

In this case the issue of "improper capping" is not a concern to the party appointed arbitrators at this time. They are at or below their respective PO budgets. The Neutral Chair, however, requested a modification in his PO budgeted amount. In the initial O & A the majority of the panel ordered the agency to compensate the arbitrators in accordance with its Policies and Procedures section 16 (a) & (b). Now, FR-96 must be included in the meaning of the agency's duty to compensate arbitrators for their fees and expenses. The agency had a duty to comply with its policies and regulations for compensating arbitrators. The administrator(s) participating in the preparation of POs for arbitrators simply did not have the authority to disregard agency policies and regulations. They were required to formulate POs that conformed to agency policies and regulations. Existing POs must be modified to conform to agency policies and regulations. Otherwise, the arbitration panel and the court would be enforcing violations of agency policies and regulations.

The agency did not act in good faith in response to the Neutral Chair's request for a modification to the agency's erroneous budget amount. The modification proposed in an email dated October 9, 2017 was based on the agency's policy 16(a) and (b) and an invoice of \$20,751.88 at the time based on an 8 hour day. In her response the contracting official made no mention of policy 16(a) & (b). In her response she made no mention of FR-96-9335. Instead, she relied on the PO's \$9,900 erroneous caps in her October 18, 2017 email response. In a telephone conversation shortly thereafter, she said the PO was based on "average" costs" or words to that effect. She also referred the Chair to Thomas Finch, the person responsible for structuring arbitrator POs. The Neutral Chair tried to telephone Dr. Finch, PH.D. on two occasions, but received a message he was "out of the office." Without ever discussing the requested modification with the Neutral Chair, Dr. Finch, in an email dated October 31, 2017, said he was ". . .not convinced that the justification you provided is sufficient to warrant the additional funds." The Neutral Chair responded in a November 1, 2017 email asking Dr. Finch to set aside his "rush to judgment" without understanding the significance of his actions. He responded in an email dated the same day. In that email he stated he looked forward to the Chair's response.

On November 17, 2017 the Neutral Chair responded to Dr. Finch's willingness to review this material. The Chair's email response requesting a PO modification based on policy 16(a) & (b) is attached as Appendix A. At no time did Dr. Finch acknowledge the existence of or any intent to follow 16(a) & (b). At no time did Dr. Finch acknowledge the existence of or any intent to follow FR-96-9335. In fact, he has failed to respond to the Chair's November 17th email request for a modification as of the date of this FSOA.

Appendix A speaks for itself. The only material that supplements Appendix A is additional arbitration work and the now realized authority of FR-96-9335. The Neutral Chair's work initially covered the period from his appointment through the SLA review process and drafting of the 52 page, more than 10,000 word, initial O & A. Since then his work has included correspondence with Dr. Finch and co-arbitrators as well as drafting this FSOA. Since then his chargeable time and expenses have increased. Since then he has learned that under FR-96-933, he is entitled to his customary \$900 per diem for an 8 hour day chargeable in quarterly increments. Based on his right to a modified PO in accordance with policy 16(a) & (b) and FR-96-9335, the Neutral Chair's fees and expenses are shown in attached Appendix B.

During the Neutral Chair's processing of his PO modification claims, he did not request payment. He did enter invoice data in the IPP Collector system in accordance with the initial PO, but did not click on "download remittance." Nevertheless, the system deposited \$9,663.88 in the Neutral Chair's business account on November 3, 2017, two days after Dr. Finch's email stating he looked forward to the Chair's response. At that time the agency knew and acknowledged the Chair was processing a modification claim. This deposit, therefore, was a partial payment, not a full and final settlement of his claim. The current status of the Chair's fee and expense account is \$29,103.88 minus a partial payment of \$9,663.88 equals his current unpaid balance of \$19,440.00. His current accounting is attached as Appendix B. This Supplemental Award includes a paragraph ordering the agency to pay the Neutral Chair's unpaid balance in accordance with Policy 16(a) & (b) and FR-96-0335. The court should order the agency to pay this current unpaid balance.

