UNITED STATES OF AMERICA
DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Case No. R-S/16-04

In the Matter of the Arbitration BETWEEN:

FLORIDA DEPARTMENT OF EDUCATION,
DIVISION OF BLIND SERVICES,

PETITIONER,

And

UNITED STATES DEPARTMENT OF DEFENSE, TYNDALL AIR FORCE BASE,

RESPONDENT.

BEFORE: Steven Fuscher, Esq, Susan R. Gashel, Esq., Patricia Plant, J.D.

APPEARANCES:
For Petitioner: Brent McNeal, Deputy General Counsel Florida Department of Education, Office of the General Counsel
For Respondent: Major Kevin G. Normile, USAF Assistant Staff Judge Advocate
325 Fighter Wing

Place of Hearing: Base Support 445 Suwannee Avenue Tyndall Air Force Base Florida 32403

Date(s) of Hearing: October 17 and 18, 2017
Date of Brief(s): December 1, 2017
Date of Reply Brief: December 18, 2017
Date of Award: January 30, 2018

Relevant Document(s): Randolph-Sheppard Act 20 U.S. Code § 107 – Operation of Vending Facilities; 34 C.F.R. § 395; Report on Senate Randolph-Sheppard Act Amendments of 1974; Federal Register 23 March 1997
Type of Grievance: Interpretation

I. ISSUES:

DID TYNDALL AIR FORCE BASE (hereinafter "TAFB") VIOLATE THE RANDOLPH-SHEPPARD ACT (hereinafter "ACT") AND ITS IMPLEMENTING REGULATIONS BY FAILING TO AFFORD THE STATE LICENSING AGENCY (hereinafter "SLA") AND FLORIDA'S LICENSED BLIND VENDORS THE PRIORITY GRANTED BY THE ACT IN 20 U.S.C. 107?

DID TAFB VIOLATE THE ACT AND ITS IMPLEMENTING REGULATIONS BY FAILING TO PROVIDE THE SLA WITH VENDING MACHINE INCOME PURSUANT TO 34 C.F.R. 395.32?

II. PETITIONER POSITION:

Petitioner Florida Department of Education, Division of Blind Services' (hereinafter "Department" or "SLA") position is that the Act applies to TAFB, and that it is entitled to a permit to operate a vending facility at TAFB, as well as income from vending machines that are not operated by the Army/Air Force Exchange Services as authorized by Title 10, U.S.C. (hereinafter "AAFES" or "Exchange") within its retail sales outlets. According to Petitioner, the SLA pursuant to the Act, TAFB's failure to apply the Act's prior right for the blind to operate vending facilities on all Federal property consisted of a limitation on the placement or operation of a vending facility without the Act's required justification to the Secretary of Education. Petitioner asserts that TAFB's failure to remit vending machine income from vending machines not within AAFES operated retail sales outlets likewise violates the Act's vending machine sharing provisions.

In response to a Freedom of Information Act request, TAFB provided the SLA with contracts between AAFES and private corporations. In

one contract, Coca-Cola agreed to pay AAFES a fee of 48% based on gross sales; in another contract, The Quality Companies agreed to pay a fee of 8% of gross sales. A third contract, between AAFES and Buffalo Rock paid 25% on beverage sales and a 10% fee on snack sales.

AAFES provided to the Division a spreadsheet purporting to display gross vending machine sales at the base by month from 2012 through 2016, as provided by the contractors.

The Division characterizes the figures as "questionable," given its many years of experience in viewing vending sales numbers. Testimony that the number of "repeats" appearing in the spreadsheet (i.e., the same dollar amount being repeated month after month for the same machine) "usually just doesn't happen. If you have $36 for one month, and you have $36 for the next two months, it's either an indication that somebody's not collecting the vending machines, or they're not accounting for what the sales actually are."

The spreadsheet is replete with numerous examples of the sales figures of an identical dollar amount being repeated month after month, year after year. Joint Exhibit 6-12. The figures in the spreadsheet are not credible, nor are they consistent with the sales figures provided in the three vending contracts discussed above.

The SLA has received no vending machine income from TAFB for at least the past ten years, yet Air Force Instructions 34-206, Vending Facility Program for the Blind on Air Force Property (AFI 34-206)

provides that vending machine income generated by an installation will be shared with the SLAs for the blind and/or the blind vendor. Moreover, vending facilities are prima facie feasible in all the locations requested by the SLA, based existing vending machines, the SLA's site visit, and the SLA's experience with other, complaint Federal entities. The SLA is not seeking income sharing from any vending machines within AAFES operated retail outlets at TAFB.

The SLA requests that the Panel find that TAFB has violated the ACT by failing to afford the Division and blind vendors the priority granted by the Act and by failing to provide the SLA with vending machine income as required by 34 C.F.R. § 395.32.

III. RESPONDENT POSITION:

The United States Air Force (hereinafter "Air Force") requests dismissal of the Complaint and Amended Complaint herein. With respect to the issue of failing to provide the vending facility priority, Air Force claims that its offer of a permit for two buildings satisfies the Act. With respect to the issue of provision of vending machine income, the Air Force's position is that the SLA did not seek to resolve the issue before proceeding to arbitration and that therefore the issue is not properly before the Panel. The Air Force also maintains that there are no vending machines at TAFB are subject to the Act's income sharing requirements. This claim is based on the Air Force's position that the regulation at 34 C.F.R. § 395.32 exempting the vending machine

income from vending machines operated by AAFES within retail sales outlets.

TAFB claims that the Act's priority only applies where there are 100 or more Federal civilian employees, and that the number of buildings at TAFB that have over 100 such employees "is incredibly small." TAFB claims that the vending machine income sharing exemption at 34 C.F.R. § 395.32(i) applies to all vending machines accruing to AAFES, whether or not the machines are located within retail sales outlets, and whether or not the machines are under the control of AAFES.

IV. JOINT STIPULATIONS OF FACTS:

1. On or about August 14, 2015, the SLA sent TAFB a Settlement Agreement signed by the SLA to resolve issues before a separate Rehabilitation Services Administration (RSA) arbitration. This settlement agreement was signed by the 325th Mission Support Group Commander Colonel Ronald L. Pieri, USAF and returned to the SLA on or about August 27, 2015.
2. Between on or about August 14, 2015 and on or about October 9, 2015, representatives from the SLA twice attempted to submit an application for a permit to TAFB and attempted to contact TAFB personnel three times to advise on the status of the permit application.
3. On or about December 15, 2015, the SLA filed a request to convene an ad hoc arbitration panel with the U.S. Department of Education.
4. The 325th Fighter Wing Commander is the designated "On-site official" at TAFB who is responsible for implementing the Act at TAFB, insofar as it relates to vending. In early 2016, representatives from the SLA were connected with Mr. Randall S. Jones, the Deputy Director of the Force Support Squadron, who was the Air Force point of contact for the "On-site official."
5. Mr. Jones reached out to the SLA and discussed the potential settlement of the arbitration with them. On or about June 15, 2016, Mr. Jones escorted representatives of the SLA on a site visit to TAFB, where the SLA representatives were taken to every building that they wished to see, with the exception of two secure facilities.
6. On or about June 29, [2016], the SLA submitted an amended Attachment B to the permit

application for SLA-operated vending facilities at TAFB, seeking to have 12 snack machines and 22 drink machines placed at TAFB. Mr. Jones provided an email response stating, in part "Don, [t]hanks for being patient as we worked through this issue with our legal team here and coordinated with Army Air Force Exchange Service (hereinafter "AAFES" or the "Exchange"). The bottom line up front is that our legal folks see this issue as little differently and do not feel that the base is required to grant a permit in the majority of the areas you proposed... That's not to say we won't work with you on this (we will) but we don't feel it's necessary to place vending machines in all of those locations to include planning machines next to existing AAFES vending machines. Having said that, we want to support your request and work with you to provide a vending machine service that will be able to provide income for a Bureau of Business Enterprise Operator in the Panama City area. We would like to propose two buildings be serviced by one of your blind service vendors…"

7. During the summer of 2016, approximately 35-40 vending machines were operating at TAFB. All these machines are run through AFFES and are located in buildings through TAFB, while being serviced by private commercial vending contractors.
8. Profits from AFFES operations support Morale, Welfare and Recreation (hereinafter "MWR") operations at TAFB and on Army and Air Force installations throughout the world and these profits supplement Congressional appropriations for MWR programs for military personnel and their families.
9. The purpose of the Act is to provide blind persons with remunerative employment, enlarge the economic opportunities of the blind, and stimulate the blind to greater efforts in striving to make themselves self-supporting. The SLA trains, licenses, and contracts with blind vendors for the operation of vending facilities on federal property un the priority granted by the Act.

