

Background

This dispute concerns the alleged failure of the Ohio Rehabilitation Services Commission, Bureau of Services for the Visually Impaired, the designated State licensing agency (SLA), to properly administer the Randolph-Sheppard vending facility program regarding vending machine income-sharing by a Federal property managing agency 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: since February 1994, the complainant, Richard Bird, operated a snack bar and three rooms with vending machines at the Cleveland, Ohio, Main Post Office under a permit agreement issued to the SLA by the U.S. Postal Service (USPS) in accordance with 34 CFR 395.16 and 395.34. In addition to the complainant's three rooms with vending machines, there are five rooms with vending machines at the Main Post Office that were not included within USPS's permit agreement because they are operated by a private vendor.

Complainant receives 30 percent of the commissions paid to USPS by the private vendor from the operation of its vending machines as provided by the Act (20 U.S.C. 107d-3) and 34 CFR 395.32. USPS had determined that those vending machines were not in direct competition, but rather indirect competition, with the vending machines operated by the complainant. One hundred percent of the commissions paid to USPS would be paid to the complainant if the vending machines of the private vendor were considered to be in direct competition with complainant's vending machines.

Since 1996, complainant contended that the vending machines of the private vendor were in direct competition with his vending machines. Complainant further alleged that income from the operation of his vending facility had declined since 1994 due in large part to employees at the Main Post Office being moved to other locations and a reduction in the commission rate paid by the private vendor to USPS. To offset this decline, complainant requested that vending machines located in the Parking, Vehicle Maintenance, and Administration Building of the Main Post Office Complex operated by a private vendor be added to his vending facility.

In 1997, the SLA requested that USPS issue permits to operate the vending machines in the Parking, Vehicle Maintenance, and Administration Building in the Main Post Office Complex. USPS denied the SLA's

request. Since 1998, SLA personnel have maintained that the vending machines at the Main Post Office operated by the private vendor were in direct, not indirect, competition with the complainant's vending machines. However, the SLA did not file a complaint with the U.S. Department of Education seeking Federal arbitration on the 1997 denial of the permits for the Parking, Vehicle Maintenance, and Administration Building or the direct versus indirect competition issue until June 1999. The SLA had requested that the June 1999 complaint be held in abeyance pending the outcome of this arbitration decision.

Complainant filed a grievance in October 1999 with the SLA. He alleged that the SLA failed to perform as his advocate by not aggressively challenging the actions of USPS to protect the value of his vending facility because of declining income. Complainant sought to be represented at the State of Ohio fair hearing on his grievance by a nonattorney. The Hearing Examiner ruled prior to the hearing that Ohio Law prohibited the nonattorney from representing complainant. The parties agreed to postpone the State fair hearing so that complainant could obtain proper representation.

Subsequently, complainant filed a complaint seeking Federal arbitration of his grievance. A hearing of this matter was held on July 19 and 20, 2001.

Arbitration Panel Decision

The issues heard by the panel were—(1) Whether the SLA prevented complainant from having access to the State administrative remedy procedures provided by the Act; (2) whether the SLA properly distributed unassigned vending machine income to complainant; (3) whether the SLA has the right to establish new vending facilities that continue to serve customers, who were originally assigned to complainant's building, after they have relocated to other USPS buildings; and (4) whether the SLA attempted to limit complainant's income by installing a second vending facility at the Cleveland Main Post Office Building.

Concerning issue number one, the panel ruled that complainant voluntarily chose to bypass the SLA State fair hearing process and sought remedy from a Federal arbitration panel.

The panel determined regarding issue number two that the SLA did not properly advocate for the complainant to ensure him the appropriate income from the vending machines in the five vending rooms not assigned to him. Further, the panel concluded that the vending machines at issue operated by

the private vendor were in direct, not indirect, competition with complainant's vending machines.

Regarding issue number three, the panel found that the complainant established at the hearing that it was the practice of the SLA to allow blind vendors to "follow" their customers when they relocate. Therefore, the panel concluded that the SLA should aggressively pursue obtaining a permit for the postal facilities where complainant's customers have relocated.

Concerning issue number four, after consideration of the SLA's testimony that they were simply considering the establishment of a second vending facility at the Cleveland Post Office, but had not made a formal decision to do so, the panel ruled that issue number four was not ripe for consideration by the panel. However, the panel cautioned the SLA to consider complainant's declining income before making any decision to place another vendor at the Cleveland Post Office.

Finally, the panel ruled that the SLA owed complainant a duty to preserve the value of his vending facility and income derived from it. The panel concluded that the SLA had not properly performed that duty by its failure to assert the priority provisions of the Act.

Accordingly, the panel awarded the complainant \$30,000 as compensation for vending machine income lost from 1996 through 2001 due to USPS's determination that the five areas with vending machines operated by the private vendor were not in direct competition with complainant's vending machines. The panel arrived at the \$30,000 figure by calculating the difference between the commission compensation complainant actually received during those years and the commission compensation the panel believed he should have received given the panel's belief that the private vendor's machines are in direct competition with complainant's vending machines.

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.