e. Continue Retained Jurisdiction

In its initial opinion and award the panel retained jurisdiction to hear any dispute arising out of or relating to the implementation of its award. Para. 12, O & A, p. 52. Paragraphs 2, 3, 4, and 5 of the initial award included a re-interview component. See: O & A, p. 50. The issue of whether the SLA's reconstituted interview panel is capable of conducting or administering interviews that comply with its regulations remains an open question. The parties have not notified the panel that award implementation disputes are no longer contemplated. As a result, the panel will continue to retain jurisdiction to address any future award implementation disputes until the parties fully comply with the awards of the panel and orders of the court.

III. SUMMARY

Congress required arbitration for the resolution of blind person disputes under the R-S Act. Arbitration is intended to be a "one bite at the apple" process with very limited judicial review under the FAA. Any dispute about filling vacancies should be a "garden variety" case. Instead, the SLA has adopted a lengthy, cumbersome and costly dispute resolution procedure. Instead, the agency has adopted regulations, policies and practices to undermine the arbitration process:

1. The agency undermined the arbitral process by failing to adopt a regulation or policy clearly providing that a state under the R-S Act had to waive its sovereign immunity under the Eleventh Amendment in order to become an SLA;
2. The agency undermined the arbitration process by adopting a regulation that violated 20 U.S.C. §107-b-1 requiring SLAs to provide blind licensees with "all relevant financial data;"
3. The agency undermined the arbitration process by adopting a policy prohibiting arbitrators from issuing subpoenas for the "production of witnesses, papers, or other evidence" under the FAA;
4. The agency undermined the arbitration process by violating its published policy of compensating arbitrators for their fees and expenses in accordance with section 16 (a) & (b) and FR-96-9335 and;
5. The agency undermined the arbitration process by violating the judicial review process under the FAA and Supreme Court decision in *Hall*.

The R-S Act expressly provides that arbitration decisions are "a final agency action." To implement Congress's intent an arbitration panel must have the power to act as the agency to produce a fair and impartial arbitration decision. The court should grant the anticipated motion of the Petitioner to confirm the initial award and the First Supplemental Award under the FAA and the *Hall* Supreme Court decision. The Congress granted that power when it specified an arbitration "as a final agency action" under 20 U.S.C. § 107-2. The Agency has no authority to limit arbitral authority by requiring arbitrators to follow an unfair and biased process. If the agency could trump a fair and impartial process by implementing undermining regulations, policies, practices, convening letters and the like, blind persons would be denied a fair and impartial arbitration process. Stated simply, the agency's current system is not the fair and impartial process contemplated by Congress under the R-S Act.

The Court should not join the state SLA and United States Department of Education in abusing the arbitration dispute resolution system for blind people. The court should dismiss the Respondent's complaint for its failure to state a cause of action under the FAA. The court should grant the anticipated

motion of the Petitioner to confirm the initial award and the First Supplemental Award under the FAA and the *Hall* Supreme Court decision.

IV. FIRST SUPPLEMENTAL AWARD

1. Pursuant to the initial Opinion and Award, the State of North Carolina as the SLA shall pay Petitioner's attorney fees, expenses and costs in the amount of \$54,465.02;
2. The Department of Education shall modify the arbitrator purchase orders to comply with agency policy Section 16 (a) and (b) and FR-96-9335 by deleting the use of fee and expense caps;
3. The Department of Education shall pay the current unpaid balance of arbitration fees and expenses in the amount of \$19,440.00 to the Neutral Chair in accordance with its *Policies and Procedures for Convening an Arbitration Panel*, Section 16(a) & (b) and FR-96-9335;
4. The arbitration panel continues to retain jurisdiction to hear any dispute arising out of or relating to the implementation of the initial award and this supplemental award until the panel determines that no award implementation disputes remain.