VI. PANEL'S ADDITIONAL FINDINGS OF FACT:

10. The Division is the state licensing agency for the state of Florida under the Act. See 20 U.S.C. § 107b.
11. The Division trains, licenses, and enters into agreements with blind vendors for the operation of vending facilities on federal property. See 34 C.F.R. § 395.7. Blind vendors licensed by the Division operate vending facilities throughout the state, including facilities at the Naval Air Stations in Pensacola and Jacksonville; at the Army Southern Command; at multiple Army Reserve locations; and at the United States Marine Corps Blount Island Command. Transcript at 106-107.
12. Tyndall Air Force Base is located in Bay County, Florida. The population at TAFB totals over

20,000 people, including 3,672 active duty; 4,551 family members; 2,799 civilians; and 9,257 retirees. The Force Support Squadron ("FSS") at TAFB serves as the point of contact for vending machines on the base. AAFES is a joint non-appropriated fund instrumentality authorized pursuant to Title 10, U.S.C. and is the primary resale activity on Army and Air Force installations for non-food merchandise and patron services.

13. The SLA/TAFB Settlement Agreement required both parties to cooperate to determine whether satisfactory vending sites existed on TAFB and explicitly referred to consultation between the parties regarding vending at "all existing buildings on the base." Joint Exhibit 6-3. In addition, the Air Force agreed to acknowledge the applicability of the R-S Act, the priority granted therein for blind persons to operate vending machines on Federal property, and the vending machine income sharing provisions. Id.
14. After the SLA's attempts to contact TAFB several times between August and October 2015, Mr. Jones of TAFB was reached in early 2016.
15. Because the parties had been unable to reach an agreement on vending after many months of negotiating, the SLA filed an amended request for arbitration in March 2017. This amended request led to the instant arbitration.
16. Mr. Donald O. Meloy is the Marketing Site Manager for the SLA. Transcript at 104. He conducted site inspections at TAFB and determined there probably would be several sites available at TAFB where an opportunity for a blind vendor could be established. Transcript at 108.
17. Over the summer of 2016, Mr. Jones facilitated requests for information from the SLA and provided the SLA with a site visit at TAFB. During the site visit, Mr. Jones escorted the representatives of the SLA to all of the buildings that they wished to see, with the exception of two secure facilities. Transcript at 140.
18. Mr. Meloy determined, based on sales numbers contained in the requests for information provided by TAFB, that the sales figures of the machines operated by AAFES seemed very low and questionable. Transcript at 126.
19. According to TAFB, for the past ten years, all vending machines at the base have been operated through contracts between AAFES and private corporations. Joint Exhibit 6-7 at 4. At TAFB, the only facility operated by AAFES is the grocery store. Transcript at 166.

VII. CONCLUSIONS OF LAW

A. The R-S Act requires that federal property managers "shall take all steps necessary to assure that, wherever feasible, in light of appropriate space and potential patronage, one or more vending

facilities for operation by blind licensees shall be located on all Federal property." 34 C.F.R. § 395.30(a).

B. There are only two permissible reasons for not establishing a blind-operated vending facility on any Federal property. The first is when a vending facility is not feasible. 20 U.S.C. § 107(a)(2). Here, the site visit established that it is feasible for vending machines to be located at TAFB, as did Petitioners' (P) Exhibit (Ex.) J6-10. The second is when a limitation on the placement or operation of a vending facility would adversely affect the interests of the United States. 20 U.S.C. § 107(b)(2).

C. A federal property manager does not make the decision that a vending facility would adversely affect the interests of the United States. The United States Secretary of Education (Secretary) makes the decision. 20 U.S.C. § 107(b)(2). It is incumbent upon a Federal property manager to fully justify in writing to the Secretary the reasons that the Federal agency believes a limitation on the placement or operation of a vending facility is justified. Id. The Secretary "shall determine whether such limitation is justified." Id. TAFB did not submit any testimony that it had sought authority to limit the placement or operation of vending machines. Transcript at 63, 64.

D. Vending machines are considered a vending facility pursuant to the R-S Act. 20 U.S.C. § 107e(7). Vending machines may be combined to create a vending facility, when such facility is maintained, serviced, or operated by a blind vendor. 34 C.F.R. § 395.7(a).

E. This duty to take affirmative steps to assure that one or more vending facilities for operation by blind licensees is established applies to the Air Force, as the R-S Act requires that every federal agency give priority to blind persons in authorizing the operation of vending facilities on Federal property." 20 U.S.C. § 107(a). The term priority means a right of first refusal. Transcript at 64.

F. The definition of "Federal property" is broad, and encompasses "any building, land, or other real property owned, leased, or occupied by any department, agency, or instrumentality of the United States (including the Department of Defense and the United States Postal Service), or any other instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States." 20 U.S.C. § 107e(3).

G. After January 2, 1975, Federal agencies must not occupy any building unless such building includes a satisfactory site for the operation of a vending facility. 34 C.F.R. 395.31(a). The law requires that every Federal agency, including the Air Force, which "undertakes to occupy any building that is to be constructed, substantially altered, or renovated .... include a satisfactory site or sites for the location and operation of a vending facility by a blind vendor." 34 C.F.R. §

395.31(b). Transcript at 61.

H. In consultation with the Florida Department of Education,[1] a determination is made that a building contains a satisfactory site. 34 C.F.R. § 395.31(c). The SLA must be given written notice, by certified mail, of the agency's intention to acquire or otherwise occupy the building. Id.

I. A satisfactory site for a vending facility to be operated by a blind licensee must be established in all buildings built or occupied after January 1, 1975. 34 C.F.R. 395.31(a) and (b). Nevertheless, if a building contains fewer than 100 Federal employees or contains less than 15,000 square feet of interior space to be utilized for Federal Government purposes in the case of buildings in which services are to be provided to the public, a satisfactory site is not required to be established. 34 C.F.R. § 395.31(d). The only purpose of the satisfactory site provisions is "to simplify the difficulties which may arise in the review of building and acquisition plans." Sen. Rep. 93-937 at 19. As testified to by Mr. Terry Smith: "That's only saying that if a federal entity is acquiring space, and they have fewer that 100 people, or 15,000 square feet, then they do not have to provide a satisfactory site, but if there's going to be vending in that space, then the priority still kicks in." Transcript at 68.

J. Where a vending facility is already established, it is self-evident that it is feasible. Once an agency decides to establish a vending facility, the priority applies, even if the building contains fewer than 100 Federal employees or is smaller than 15,000 square feet. Transcript at 97, 98. Where a vending facility is ***feasible***, the priority is to be afforded to the SLA under the RSA. In other words, once a federal agency (or its lessee) decides to establish a vending facility on federal property, the RSA priority requires that the vending facility be operated by a licensed blind vendor, unless the SLA declines the priority.

