Dated: June 12, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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DEPARTMENT OF EDUCATION

Arbitration Panel Decision Under the Randolph-Sheppard Act

AGENCY: Department of Education.

ACTION: Notice of arbitration panel decision under the Randolph-Sheppard Act.

SUMMARY: The Department gives notice that on August 2, 2002, an arbitration panel rendered a decision in the matter of *Alabama Department of Rehabilitation Services* v. *U. S. Department of Veterans Affairs, Veterans Canteen Service (Docket No. R–S/01–6).* This panel was convened by the U.S. Department of Education, under 20 U.S.C. 107d–1(b), after the Department received a complaint filed by the petitioner, the Alabama Department of Rehabilitation Services.

SUPPLEMENTARY INFORMATION: Under section 6(c) of the Randolph-Sheppard Act (the Act), 20 U.S.C. 107d–2(c), the Secretary publishes in the **Federal Register** a synopsis of each arbitration panel decision affecting the administration of vending facilities on Federal and other property.

Background

This dispute concerns the alleged denial by the U.S. Department of Veterans Affairs (DVA), Veterans Canteen Service (VCS), of a request by the Alabama Department of Rehabilitation Services, the State licensing agency (SLA), to establish Randolph-Sheppard vending facilities at DVA Medical Centers in Alabama, in violation of the Act (20 U.S.C. 107 *et seq.*) and the implementing regulations in 34 CFR part 395.

A summary of the facts is as follows: In 1998 the SLA filed an arbitration complaint with the U.S. Department of Education. The SLA's complaint alleged that DVA/VCS had failed to comply with the provisions of the Act and implementing regulations regarding permit applications submitted by the SLA for four Federal properties maintained and operated by DVA/VCS. A Federal arbitration panel was convened to hear this matter and rendered a decision on October 20, 2000.

The panel ruled that DVA/VCS had not complied with the Act and implementing regulations regarding the establishment of Randolph-Sheppard vending facilities on Federal property. At the instruction of the arbitration panel, the SLA submitted to DVA/VCS, during the arbitration proceedings, permit applications requesting the establishment of blind vending facilities in 33 separate buildings located in Alabama. However, at the time of the SLA's filing of this second arbitration complaint, the SLA had not received a response to these requests.

Later, the SLA alleges that it learned DVA/VCS had contracted with private companies to operate vending machines on DVA/VCS property in Alabama subsequent to January 1, 1975, which is in violation of the Act and implementing regulations. Further, the SLA also contends that it has never received any disbursement of vending machine income from the operation of these vending machines operated by DVA/VCS on Federal property in violation of the income-sharing provisions of the Act and implementing regulations.

As a result of this dispute, the SLA requested the Secretary of Education to convene a Federal arbitration panel to hear this complaint. A panel was convened, and a hearing on this matter was held on April 23, 2002.

Arbitration Panel Decision

The arbitration panel heard the following three issues: (1) Whether DVA/VCS had violated the Act and implementing regulations by failing to take action necessary to carry out the decision of the arbitration panel in *Alabama Department of Rehabilitation Services* v. *Department of Veterans Affairs, Veterans Canteen Service, Case No. R–S/98–7;* (2) whether DVA/VCS' failure to approve or disapprove the applications for permits submitted by the SLA in March 2000 to establish vending facilities on Federal property in Alabama was in violation of the Act and implementing regulations; and (3) whether the operation of vending machines by private companies and the receipt of vending machine income from those machines by DVA/VCS without sharing a percentage of the income with the SLA was in violation of the income-sharing provisions of the Act and implementing regulations.

After considering the evidence presented, the panel made the following decision and award: Concerning the first issue, the panel concurred with the first arbitration panel's findings and award in Case No. R–S/98–7 in which that panel ruled that DVA/VCS had violated the Act. Therefore, the panel ruled that DVA/VCS should take all proper corrective action necessary.

Regarding the second issue, the majority of the panel ruled that DVA/VCS had failed to properly respond to the applications for permits submitted by the SLA in March 2000. Accordingly, the panel directed DVA/VCS to review, investigate, and determine which permit applications submitted by the SLA should have been approved and then to issue those permits. Also, the panel ordered DVS/VCS to determine the amount of monies lost as the result of its failure to timely grant and issue those permits and to compensate the SLA with interest at the lawful rate.

Finally, as to the third issue, the majority of the panel concluded that testimony showed that DVA/VCS performed every activity involved in the vending of beverages, thus establishing that DVA/VCS, not a private vending company, operated the vending machines. Therefore, the panel ruled that profits made by DVA/VCS were exempt from the vending machine income-sharing provisions of the Act as alleged by the SLA.

One panel member dissented.

The views and opinions expressed by the panel do not necessarily represent the views and opinions of the U.S. Department of Education.

FOR FURTHER INFORMATION CONTACT: You may obtain a copy of the full text of the arbitration panel decision from Suzette E. Haynes, U.S. Department of Education, 400 Maryland Avenue, SW., room 3232, Mary E. Switzer Building, Washington, DC 20202–2738. Telephone: (202) 205–8536. If you use a telecommunications device for the deaf (TDD), you may call the TDD number at (202) 205–8298.