This the 2nd day of January, 2018
Robert G. Williams
Neutral Chairman

Susan R. Gashel
Concurring Petitioner Appointed Arbitrator

Buren R. Shields, III, Respondent Appointed Arbitrator
Dissenting Opinion Attached

**Opinion of Buren R. Shields, III, State Licensing Agency
Appointed Arbitrator, dissenting from the First Supplemental
Opinion and Award (FSOA) of Chairman Williams:**

I respectfully dissent:

BACKGROUND:

In its 26 Sep 2017 decision on the merits in this matter, the panel majority, inter alia, authorized Petitioner Hooks to submit a motion for attorneys' fees. The panel also retained jurisdiction to hear any disputes arising out of, or relating to, the implementation of the stated award. On 20 Nov 2017, the Petitioner filed a Motion for Costs and Attorneys' Fees (Motion for Costs) with the panel. Therein, he sought costs of \$ 1,365.02 and attorneys' fees of \$ 61,996.25. Attached in support of his Motion was an Affidavit of Counsel (Exhibit 1) and four billing invoices (Exhibits A and B).

On 29 Nov 2017, Respondent, the State Licensing Agency (SLA), filed a Response to Petitioner's Motion for Costs. Therein, Respondent asked the panel to deny Petitioner's motion, arguing awards of such damages against the State Respondent were barred by the Eleventh Amendment to the United States Constitution and by the relevant controlling law in the United States Fourth Circuit Court of Appeals. Respondent included, as Exhibit A thereto, a copy of its Complaint/Petition filed on 20 Nov 2017 in the United States District Court for the Middle District of North Carolina, Case No. 1:17-cv-01058, seeking judicial review of this panel's 26 Sep 2017 decision on the merits of Petitioner's Randolph-Shepard Act (R-S Act) claims. In its Prayer for Relief in its Response, Respondent asked the panel to deny Petitioner's Motion for Costs and Attorneys' Fees or, in the alternative, to stay any ruling thereon pending completion of judicial review.

Motion for Costs and Attorneys' Fees

In section II (c) of his FSOA, Chairman Williams awarded Petitioner \$52,965.02 in costs and attorneys' fees. He confirms this in Award paragraph IV (1). I disagree.

Petitioner is entitled to no costs and no attorneys' fees in this matter from this panel. If such an award was not barred, the documented unreimbursed attorneys' fees and costs in evidence are \$ 52,965.02.

As set out in pages 13-24 of my dissent to the panel's decision on the merits, Eleventh Amendment sovereign immunity bars this panel awarding costs, attorneys' fees, or any other retroactive money damages against the State Respondent in this matter. As set out therein, the panel also lacks Statutory authority under the R-S Act, as currently implemented by the Secretary, to award such money damages against the State Respondent in this matter.

In addition, although the Attorney Affidavit offered in support of Petitioner's Motion for Costs claims \$61,996.25 in attorneys' fees and \$1365.02 in costs, the attachments to that affidavit do not support that claim.

Exhibit A thereto is an invoice from Black, Slaughter & Black, PA, dated 10/23/2017, showing fees from 02/05/2015 to 06/09/2016, which total \$14,660.00. Exhibit B consists of three invoices from Rossabi, Reardon, Klein, Spivey PLLC. The first, no. 1214 dated 10/26/2017, covers legal services from 07/05/2017 to 08/31/2017, and shows fees of \$15,715.00 and costs for Westlaw research of \$134.81. The second, no. 745 dated 03/09/2017, covers only transcript costs of \$1,021.25. The third, no. 890 dated 06/01/2017, covers legal services from 06/21/2016 to 05/25/2017, and shows fees of \$22,715.00 and costs for Westlaw research of \$218.96. Thus, the documented attorneys' fees (\$14,660.00 + \$15,715.00 + \$22,715.00) total \$53,090.00, minus the previous payment of \$1500.00 in fees from Respondent noted in paragraph 7 of Respondent's Attorney's Affidavit, equals \$51,590.00 in unreimbursed attorneys' fees. Documented costs (\$134.81 + \$1,021.25 + \$218.96) total \$1,375.02. Thus, the total of documented costs and attorneys' fees is \$52,965.02.