K. The implementing regulation defines "Individual location installation or facility" to mean "a single building or a self-contained group of buildings. In order for two or more buildings to be considered to be a self-contained group of buildings, such buildings must be located in close proximity to each other, and a majority of the Federal employees housed in any such building must regularly move from one building to another in the course of official business during normal

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[1] The R-S Act is a cooperative federal-state program. Under the program, the United States Department of Education enters into agreements with state licensing agencies (SLAs) to train and license blind persons to operate vending facilities on Federal and other property. 20 U.S.C. § 107b.

working days. 34 C.F.R. § 395.1(h). The Panel, during two separate site visits, had the opportunity to view a self-contained group of buildings, and concludes that TAFB constitutes an individual location installation or facility as that term is defined in the R-S Act.

L. When non-blind operated entities on Federal property either compete with a blind vendor or operate vending facilities to the exclusion of blind vendors, the priority is undermined. Transcript at 71. The R-S Act addresses this issue by requiring that income from:

- competing vending machine income accrues to the SLA, to be distributed to the blind vendor. 34 C.F.R. § 395.32(a), Transcript at 71.
- vending machine income operated by non-blind operated concerns accrues to the SLA for the purposes set out in 34 C.F.R. § 395.8(c). 34 C.F.R. §§ 395.32(b)(c)(d).

M. TAFB's offer of two buildings to the SLA as purported compliance with the R-S Act, with the statement that ended the SLA's request for income-sharing pursuant to the R-S is a refusal to comply with the Act, and the issue of income-sharing is properly before this Panel.

N. By refusing to enter into a vending machine permit with Petitioner, Respondent has violated both the August 2015 settlement agreement and the R-S Act. Moreover, TAFB has failed to comply with 34 C.F.R. § 395.32(h) in that it has failed to renegotiate all arrangements pertaining to the opration of vending machines on Federal property not covered by contract with, or permits issued to, the SLA. By not tendering vending machine income as required by the Act for at least a ten year period, TAFB has violated the Act.

VIII. STANDARD OF REVIEW

This Panel is directed to, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision[.]" 20 U.S.C. § 107d-2(a). That subchapter, provides, at 5 U.S.C. § 556(d), that the proponent of an order has the burden of proof, and an order may issue "in accordance with the reliable, probative, and substantial evidence." Id. According, the SLA has the burden of proof to prove by ***substantial*** evidence that TAFB

violated the Act. "This is something more than a mere scintilla but something less than the weight of the evidence." Pennaco Energy v. U.S. Dep't of Interior, 377 F.3d 2247, 1156 (10th Cir. 2004)

IX. ANALYSIS

A. The Evidence Established that a Vending Facility is Established at TAFB; Therefore the Act Applies

The Act establishes a priority for licensed blind persons to operate vending facilities on all Federal property. 20 U.S.C. § 107. The Act requires that "wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States." 20 U.S.C. § 107. The SLA is authorized to select locations for vending facilities on Federal property. 20 U.S.C. § 107a(c). The Secretary of the Department of Education (hereinafter "Secretary") and the SLA determine the sufficiency of patronage at a particular location. Under the Act, the SLA submits to a Federal entity, for review and approval, a permit application for the operation of vending facilities on federal property. 34 C.F.R. § 395.34. The federal entity then must accept the permit or, if it believes that the proposed placement of vending machines would adversely affect the interests of the United States, fully justify any limitation of the placement in writing to the Secretary, who shall then determine whether such limitation is justified. 20 U.S.C. § 107(b)(2); 34 C.F.R. § 395.30. TAFB has failed to provide

any justification to the Secretary for its failure to approve the permit. Because TAFB has not approved the permit application, such refusal constitutes a limitation on the placement and/or operation of vending machines by the SLA.

Federal entities are required to:

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

34 C.F.R. § 395.30(a).

Based on the Joint Stipulations of Fact, the SLA has established that it has complied with its responsibilities pursuant to the Act with respect to seeking a vending facility at TAFB. Based on the site surveys conducted by the SLA, and the testimony of the SLA's Marketing Site Manager Donald O. Meloy, the SLA has established, by substantial evidence, that a vending facility at TAFB is feasible. Moreover, the existence of contracts between AAFES and commercial providers conclusively establishes that a vending facility is feasible at TAFB. No evidence was presented that TAFB negotiated in good faith or returned

a signed permit within a reasonable period of time, or sought authority for a limitation on the placement of a vending facility from the Secretary.

Instead, TAFB claimed, as reflected in Joint Stipulation of Fact 6, that "it was not required to grant a permit." TAFB's reasons, as set out more fully below, cannot be accepted as adequate grounds to refuse to comply with its responsibility to "take all steps necessary" to ensure that a vending facility or facilities is established at TAFB.

B. The Act Applies in Buildings with Less than 100 Federal Employees Where the Federal Entity Desires Vending Services

As testified to by the SLA's expert witness, Terry Smith, where a vending facility is already established, it is self-evident that it is feasible. Once an agency decides to establish a vending facility, the priority applies, even if the building contains fewer than 100 employees or is smaller than 15,000 square feet. Transcript at 97, 98. Here, the evidence is clear that a vending facility has been established, and the Panel personally observed that to be true when it toured various buildings at TAFB where vending machines were located.

TAFB's contention that the Act only applies where there are 100 "civilian" employees in a building is incorrect. The Panel rejects TAFB's claim that military service members are excluded in determining the number of employees in a given building. No court has

so held, and, given the purposes of the Act, to provide employment and economic security for the blind, such a construction is illogical.

In Arizona Dep't of Economic Security v. U.S. Postal Service, R-S/06-3, the panel considered whether the 100 Federal employee limit in 34 C.F.R. § 395.31 was intended by Congress to allow Federal property management officials to secure vending services without recognizing the Act's priority. The Panel stated that it could "find nothing in the statute, the regulations, or the legislative history that suggests Congress intended to exempt such properties from the priority ... if the federal entity desires vending services then the priority still applies.

In 2011 another arbitration panel considered and explicitly rejected the same argument, Oregon Commission for the Blind v. U.s. Dep't of Veterans Affairs, R-S/09-2.

The SLA has conclusively established, by substantial evidence, that TAFB violated the Act when it failed to approve the proffered permit application. The SLA has conclusively established that the terms in the permit are reasonable, and that TAFB has waived its opportunity to re-negotiate the terms of its permit by its failure to do so since June 2016.

C. The 100 Employee Provision Does Not Bar Application of the Act Where a Vending Facility is Established in Buildings with Fewer than 100 Employees

TAFB's interpretation of the regulation at 34 C.F.R. § 395.31(d) is simply incorrect. TAFB claims that the Act's priority only applies to

buildings with 100 or more civilian Federal employees. Yet, at the hearing of this matter, the SLA's expert witness, testified he is familiar with 34 C.F.R. 395.31 and that that the word "civilian" does not precede the word employees anywhere in that section. Transcript at 96. The Panel finds that, by the plain terms of the regulation at 34 C.F.R. § 395.31(d) that the application of that section is not limited to Federal "civilian" employees.

34 C.F.R. § 395.31 contains a comprehensive scheme to assist SLAs and Federal property managers to implement the Act. Briefly summarized, section (a) provides a Federal agency cannot occupy a building unless it first determines that the building includes a satisfactory site for the operation of a vending facility by a blind person; section (b) provides that a Federal agency cannot construct or renovate a building unless it first determines that the building includes a satisfactory site for the operation of a vending facility by a blind person; section (c) provides that the satisfactory site provision decision is made between the SLA and the Federal agency planning to acquire or occupy the building, and that the SLA must be given written notice, by certified mail, of the agency's intention to acquire, or otherwise, occupy a property. However, if there are fewer than 100 Federal government employees, then the Federal agency can occupy, construct, or renovate a building without providing for a satisfactory site. This does not mean that where the agency has already determined that a vending facility is

feasible and established such a facility (the case here), that it can evade the priority by having fewer than 100 Federal government employees in a building, civilian or not.