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Dated: June 13, 2003.

Robert H. Pasternack,

Assistant Secretary for Special Education and Rehabilitative Services.

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DEPARTMENT OF EDUCATION

Arbitration Panel Decision Under the Randolph-Sheppard Act

AGENCY: Department of Education.

ACTION: Notice of arbitration panel decision under the Randolph-Sheppard Act.

SUMMARY: The Department gives notice that on July 11, 2001, an arbitration panel rendered a decision in the matter of *David Ramsey, et al.* v. *New Hampshire Department of Education, Division of Vocational Rehabilitation, Bureau of Service for the Blind and Visually Impaired (Docket No. R–S/99–4).* This panel was convened by the U.S. Department of Education, under 20 U.S.C. 107d–1(a), after the Department received a complaint filed by the petitioner, David Ramsey, *et al.*

SUPPLEMENTARY INFORMATION: Under section 6(c) of the Randolph-Sheppard Act (the Act), 20 U.S.C. 107d–2(c), the Secretary publishes in the **Federal Register** a synopsis of each arbitration panel decision affecting the administration of vending facilities on Federal and other property.

Background

This dispute concerns a competitive bidding process for the operation of vending machines at the roadside rest areas located on the interstate highway system used by the State of New Hampshire. The State's use of this competitive bidding process allegedly prevented blind vendors from operating these vending machines in violation of the priority provisions of the Randolph-Sheppard Act (20 U.S.C. 107 *et seq.*) and the implementing regulations in 34 CFR part 395. The State was represented in this arbitration proceeding by the New Hampshire Department of Education, Division of Vocational Rehabilitation, Bureau of Services for the Blind and Visually Impaired, which is the State licensing agency (SLA).

A summary of the facts is as follows: In July 1985, the New Hampshire legislature enacted State legislation, RSA 230:30–a, which instituted a competitive bidding process for anyone seeking to install and maintain vending machines at rest area locations along New Hampshire's interstate highway system.

The complainants, David Ramsey, *et al.*, claimed that blind vendors had a ''right of first refusal'' before any other entity was approached to operate vending facilities at rest area locations on the interstate highway system. The complainants maintained that the right of first refusal resulted from the Transportation Equity Act of the 21st Century (TEA–21), in 23 U.S.C. 111(b), which authorizes placement of vending machines at rest areas located on the interstate highway system. This authority also provides that the State shall give priority to vending machines operated by the SLA under the Act. The complainants further alleged that the State law, RSA 230:30–a, which authorized the bidding process for the placement of vending machines on the interstate highway system, was preempted by the TEA–21, which is a Federal law.

The SLA denied that there was a preemption issue and alleged that a conflict did not exist between State and Federal law in this case. The SLA further alleged that the Federal arbitration panel did not have jurisdiction concerning the issues raised by complainants. The SLA also maintained that the State implemented the priority provision under the TEA–21 by giving priority to blind vendors and awarding a vending contract to the SLA if it submitted the high bid or if the SLA tied for the high bid.

Arbitration Panel Decision

A majority of the arbitration panel concluded that RSA 230:30–a resulted in the awarding of contracts to private vendors, thus preventing blind vendors from competing since they lacked comparable resources. According to the panel, although RSA 230:30–a is silent regarding the priority or preference to blind vendors in the installation and maintenance of vending machines at interstate rest areas, no real priority was given to blind vendors on the basis of breaking a tie bid in favor of blind vendors. Thus, the panel rejected the SLA's interpretation of the meaning of priority under the TEA–21.

Accordingly, the panel agreed with the complainants that the purpose and fair interpretation of priority within section 111(b) of the TEA–21 required that the complainants receive an opportunity to operate vending machines before any private vendor was even invited to bid. Otherwise, RSA 230:30–a rendered the TEA–21 meaningless.

The panel further determined that, contrary to the SLA's position, the panel did have the authority to rule on these issues. The panel stated that the grievance procedure in 20 U.S.C. 107d–1(a) does not contain any limitation on the authority of an arbitration panel in deciding disputes between blind vendors and SLAs.

Concerning the issue of preemption of State law, the panel ruled that this case was not one in which State law simply supplemented Federal law as argued by the SLA. The panel determined that RSA 230:30–a clearly interfered with section 111(b) of the TEA–21, because it frustrated the purpose of Congress, which was to provide blind people with realistic economic and employment opportunities.

Finally, the panel ruled that the complainants were entitled to damages in the amount of full commissions payable from the time the complaint was filed on October 28, 1998. The panel instructed that the State pay to the SLA the commissions to be used to benefit the blind vendors. Legal fees were not awarded to either party.

One panel member dissented.

The views and opinions expressed by the panel do not necessarily represent the views and opinions of the U.S. Department of Education.

FOR FURTHER INFORMATION CONTACT: You may obtain a copy of the full text of the arbitration panel decision from Suzette E. Haynes, U.S. Department of Education, 400 Maryland Avenue, SW., room 3232, Mary E. Switzer Building, Washington, DC 20202–2738. Telephone: (202) 205–8536. If you use a telecommunications device for the deaf (TDD), you may call the TDD number at (202) 205–8298.

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