Other Matters Addressed in Chairman Williams's FSOA

In the remaining subsections in Section II of his FSOA, Chairman Williams addressed several additional issues. None of these issues is within the jurisdiction of this panel. None of them are raised in Petitioner's Motion for Costs or in his Complaint referred to the panel when convened by the Secretary. None are raised in the Respondent's Response to the Motion for Costs. Most are addressed in my dissent to the panel's decision on the merits of Petitioner's claims. Several are addressed further below.

Pursuant to his authority under the R-S Act, the jurisdiction of this panel is defined by the 18 Jul 2016 letter of the Secretary, U.S. Department of Education (US DoEd.) (the

Secretary) convening this panel under the R-S Act. P. Ex 1. That letter did not address, or authorize determination of, any of the issues in these subsections of Section II of Chairman Williams' FSOA.

In pertinent part, the Secretary's letter convening this panel states: "By this letter, the Secretary authorizes the convening of an arbitration panel to hear and render a decision on the issues raised in the complaint. The central issue is whether the SLA violated the R-S Act, implementing regulations and state rules and regulations by failing to award Mr. Hooks the I-85 Davidson Area County Rest Area." (emphasis added). See also Panel Merits decision, p. 4. (The panel's function "is to determine if applicable federal and/or state laws were violated during the selection process." (emphasis added). None of the issues addressed by Chairman Williams in these subparagraphs had to do with the process whereby the I-85 Davidson Area County Rest Area in North Carolina was awarded to a blind applicant other than the Petitioner.

Both the R-S Act and the Secretary's implementing regulations are clear on this point. In 20 U.S.C. § 107d-1, the R-S Act states that the Secretary is to convene a panel "to arbitrate the dispute" between the blind petitioner and the SLA. In 61 FR 16700, April 16, 1996, implementing the Secretary's commitment to pay arbitration fees and expenses under the R-S Act, the Secretary states: "The Act further provides for arbitration to resolve disputes that arise under the program between individual vendors and the SLA" (emphasis added).

I also disagree with Chairman Williams' arguments and conclusions in these subsections in Section II of his FSOA.

In his subparagraph (a), "Respondent Riding the Wrong Horse," Chairman Williams addressed Respondent's Petition for Judicial Review (PJR) of the panel's 26 Sep 2017 decision on the merits. He found that the PJR improperly seeks judicial review under the federal Administrative Procedures Act (APA), rather than under the Federal Arbitration Act, 9 USC, §§ 9, et. seq.(FAA).

This issue, if it should arise, is properly the concern of the parties to judicial review. The panel is not a party to that proceeding. This issue is appropriately argued, and decided, in the judicial forum where the PJR has been filed. It is not matter properly before this panel. This panel was convened solely to address the Petitioner's complaint concerning the

administrative procedure used by the SLA in the site selection process for the I-85 Davidson Area County Rest Area in North Carolina. The issue was not briefed or argued by the parties, or otherwise raised, before the panel. The panel was not convened to address the possible future judicial review of its arbitral decision.

Chairman Williams found that, because the panel is an arbitration panel, judicial review must be under the FAA. There is no clear mandate to that effect in the R-S Act. The Secretary is the implementing authority under the R-S Act. That is not what the Secretary directed. Judicial review under the APA is the long-established practice. The Secretary's direction and this long practice are supported by clear and compelling logic.

The subject matter in question is the review of an administrative process to insure compliance with applicable administrative standards and governing law. The Secretary appoints an SLA to implement the federal administrative program for providing employment opportunities under the R-S Act. As part of the SLA application process, the SLA must obtain approval from the Secretary of the administrative procedures it will use in implementing this federal administrative program. This approval is an administrative procedural process. An arbitration panel convened by the Secretary under the R-S Act is part of the federal administrative process for making final blind operator site awards. It is not the mandated dispute resolution process as Chairman Williams found. Rather, it is but the final step in an agency dispute resolution process/procedure. Disputes may be resolved at earlier stages of the approved SLA grievance process. The panel's task is most often review of the administrative procedures used in the challenged administrative process site award. Under statute, the arbitration panel decision in this particular administrative process is not an "arbitration award" under the FAA, but is, under the R-S Act, a "final agency decision." Review of federal agency administrative decisions is the purpose of the APA.