TAFB claims that its interpretation of the regulation – that the Act only applies when there are more than 100 Federal civilian employees in a building -- is entitled to deference, claiming that its interpretation of the regulation is that of the United States Department of Education. The Panel rejects this argument, as illogical and contrary to the interpretation of the regulation set forth by the Department of Education in its April 2016 letter, quoted below. It beyond a shadow of a doubt that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). Accordingly, the Panel rules that TAFB's view of the regulation at 34 C.F.R. § 305.31(d) is illogical, and is contradicted by the April 2016 letter of the United States Department of Education, Office of Special Education and Rehabilitative Services, which explains the application of the regulation regarding 100 Federal employees:

The satisfactory site provision in section 395.31 of the regulations ... does not control when the priority applies but rather under what conditions a Federal agency must provide a satisfactory site for a vending facility. ... If a Federal property does not meet the minimum

requirements in section 395.31, the property manager is under no obligation to meet the satisfactory site requirements. ... Thus, in answer to your concern that the VA maintains that it can "do what it wants" just because there are fewer than 100 employees or 15,000 square feet, there is no basis in the R-S Act for this position. Petitioner's Exhibit 33. It is this opinion that is entitled to Chevron deference. Accordingly, the SLA has established by substantial evidence that the Act's priority applies because TAFB cannot just "do what it wants" with respect to application of the priority, and TAFB violated the Act when it failed to take all necessary steps to ensure that the Act applies.

C. The Only Vending Machine Income at TAFB Which is Exempt From the Income-Sharing Provisions of the Act is the Income from Vending Machines Within the AAFES Retail Sales Outlet

The Act's priority is achieved and protected by its income-sharing provision. 20 U.S.C. §§ 107d-3, 107(b)(1).

The distribution of income from competing vending machines is intended to assure that blind vendors be given a preferential position in the competitive vending of articles and services on Federal property.

Comments on Final Randolph-Sheppard Regulations, 1977, at 1.

The income-sharing provisions of the Act do not "apply to income from vending machines within operated retail sales outlets under the control

of post exchange or ships' stores systems authorized under Title 10 of the United States Code" 34 C.F.R. § 395.32(i). This provision was construed in United States v. Mississippi Vocational Rehab. for the Blind, 794 F. Supp. 1344, 1348 (S.D. Miss.), judgment entered, 812 F. Supp. 85 (S.D. Miss. 1992). There, the dispute involved 45 vending machines in 20 buildings at NASA. The Exchange awarded a contract for the operation of the machines, with the concessionaire remitting a percentage of its income to the Exchange. Arbitration ensured, and the District Court confirmed the Panel's "decision that the defendant MVRB is entitled to priority for a permit for the operation of the vending machines by its blind licensees at NASA's Hancock County property in issue."

In analyzing the first phrase of 34 CFR § 395.32(i), "The provisions of this section shall not apply to income from vending machines within operated retail sales outlets under the control of post exchange or ships' stores systems authorized under Title 10 of the United States Code" the Mississippi District Court recognized that the 45 machines were not within retain sales outlets and that the priority should have been afforded to the SLA.

The regulation at 34 C.F.R. § 395.32(i) grants the Veterans Canteen Service a "blanket" exemption from the income sharing requirement: all income from vending machines operated by the VCS is exempt."

It is important to note that the exchange exemption, which applies to

AAFES, is much more narrowly defined: it applies to income from vending machines (1) within retail sale outlets, that are (2) under the control of the Exchange.
Congress knew how to draft the exact exemption that DOD wants, because it did so in the very next clause. Second, this exemption proves that Congress only wanted to provide this broad exemption (encompassing all machines, regardless of location) to the veterans canteen service.

Texas State Commn. for the Blind v. U.S., 796 F.2d 400, 420 (Fed. Cir. 1986) (Smith, J.,

dissenting). Judge Smith accurately stated that “

[t]he majority, at the urging of DOD, has rewritten the statute by deleting the words ‘within retail sales outlets’ from Congress’ own language. The statutory exemption, as rewritten by the majority, now reads: ‘income from vending machines under the control of exchange or ships’ stores systems.’ Only after rewriting the statute is it possible to conclude that the exemption covers all vending machines operated by the military exchanges, without regard to the machines.

In the opinion of the Panel, Texas State Commn. for the Blind v. U.S.

was wrongly decided. Moreover, the decision is not binding on this Panel. Akanthos Capital Mgt., LLC v. CompuCredit Holdings Corp., 2 F.Supp. 3d 1306, 1313 (N.D. Ga. 2014).

Furthermore, the Texas case was decided in 1968, in the Federal Circuit, as it was an appeal from the Court of Claims. In 2004, here is what the Court of Claims said about Texas "given the strong rationale in favor of exhaustion stated above, and a number of deficiencies in the approach taken in *Texas State Commission* noted below, this court declines to follow that case as authority." Kentucky v. United States, 62 Fed. Cl. 445, 459 (2004), aff'd sub nom. Kentucky, Educ. Cabinet, Dep't for the Blind v. United States, 424 F.3d 1222 (Fed. Cir. 2005).

In 2006, the Court of Claims went further and made it absolutely clear that it is not the venue for review of R-S Act arbitration decisions: "*Texas State Commission* did not address the question presented here: whether state licensing agencies can obtain judicial review of an arbitration panel decision in the CFC. The Court concludes that they cannot." Colorado Dep't of Human Servs. v. United States, 74 Fed. Cl. 339, 347 (2006).

Accordingly, the Texas majority decision must be ignored by this Panel. Moreover, the Texas majority decision relies on a quote from a legislative floor debate and letter from individual congressmen as "legislative history." The Air Force would have the Panel rule on that basis. As the dissent states in Texas, the Supreme Court simply does not allow such tactics:

It is impossible to discover the "intention of Congress" from remarks made by individual legislators on the congressional floor. The safest guide to congressional intent is found in the words employed by Congress in the statute.

Texas State Comm'n for the Blind v. United States, 796 F.2d 400, 424–25 (Fed. Cir. 1986)

AAFES makes much of Mr. Meloy's testimony with respect to income-sharing. The Panel agrees with the SLA that statements by Mr. Meloy, a non-lawyer, regarding his understanding of the complex legal issue of income sharing, has no bearing on the plain language of the law. In any event, the Act does not place specific responsibility on the SLA to collect vending machine income from vending machines at TAFB; that is the responsibility of TAFB's on-site official.

The Act provides vests responsibility in the on-site official to collect, account for and ensure compliance with the vending machine income-sharing provisions of the Act. 34 C.F.R. § 395.32(a). The regulation at 34 C.F.R. § 395.32(g) plainly states that "[t]he collection of vending machine income and its disbursement to the appropriate State licensing agency shall be conducted on at least a quarterly basis." TAFB has failed to do so, and thus violated the Act.

REMEDY

Citing to Maryland State Dep't of Educ. v. U.S. Dep't of Veterans Affairs, 98 F.3d 165, 169 (4th Cir. 1996) TAFB claims that this panel's sole authority is to make a determination as to whether TAFB's acts are in violation of the Act. The Maryland Court acknowledged that a federal entity could "simply refuse" to remedy the violations. This

comes close to a wrong without a remedy, something usually disdained by the courts. Oddly, the Maryland Court found that the SLA could file another arbitration complaint. The Panel concludes that this could result in an endless loop of arbitrations and thus does not constitute a viable remedy.

The Panel agrees with the more current case of Kentucky by & through Educ. & Workforce Dev. Cabinet Office for Blind v. United States by & through Mattis, No. 5:12-CV-00132-TBR, 2017 WL 1091793, at *1 (W.D. Ky. Mar. 22, 2017), which granted injunctive relief to a SLA to enforce the Act. In that District Court case, the Court had previously ruled the Department of Defense (DoD) was required to afford the blind vendor priority and enjoined DoD to renegotiate with the SLA. The injunction was stayed and the 2017 case lifted the stay, allowing the decision of the arbitration panel to be enforced. Accordingly, the Panel rejects the conclusion of Maryland limiting its authority to solely determining whether or not the Act was violated.

Accordingly, with these constraints in mind, the Panel finds:

a. TAFB violated the Act by failing to apply the priority and by failing to enter into the permit proffered by the SLA on June 29, 2016, and the Panel directs TAFB to enter into the Permit within 30 days from the date of this decision.
b. TAFB violated the Act by failing to maximize opportunities for blind vendors;
c. TAFB violated the Act by failing to remit vending machine income to the SLA as required by the Act, and the Panel directs TAFB to remit such vending machine quarterly as required by the Act, beginning with the end of the quarter starting within 30 days of the date of this decision.

Dated January 30, 2018.

Patricia Plant, Chair

Susan Rockwood Gashel, concurring

Steven Fuscher, dissenting

IN THE MATTER OF AN ARBITRATION
BEFORE THE UNITED STATES DEPARTMENT OF EDUCATION,
REHABILITATION SERVICES ADMINISTRATION
RANDOLPH-SHEPPARD ACT ARBITRATION

CASE NO. R-S/16-04

FLORIDA DEPARTMENT OF EDUCATION,
DIVISION OF BLIND SERVICES
Complainant

and

UNITED STATES AIR FORCE,
TYNDALL AIR FORCE BASE
Respondent

Appearances:

For the Complainant: Brent McNeal
Florida Department of Education

For the Respondent: Kevin G. Normile, Maj, USAF
Miles C. McCoy, Capt, USAF
Department of the Air Force

DISSENTING OPINION

The Panel conducted an arbitration hearing pursuant to 20 USC 107d-1(b) and CFR 395.37. A hearing was held in the above matter on October 17 and 18, 2017 at Tyndall Air Force Base, Florida ("TAFB") in Florida. The parties were given the full opportunity to present testimony

and evidence. The Panel has considered the testimony, exhibits and arguments in reaching its decision and a majority of the panel decided in favor of the Florida Department of Education, Division of Blind Service (SLA) on both issues before the panel. I do not concur in the majority decision for the reasons stated below.

CONCURRING IN DEFINTION OF ISSUES

I concur with the majority that the issues before the panel are: Issue I: Did TAFB Violate the R-SA and its implementing regulations by failing to afford the State Licensing Agency (SLA) and Florida's Licensed Blind Vendors the priority granted by the Act in 20 U.S.C. §107? Issue 2: Did TAFB violate the Act and its implementing regulations by failing to provide the SLA with vending machine income pursuant to 34 C.F.R. §395.32?

NON-CONCURING IN RELIEF REQUESTED BY SLA

The SLA requests that the arbitration panel render a decision finding that TAFB is violating the Act and its implementing regulations by failing to afford the SLA and Florida's licensed blind vendors the priority granted by the Act, and by failing to provide the SLA with vending machine income as required by the Act, and directing TAFB to 1) grant the permit submitted by the SLA and 2) share income from all vending machines on the base that are *not* within Army and Air Force Exchange (AAFES) operated retail sales outlets.
However, the Secretary has no authority to enforce the order of the panel, direct TAFB to grant a permit to the SLA, or order the TAFB to pay the SLA for shared income on vending machines owned by AAFES. The decision of the panel is advisory to the Secretary of the Department of Education (DOE) and enforcement must be through the appropriate court with jurisdiction over this matter or voluntarily through the Air Force. The 11th Circuit Court of Appeals in *Georgia Dep't of Human Resources v. Nash*, et al., 915 F.2d 1482 (11th Cir. 1990) found that an arbitration panel convened under the authority of the RSA "has no remedial powers whatsoever," concluding that "[i]t may determine that certain of the federal entity's acts violate the RSA, but the RSA leaves responsibility for remedying the violation to the federal entity itself." *Georgia Dep't of Human Resources v. Nash, et al.*, 915 F.2d 1482, 1492 (11th Cir. 1990). In a subsequent court review of an RSA arbitration decision, the *Georgia Dep't of Human Resources* case was cited with approval in *Commonwealth of Kentucky v. United States*, 122914 KYWDC, 5:12-CV-00132-TBR, where Judge Russell noted that "the Eleventh Circuit has concluded that

an arbitration panel considering such a conflict may determine whether or not the federal entity has complied with the RSA but may not order a specific remedy." Judge Russell agreed that "although the arbitration panel's decision constitutes the [DOE]'s final agency action, the Secretary of Education has no authority to order another federal entity to act one way or another." *Commonwealth of Kentucky v. United States*, 122914 KYWDC, 5:12-CV-00132-TBR. Finally, in *Maryland State Dep't of Education v. U.S. Dep't of Veterans Affairs*, 98 F.3d 165 (4th Cir. 1996), the Fourth Circuit Court of Appeals agreed that a Section 107d-1(b) arbitration panel lacks authority to award a specific remedy for a violation of the RSA. That Court acknowledged that a federal entity could "simply refuse" to remedy the violations found by an arbitration panel, which comes close to a wrong without a remedy, something usually disdained by the courts. Therefore, while the majority may identify acts of the Air Force that are in violation of the RSA, it has no authority to order remedies for such violations. That responsibility lies with the head of the agency.

This limitation on the authority of the Secretary is important to the overall interpretation of the interaction of the RSA and the Air Force.

FINDINGS OF FACT

I concur with the following findings of fact by the panel. They are included here in order to avoid creating confusion during the analysis of the issues. Additional facts will be provided during the analysis of each issue.

The Complainant is the state-licensing agency for the State of Florida under the RSA.[2]

The purpose of the Act is to provide blind persons with remunerative employment, enlarge the economic opportunities of the blind, and stimulate the blind to greater efforts in striving to make themselves self-supporting.[3]

Blind vendors licensed by the Complainant operate vending facilities throughout the state, including facilities at the Naval Air Stations in Pensacola and Jacksonville; at the Army Southern Command; at multiple Army Reserve locations; and at the United States Marine Corps Blount

[2] *See* 20 U.S.C. § 107b. See also Complaint Letter Dated March 15, 2017 to Betsy DeVos, Secretary, DoE.

[3] 20 U.S.C. § 107.

Island Command.[4]

TAFB is located in Bay County, Florida.[5]

The population at TAFB totals over 20,000 people, including 3,672 active duty; 4,551 family members; 2,799 civilians; and 9,257 retirees.[6]

The Army and Air Force Exchange Service ("AAFES") is a joint nonappropriated fund instrumentality and is the primary resale activity on Army and Air Force installations for non-food merchandise and patron services. [7]

There are a number of snack and drink vending machines (hereafter "vending machines") operating on TAFB, all of which are operated by AAFES through third party commercial vending contractors.[8]

The profits from vending machines made by AAFES go into an account for military Morale, Welfare, and Recreation ("MWR") benefits based upon a formula used by AAFES, and come in the form of a payment described as a dividend or "check" that is "receive[d] on a monthly basis." [9]

The installation is commanded by the officer appointed as the Commander of the 325th Fighter Wing, and the person in that position also functions as the "on-site official" for the Randolph-Sheppard Act.[10]

On or about 14 August 2015, the SLA sent the Air Force a settlement agreement to settle a separate dispute involving the R-SA as it applied to cafeteria services at TAFB.[11]

The Mission Support Group Commander, Colonel Ronald L. Pieri, USAF, signed on behalf of the Air Force on 27 August 2015.[12]

Mr. Donald O. Meloy is the Marketing Site Manager for the Bureau of Business Enterprise, Division of Blind Services in Florida.[13]

Over the summer of 2016, Mr. Jones facilitated requests for information from the SLA and provided the SLA with a site visit at TAFB. During the site visit, Mr. Jones escorted the representatives of the SLA to all of the buildings that they wished to see, with the exception of two secure facilities.[14]

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[4] Transcript at 106-107.

[5] Joint Exhibit 6-13 at 1.

[6] Id.

[7] Joint Exhibit 6-30 at 9, 21, 27

[8] Transcript, Testimony of Randall S. Jones at 162-163, Joint Exhibit 6-N, Joint Stipulation of Facts at 2

[9] Transcript, Testimony of Randall S. Jones at 181-182.