The R-S Act is clear that: (1) actions of this panel are to be conducted pursuant to the APA, 5 U.S.C. §§ 555 et seq.; and (2) subsequent judicial review of the panel decision/final agency action occurs under the provisions of that Act. Section 107d-2(a) provides that this 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." (emphasis added). This section further states the panel decision "shall

be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5." (emphasis added). Title 5 is, of course, the APA, not the FAA.

Review as "a final agency decision" is a term of well-established legal meaning denoting review under the APA and its standards of judicial review. I find compelling that the courts have long applied the APA standards to judicial review of R-S Act arbitration panel final agency decisions. In doing so, those same decisions specifically have noted that 20 U.S.C. §107d-2(a), by requiring APA review, provided a scope of judicial review broader than that ordinarily available under the FAA. See, e.g., *Del. DHHS v. US DOE*, 772 F.2d 1123 (3rd Cir. 1985) and *Wisc. v. US DOE*, 667 F. Supp. 2d 1007, 1016-1017 (W.D. Wisc. 2009). The decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), cited by Chairman Williams, is not relevant as it is simply a decision interpreting the scope of judicial review required, if the FAA applies (which it does not here).

In his implementing regulation, 34 CFR 395.13(c), the Secretary clearly directs judicial review under the APA - stating the panel decision "shall be subject to appeal and review as a final agency action for the purposes of the provisions of 5 U.S.C. chapter 7." (emphasis added). The underlined language was added to the statutory text by the Secretary, in legitimate exercise of his implementing authority to clarify statutory intent, i.e., to stress that judicial review was to be under "the provisions of" the APA, e.g., the APA standards of review.

It is the Secretary, not this panel, that is designated, and authorized, in the R-S Act to implement that Act and specifically to establish the "requirements for the uniform application" thereof. 7 U.S.C. §107 (a). This point applies equally to Chairman Williams' other objections in Section II of his FSOA to the manner in which the Secretary has implemented the R-S Act.

In subparagraph II (b), Chairman Williams identified several implementing actions by the Secretary that he found were "a pattern of actions" that "undermine" the Congressional intent in the R-S Act "mandating arbitration as the dispute resolution system for blind persons covered by the R-S Act." He found that these "agency actions" impeded the arbitration process, limited the directed arbitration panel's ability to efficiently and completely determine issues before it, and made the mandated dispute resolution process more complex and costly than

necessary. I disagree and find all these "agency actions" not prohibited by statute and within the Secretary's regulatory implementing authority under the R-S Act.

In subparagraph II (b)(1), Chairman Williams found that using the APA, rather than the FAA, standard for judicial review tended to allow re-litigation of the issues resolved by the arbitration panel and, thus, undermined the statutory determination that arbitration was to be the determinative dispute resolution system under the R-S Act. As noted above, I disagree. I find the APA approach required by statute and well within the implementing authority given the Secretary.

Chairman Williams also found that the Secretary failed to clearly require a waiver of sovereign immunity as a condition precedent to becoming certified as a SLA and that this agency action hindered the arbitration process by allowing sovereign immunity to be litigated in federal court, rather than being disposed of in the R-S Act arbitration stage. I disagree on both points.