[10] Joint Exhibit 6-B, Statement of Randall S. Jones at 1, Joint Exhibit 6-N Joint Stipulation of Facts at 1.

[11] Joint Exhibit 6-3, Request for Arbitration.

[12] *Id.* at 3.

[13] Transcript, Testimony of Donald Meloy at 104.

[14] Transcript, Testimony of Donald Meloy at 140.

Following the site visit, the SLA sent a new offer, proposing that 34 vending machines be placed at TAFB. Mr. Jones countered the SLA's proposal with an e-mail offering the SLA to place vending machines in two buildings. At the arbitration hearing, Mr. Donald Meloy admitted that he did not have any communications with the Air Force to attempt to resolve any income sharing questions informally. [15] The SLA did not provide a counter proposal and amended their Randolph-Sheppard Act complaint on 15 March 2017.[16]

ANALYSIS OF ISSUE 1

Issue I: Did TAFB Violate the R-SA and its implementing regulations by failing to afford the SLA and Florida's Licensed Blind Vendors the priority granted by the Act in 20 U.S.C. §107? The majority opinion would apply the RSA priority to all locations on TAFB where the SLA determines is a suitable site for the placement of vending machines regardless of the size of the facility or the number of federal government employees working in the facility. I do not concur in this expansive interpretation of the RSA. I take the more narrow reading of the RSA that limits the priority to federal facilities occupied by 100 or more federal government employees. I also concur that TAFB "may" permit the placement of vending machines in locations with less than 100 or more federal employees. Therefore, the following analysis addresses whether or not, in my opinion, TAFB "must" grant the RSA priority to the placement of vending machines to any site the SLA determines to be a suitable site.

Whether or not the priority is limited to federal facilities occupied by 100 or more federal government employees is significant since only a limited number of facilities on TAFB satisfy this requirement. Both parties agree that the federal government "may" grant a permit to an authorized State Licensing Agency (SLA) to place vending machines in facilities with less than 100 federal employees; however, it is the panel's position that TAFB "must" grant a priority to the SLA for the placement and operation of vending machines under the R-SA in federal facilities with less than 100 federal employees.

The regulations promulgated by the Secretary of Education that implement the RSA can be found in Title 34, Subtitle B, Chapter III, Part 395, Subpart C, of the Code of Federal

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[15] See Joint Exhibit 6-6.

[15] Transcript, Testimony of Donald Meloy at 140.

[16] March 15, 2017 letter to Betsy DeVos, Secretary, U.S. Department of Education

Regulations. *34 C.F.R § 395.31(d)* states the requirement to provide satisfactory sites for the operation of vending facilities shall "not apply when fewer than 100 Federal Government employees are or will be located during normal working hours. This language is the regulatory basis for the priority.

The Randolph-Sheppard Act is found at *20 U.S.C. § 107, et seq.*, and had its most recent substantive revision in 1974. In relevant part, the RSA states: "wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States."[17] The statute goes on to state that the Secretary of Education shall "*establish requirements for the uniform application of this Act*…including…*policies on the selection and establishing* new vending machines."[18]

34 C.F.R. § 395.31(e) goes on to allow for "arrangements under which vending facilities to be operated by blind vendors may be established in buildings of a size or with an employee population less than that specified in paragraph (d) of this section: Provided, that both the State licensing agency and the federal property managing department or instrumentality concurs in such establishment." Therefore, both the SLA and the Air Force agree that the parties "may" agree to the establishment of vending machines in facilities with less than 100 federal employees.

The SLA is asking the panel to ignore the plain wording of this section. This is difficult since the RSA regulations provide for "permission" to establish vending machine facilities when both parties agree to cooperate and place vending machines in a facility with less than 100 employees, they do not require it.

NISH v. Cohen, 247 F.3d 197, 202 (4th Cir. 2001) addressed whether the Department of Education's regulations promulgated under the RSA were entitled to deference. The court opined that when "an agency, such as DOE [Department of Education], is charged with implementation of a statute, its policy decisions are entitled to deference."[19] Both parties agree that the RSA empowered the Department of Education to promulgate regulations to implement the R-SA. *See 20 U.S.C. § 107a(a)(1).*

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[17] 20 U.S.C. § 107a(a)(1).

[18] *Id*. (emphasis added).

[19] Id.

Since *34 C.F.R. § 395.31* specifically exempts buildings with fewer than 100 Federal Government employees from being subject to the SLA's priority for placement of vending machines, the department's implementing regulations must be given deference. If the parties agree to the placement of vending machines in facilities with less than 100 employees, the parties "may" cooperate in the placement of those machines, but the government is not obligated to place the machines in those facilities.

There is public policy support for this interpretation on Department of Defense facilities since income from AAFES vending machines supports the MWR program that provides for quality of life programs for service members and their families. The parties agree that the placement of SLA vending machines in federal facilities with less than 100 employees will reduce the income to AAFES from AAFES vending machines in those facilities. This arbitration boils down to which public policy has priority. Either the RSA takes the income from its vending machines to support the SLA and its programs, or AAFES takes the income from its vending machines to support MWR programs.

In *Texas State Commission for the Blind*[20],the Federal Circuit's majority decision addressed the public policy issue stating:

"The [civilian MWR] funds of such employee groups were attractive targets for diversion. No similar motive existed for reaching the earnings of military exchanges. Diversion of that income to state agencies for the blind would make no economic sense. It would simply be robbing Peter to pay Paul, and then appropriating money for Peter to make up for the transfer."[21]

The dissent argued that the RSA "does not allow the exchange to nullify the priority for blind vendors by placing competing vending machines over the entire base."[22] The SLA cites a number of arbitration decisions and non-DoD AAFES related cases to request the panel ignore the majority decision in the *Texas State Commission for the Blind* case and adopt the dissent. While the panel may find the dissent compelling, the majority decision is still the majority decision on this question of the law.[23]

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[20] Texas State Commission for the Blind v. U.S., 796 F.2d 400, 420 (Fed. Cir. 1986)

[21] *Id.* at 8.

[22] *Id.* at 423.

[23] Joint Exhibit 6-K, Texas State Com. for the Blind v. United States 769. F2d., 400, supra.

The legislative and regulatory history of the RSA supports the majority decision in the *Texas State Commission for the Blind Case*. When the Department of Education promulgated the current version of *34 C.F.R. § 395.31*, it published a number of comments in the Federal Register.[24] These comments addressed a number of issues including the definition of a "satisfactory site."

"Each Federal department, agency or instrumentality planning to acquire or otherwise occupy a building was required to ensure that the building included a satisfactory site or sites. A building was not required to contain a satisfactory site if there was expected to be fewer than 100 Federal employees during normal working hours or if the building was to have less than 15,000 square feed of interior space in the case of building used to provide services to the public."[25]

The SLA argues that this limitation on the placement of vending machines is restricted to new construction or the remodeling of existing facilities. The above comment challenges that interpretation of the regulation.

The comments continue stating that the definition of "satisfactory site" limited the role of the Secretary of the DoE stating:

> It is noted, in addition, that the definition of "satisfactory site" limits the role of the Secretary in the determination of satisfactory sites to the promulgation of an overall regulatory standard. It is not intended that the Secretary will actively participate in negotiations between State licensing agencies and Federal departments and agencies concerning the location of individual vending machines . . . §1369.31 has been extensively revised to clarify all role relationships and responsibilities affecting the selection of a location for a vending facility on Federal property to be acquired or otherwise occupied after January 2, 1975.[26]

While the comments clearly state that the implementation of the satisfactory site definition was limited to Federal property to be acquired or otherwise occupied after January 2, 1975, the comments state this clarification was intended to avoid changing current business arrangements between the SLA and

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[24] See Joint Exhibit 6-H. Federal Register, Vol 42, No. 56, Wednesday, March 23, 1977, at page 15802-15810.

[25] *Id.* at 15808.