As a condition to participation as an SLA, the R-S Act, and the Secretary, did require that States waive sovereign immunity sufficient to participate in arbitration of disputes under the R-S Act with blind vendors as required by the Act. That waiver means that SLAs: (1) may be found liable of violating the R-S Act; and (2) are subject to prospective injunctive relief. *Wisc. v. US DOE*, 667 F. Supp.2d 1007, 1013-1015 (W.D. Wi. 2009). If the State is subject to prospective injunctive relief, this is sufficient to give meaning to the agreement to arbitrate in the R-S Act. *Id.* It is now clear that Congress may condition participation in a federal program like this upon a waiver of sovereign immunity from prospective injunctive relief without also waiving sovereign immunity from monetary damage awards. *Nelson v. Miller*, 570 F.3d 868, 884-85 (7th Cir. 2009). This is what occurred in the R-S Act. (Dissent, O & A, pp. 13-21).

Therefore, for the reasons, and authorities, stated in my dissent in the panel decision on the merits of Petitioner's claim, I find no violation of the R-S Act, or other law, in the Secretary taking this position. Neither the R-S Act, nor the Secretary in his implementing regulations, required the State to waive its sovereign immunity to money damages as a condition of being certified as an SLA or otherwise. I do not find that this prevented sovereign immunity as to such damages by the panel from being addressed by the arbitration panel, as it was by the majority in this case. Nor do I find that allowing

federal courts on judicial review to address this issue hindered the arbitration here.

In subparagraph II (b)(2), Chairman Williams found that the Secretary's implementing regulation, 34 C.F.R. 395.12, made the disclosure to litigants of certain information relating to a State's R-S Act program subject to the personal privacy rights of other program participants existing under State law. He found that this privacy protection for other blind operators deprived blind competitors of data necessary to consider in bidding on open sites and necessary to disappointed applicants in proving compensatory damages in arbitration. As a result, he concluded that this balancing of privacy interests in this statutory implementation by the Secretary violated 20 U.S.C. §107b-1.

In subparagraph II (b)(3), Chairman Williams found that the Secretary's implementing regulations prohibiting the arbitration panel from issuing certain subpoenas: (1) permitted "an opposing party" to withhold relevant evidence and that this "occurred in this case;" and (2) amounted to the Secretary "prohibiting access" to essential evidence.

As to both these findings concerning regulations, I disagree. I find no such evidence in the record. I do not find this to be an issue asserted by the Petitioner before the panel. For the reasons, and authorities, stated in my dissent in the panel decision on the merits of Petitioner's claim (Dissent, O & A, pp. 25-29), I find both these actions by the Secretary consistent with statute and within the Secretary's regulatory implementing authority under the R-S Act.

On page 12 of his FSOA, Chairman Williams found that the Respondent SLA has adopted an internal grievance procedure in implementing the R-S Act that is more "cumbersome" and "lengthy" than he believes necessary, and which he believes increases the costs for litigants. Under 34 C.F.R. 395.4(a), all such SLA rules and procedures must be "adequate to assure the effective conduct of the State's vending facility program" and must be approved by the Secretary as doing so. 34 C.F.R. 395.17 sets out the requirements and procedure for suspending any SLA. A SLA may be suspended for failure to "substantially comply with" the R-S Act, but only if, after notice, it fails to take corrective action the Secretary deems necessary. The Secretary approved the grievance procedure at issue. There is no evidence before the panel that he has issued any determination to the SLA

that any part of the State grievance procedure does not "substantially comply with" the R-S Act.

By including this in his discussion of "A Pattern of Agency Actions Abusing Blind Persons under the R-S Act", Chairman Williams seemed to add the Secretary's approval of this SLA grievance procedure as another "agency action" which Chairman Williams found to undermine the arbitral process mandated by the R-S Act. I disagree. I find the Secretary's approval of the SLA and its program authorized by, and in accord with, statute. I find both within the Secretary's implementing authority under the R-S Act. See 34 C.F.R. 395.2-395.5 and 395.13(a). I find no evidence in the record to support Chairman Williams' conclusions nor any evidence that the Petitioner raised this issue.

As to paragraph IV., First Supplemental Award, in Chairman Williams' FSOA, for the reasons stated in my dissent to the panel's decision on the merits and herein, I dissent from paragraphs 1 and 4.

Buren R. Shields, III
State Licensing Agency Appointed Arbitrator