[26] *Id.* at 15809.

Federal property manages, not to expand the RSA priority to require federal agencies to place vending machines in any location deemed satisfactory by the SLA. The comments state:

> "A few comments from the State licensing agencies and representatives of blind vendors requested that these limitations be eliminated and suggested that site locations be negotiated for each Federal property on an individual basis.
> The regulation has been revised to clarify that existing vending facilities on any Federal property are not affected by this requirement and that if there is concurrence on the part of both the Federal property managing department or agency and the State licensing Agency, a vending facility may be located on any Federal property which does not meet either the established building size or Federal employee patronage standards. The Building size and Federal employee patronage standards themselves have been retained, however, because such standards are necessary to prevent incurring Federal administrative expenses estimated to total approximately $6 million annually. . . . Since these minimum standards could eliminate from consideration for the location of a vending facility only those buildings in which the operation of a vending facility would not be feasible, their establishment is not expected to reduce opportunities for the blind to operate vending facilities on Federal property. Furthermore, as has been indicated, when the Federal property managing agency or department and the State licensing agency agree to the location of a vending facility in a building which does not meet the minimum standards…such location would of course be possible."[27]

The last sentence of the comment is instructive since it states that the placement of vending machines "may" be placed in locations that do not meet the satisfactory site definition, the comments do not suggest that the federal agency "must" place vending machines in locations that do not meet this definition.

The DOE's interpretation of its own RSA regulations is compelling. The Secretary's comments are consistent with an interpretation of the RSA regulations that limit the application of the R-SA priority to facilities with 100 or more federal employees or if the building has more than 15,000 square feet of interior space in the case of buildings used to provide services to the public. The Secretary's comments also support the majority decision in *Texas State Commission for the Blind.*

Therefore, it is my opinion that the SLA only has an actionable priority in buildings with 100 or more Federal Government employees on a day-to-day basis or buildings with more than 15,000 square feet of interior space in the case of buildings used to provide services to the public.

ANALYSIS OF ISSUE II

[27] *Id.* at 15809.

Issue II: Did Tyndall AFB (TAFB) violate the Act and its implementing regulations by failing to provide the SLA with vending machine income pursuant to 34 C.F.R. §395.32?

34 C.F.R.§395.32 addresses the collection and distribution of vending machine income from vending machines on Federal property. The responsibility for the collection and distribution of vending machine income rests with "the on-site official responsible for the Federal property."[28] Under the regulation, the SLA is entitled to 100% of the income from vending machines that are in direct competition with a vending facility operated by a blind vendor. [29] This income collection provision does not apply to "income from vending machines within operated retail sales outlets under the control of Post Exchange or ships' stores systems authorized under 10 U.S.C." [30]

The Air Force signed a settlement agreement on August 27, 2015 to acknowledge the SLA's priority to provide vending machine services and the vending machine income sharing provisions of the RSA.[31] In exchange for the SLA's agreement to withdraw its request for arbitration in Case No. R-S/13-05 with prejudice, the Air Force agreed to acknowledge the Division's priority to provide vending machine services on federal property and the income sharing provisions of the RSA.[32] The Air Force also agreed "to consult with the Division in good faith regarding satisfactory sites for vending machines to be

[28] 34 C.F.R.§395.32(a) The on-site official responsible for the Federal property of each property managing department, agency, or instrumentality of the United States, in accordance with established procedures of such department, agency, or instrumentality, shall be responsible for the collection of, and accounting for, vending machine income from vending machines on Federal property under his control and shall otherwise ensure compliance with the provisions of this section.

[29] 34 C.F.R.§395.32(b) Effective January 2, 1975, 100 per centum of all vending machine income from vending machines on Federal property which are in direct competition with a vending facility operated by a blind vendor shall accrue to the State licensing agency which shall that the total amount of such income accruing to such blind vendor does not exceed the maximum amount determined under §395.8(a). In the event that there is income from such vending machines in excess of the maximum amount which may be disbursed to the blind vendor under §395.8(a), such additional income shall accrue to the State licensing agency for purposes determined in accordance with §395.8(c).

[30] 34 C.F.R.§395.32 (i) The provisions of this section shall not apply to income from vending machines within operated retail sales outlets under the control of post exchange or ships' stores systems authorized under title 10 U.S.C.; to income from vending machines operated by the Veterans Canteen Service; or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually.

[31] State Exhibit P-2. Settlement Agreement between Florida Department of Education, Division of Blind Services and the United States Department of Defense, Department of the Air Force, Tyndall AFB, dated 27 August 2015.

32 Id.

operated by blind persons."[33]

Paragraph 4 of the settlement agreement states: "A satisfactory site requirement does NOT apply 1) When fewer than 100 federal employees are located in the building during normal working hours; or 2) When the building has fewer than 15,000 square feet of interior space to be used for Federal purposes and the Federal Government space is used to provide services to the general public."[34] The Air Force also agreed that it will provide notice of a satisfactory site or sites as required by "20 U.S.C. §107a, 34 C.F.R §395.1 et seq., DoD Instruction 1125.03, December 22, 2009 and Air Force Instruction 34-206, August 2012."[35] This notice requirement applied when the Air Force "plans for occupation, acquisition, renovation, or relocation of a building at Tyndall Air Force Base."[36]

On June 29, 2016, Mr. Donald Meloy[37] provided Mr. Randall S. Jones[38] with a list of proposed sites where Mr. Meloy acknowledged that a number of the proposed vending sites were served by AAFES through a contract vendor. In his proposal, Mr. Meloy stated: "It is our opinion that we would be able to provide (A) an exclusive vending machine service at these locations, which is our preference, or (B) coexist at the location by adding our vending machines to the existing service. We are certainly open to discussion regarding a preference of (A) and (B) conditions."[39] September 27, 2017, Mr. Jones responded with a proposal to permit the SLA to place vending machines in two buildings on Tyndall AFB.[40] He expressed the Air Force position that "we don't feel it is necessary to place vending machines in all of those locations to include placing

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[33] Id.

[34] *Id*. at Paragraph 4.

[35] *Id.*

[36] Id. at Paragraph 4.

[37] Mr. Donald Meloy was Marketing Manager for the Bureau of Business Enterprise, FLDOE/Division of Blind Services.

[38] Mr. Randall S. Jones was Deputy, 325th Force Support Squadron, Tyndall AFB.

[39] *State Exhibit P-5.* Email from Mr. Donald Meloy to Randall Jones dated June 29, 2016.

[40] *State Exhibit P-6,* Email from Mr. Randall Jones to Mr. Donald Meloy dated September 26, 2016.

machines next to existing AAFES vending machines."[41]

The priority for the placement of vending machines is addressed in the analysis of Issue 1 above and will not be addressed in the analysis of Issue II. The following analysis specifically addresses whether or not the Air Force is required to pay the SLA the income from its current vending machines based on the 34 C.F.R. §395.32 when that income is from vending machines operated within retail sales outlets under the control of post exchange or ships' stores systems authorized under 10 U.S.C. The parties agree that 34 C.F.R.§395.32 (i) specifically excludes income from these vending machines.[42] The parties also agree that AAFES is a joint nonappropriated fund instrumentality and is the primary resale activity on Army and Air Force installations for non-food merchandise and patron services. [43]

AAFES is authorized to operate the following revenue-generating activities on military installations, to include: Retail stores; Mail-order, catalog, and e-commerce services; Automobile services, including garages, fuel sales, car washes, and service stations; Restaurants, cafeterias, and snack bars, and name-brand fast food outlets, including nationally and regionally recognized franchises and exchange signature brands. Packaged beverage stores; Barber and beauty services, including nail salons, day spas; Flower shops; Laundry, dry cleaning; and pressing plants and services; Alteration and tailor services; Product repair services, such as watch, shoe, radio, television, computer and electronic repair; Photographic studios; Vending machines; Personal services; Newsstands; Unofficial telecommunication services (including, but not limited to, pay telephone stations and telephone calling centers); Military clothing sales operations; Exchange credit programs; Tax preparation services; Exchange marts; Motion picture theaters; Rental of merchandise; The Secretary of the Army and the Secretary of the Air Force may prescribe in their regulations a selection of food and beverages, including malt beverages, wines, and other alcoholic beverages. Food items will supplement the primary full-line grocery service provided by the commissary system. [44] This list of activities demonstrates the important services provided by AAFES in support of Air Force Morale, Welfare, and Recreation ("MWR") Programs.

At TAFB, AAFES operates the base exchange, which includes a food court, along with many of

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[41] Id.

[42] See fn 3.

[43] *Joint Exhibit 6-30 at 9, 21, 27*

[44] *Joint Exhibit 6-30 at 69-70.*

the services listed above, including shoppettes, gas stations, food trucks, barber shops, and clothing stores.[45] In addition, there are a number of snack and drink vending machines (hereafter "vending machines") operating on TAFB, all of which are operated by AAFES through third party commercial vending contractors.[46]

The services provided by AAFES through the above facilities highlight the extent of AAFES services at TAFB. It is not necessary to address whether or not these facilities are all retail sales outlets under the control of post exchange or ships' stores systems authorized under 10 U.S.C. because of the majority decision in *Texas State Com. For Blind v. United States*. As discussed in the Issue I analysis, the SLA is asking the panel to ignore the majority decision in *Texas State Com. For Blind v. United States*, 796 F.2d 400, (Fed. Cir. 1986) where the majority of the court determined the DoD's interpretation of the RSA that income from vending machines operated by or for the military exchange or ship's stores systems are exempt from the income provisions of 34 C.F.R.§395.32 (i).[47] The analysis of the court to support this interpretation of the DoD instruction is:

The task before us of interpreting the statutory language of the military exchanges exemption is succinctly summarized in *United States v. Turkette*, 452 U.S. 576,
580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981) :

In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Products Safety Comm'n v. GTE Sylvania, Inc*., 447 U.S. 102, 108 [100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980) .

Of course, there is no errorless test for identifying or recognizing "plain" or "unambiguous" language. Also, authoritative administrative constructions should be given the deference to

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[45] Transcript at 165-168.

[46] Transcript, Testimony of Randall S. Jones at 162-163, Joint Exhibit 6-N, Joint Stipulation of Facts at 2

[47] A DOD regulation, 32 C.F.R. § 260.3(i)(3)(i) (1985), interprets this exemption to exclude: Income from vending machines operated by or for the military exchange or ships' stores systems.

which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 [98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978) ; *Commissioner v. Brown*, 380 U.S. 563, 571 [85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965) .

In this case, the statement of the difficulty in identifying "plain" or "unambiguous language" is particularly apropos. Whether or not words of a statute are clear is itself not always clear. Even if the "common" understanding of "within retail sales outlets" were physically within the walls of a store, as the Claims Court held, that does not make the subject phrase "plain" or "unambiguous." The determination of what usage of particular words is common must be rejected as an "errorless test."

Moreover, even where a statute is clear on a purely linguistic level, interpretation may be necessary if that interpretation does not do justice to the realities of the situation. As stated by the Supreme Court in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892), it is a "familiar rule that a thing may be within the letter of the statute, but not within its spirit nor within the intention of its makers." See also *United States v. Riverside Bayview Homes, Inc.*, ——U.S. ——, 106 S.Ct. 455, 461, 88 L.Ed.2d 419 (1985) (argument that it is "unreasonable to classify 'lands,' wet or otherwise, as 'waters' " is "simplistic.")

Finally, the question in this case is not what interpretation this court would give to the statute were it the executive branch. The issue to be decided by this court is whether the statute is capable of more than one interpretation and whether the agency's interpretation is reasonable.

With these premises in mind, we turn to the statutory analysis.[48]

The court analyzed the intent of the Statute as well as the specific wording of the Statute. The court stated:

In any event, the statutory purpose to be considered here is not simply the purpose of the

[48] Id. at 5.

legislation, but the purpose of the exemption. That *exemption* was designed to keep the financial support of essential services by the exchanges intact so that Congress need not appropriate additional funds. *Congress expected* the exchange income to continue to supplement *essential* programs approved by Congress. Senator Randolph, the blind groups, Mr. Brademas, Mr. Sikes, and both chambers of Congress all agreed on this purpose.[49]

The court determined there was sufficient ambiguity to support the reasonableness of DoD's interpretation of the statute, stating:

Given the congressional purpose of the exemption, the question becomes whether the language can reasonably be interpreted, as in DOD's regulation, to effectuate that purpose. We conclude that the statutory language has sufficient ambiguity to make DOD's interpretation reasonable.[50]

The majority of the court found that "all" vending machine income generated by AAFES was exempt from 34 C.F.R.§395.32 (i).[51]

We do not have an instance here where the words of an exemption were selected after debate over its scope. Indeed, in light of the legislative history, had no exemption been specifically granted, an interpretation by regulation to exclude the military exchanges from the definition of "vending machine income"—which HEW has concluded is proper for other agencies—would appear appropriate. The language selected to insure that the military exchanges were unquestionably exempt "represents an instance of in artful drafting rather than the intentional drawing of a subtle distinction." *Exxon Corp. v. Hunt*, 475 U.S. 355, 106 S.Ct. 1103, 1113, 89 L.Ed.2d 364 (1986).[52]

The court recognized that income generated by AAFES supports an important purpose since the

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[49] Id. at 11.

[50] The Court cited: S.REP. NO. 937, 93d Cong., 2d Sess. 10, 14–15 (1974).

[51] A DOD regulation, 32 C.F.R. § 260.3(i)(3)(i) (1985), interprets this exemption to exclude: Income from vending machines operated by or for the military exchange or ships' stores systems.

[52] Id.at 12.

income from vending machines directly supports MWR programs. The court analyzed the legislative history that specifically addressed the possible diversion of income for AAFES, stating:

> All legislative history expressly addressing the possible diversion of income from the exchanges indicates that income was to be exempt. The records contain not even a suggestion of cutting funds for essential military services or making up the loss with additional appropriations. The exchanges simply were not to be affected, as the blind organizations themselves represented.[53]

The SLA asks the panel to ignore the decision of the court and adopt the dissent. However, it is my opinion that the majority arrived at the right answer based on the above rationale; therefore, it is my position that the income from AAFES vending machines is exempt from the collection and payment provisions of 34 C.F.R.§395.32 (i).

ADVERSE INTERESTS OF THE UNITED STATES

This is a difficult decision since there are compassionate concerns for both parties. The SLA has a specific charter to provide income opportunities for blind vendors. TAFB has a specific charter to generate income for services in support of military families through AAFES vending machines. The court in *Texas State Com. For Blind v. United States* ignored these compassionate concerns and attempted to find justice through a careful analysis of Congressional intent. Since the majority decision finds in favor of the SLA, TAFB has an opportunity to specifically address whether or not the placement of vending machines by the SLA in competing locations with AAFES vending machines is adverse to the interests of the United States. This allows the Secretary for the DOE to render an opinion on this issue.

20 U.S.C. § 107a(a)(1) states, "wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States."[54] In light of the panel decision, TAFB could take the position that the placement of vending machines provided by the SLA in competition with AAFES is adverse to the interests of the United States because of AAFES direct support of the Air Force's

[53] Id at 9.

[54] 20 U.S.C. § 107a(a)(1) of the RSA.

MWR program. The consequence of placing SLA vending machines in competition with AAFES vending machines is reduced revenue to support the MWR program. In order to replace this loss of funding to support the military families, Congress will need to appropriate additional funds or services will need to be cut. This is the basic rational of the *Texas State Com. For Blind v. United States* majority decision. In the court's opinion, while the language of the statute may have been in artful, there never was any intent to adversely impact DoD's MWR programs.

Steven R Fuscher Dated 30 Jan 2018
Arbitrator