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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JANUARY 7, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY BIRD,

Petitioner-Appellee,

v.

OREGON COMMISSION FOR THE BLIND,
an Agency of the State of Oregon,

Respondent-Appellant.

v.

U.S. DEPARTMENT OF EDUCATION,
Rehabilitation Services Administration,

Respondent-Appellee.

No. 20-36066

D.C. No. 3:18-cv-01856-YY

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernández, Chief District Judge, Presiding

Before: Susan P. GRABER and
Morgan CHRISTEN, Circuit Judges, and
Raner C. COLLINS,* District Judge.

R. COLLINS, District Judge:

Respondent Oregon Commission for the Blind ("OCB") appeals the district court's affirmation of an arbitration panel's award of compensatory relief, attorney's fees, and costs in favor of Petitioner Jerry Bird. We have jurisdiction pursuant to 28 U.S.C. § 1291. Reviewing the denial of sovereign immunity de novo, *Ray v. County of Los Angeles*, 935 F.3d 703, 708 (9th Cir. 2019), we reverse. Neither the Randolph-Sheppard Act ("RSA") nor the parties' operating agreements unequivocally waive a state's sovereign immunity from liability for monetary damages, attorney's fees, or costs. In coming to this conclusion, we join the Sixth and Tenth Circuits and conclude that our holding in *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997), is no longer binding.

I. Factual and Procedural History

The RSA creates a cooperative federal-state program that gives preference to blind applicants for vending licenses at federal facilities. 20 U.S.C. §§ 107-107f. At the federal level, the Secretary of Education is responsible for administering the Act. 20 U.S.C. §§ 107(b), 107a(a). At the state level, state licensing agencies designated by the Secretary of Education implement the program. 20 U.S.C. § 107a(a)(5). Under the RSA, a blind licensee who is dissatisfied with "any

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* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

action arising from the operation or administration of the vending facility program" may request an evidentiary hearing before the licensing agency. 20 U.S.C. § 107d-1(a). If the licensee disagrees with the hearing's result, he or she may file a complaint with the Secretary of Education, who will summon an arbitration panel to resolve the dispute. *Id.* The arbitration panel's decision is "final and binding on the parties" and is reviewable by the district court as a final agency decision under the Administrative Procedures Act. *Id.* §§ 107d-1, 107d-2(a).

Oregon's mini-RSA is the state equivalent of the RSA, applied to licenses at state buildings. *See* Or. Rev. Stat. §§ 346.510-346.570. OCB is a state licensing agency that executes the state's version of the RSA by obtaining vending permits in state buildings, licensing blind vendors, and assigning blind vendors to vending sites. *See id.* §§ 346.120, 346.540. "State participation in the program is voluntary, and a state agency seeking to be designated as a[n RSA licensing agency] must apply to the Secretary of Education and agree to a number of conditions." *Premo*, 119 F.3d at 767. Oregon agreed to have the OCB "[s]ubmit to an arbitration panel (upon its being convened by the Secretary [of Education]) those grievances of any vendor which the vendor believes to be unresolved after a full evidentiary hearing."

Bird is a blind vendor who gave up his vending contract at the Oregon Lottery building in 2005 in response to OCB's promise to assign him to the vending contracts at Chemeketa Community College ("CCC") and Santiam Correctional Facility. Despite its promise, OCB did not assign Bird to those locations, choosing instead to contract with another vendor.

In 2006, Bird filed a grievance alleging that he should have been assigned the vending contract at CCC. In 2009, an arbitration panel reviewed Bird's grievance and determined that OCB had violated the RSA. The arbitration panel ordered OCB to: (1) "pay Bird an amount equal to the net revenues from vending at CCC"; (2) "award Bird the vending contract at CCC"; and (3) consult with an elected committee of blind vendors regarding any further actions for additional vending that might become available at CCC. OCB did not appeal that decision.

Bird later realized that OCB did not control all the vending contracts at CCC. Consequently, Bird asked OCB to commence "whatever action" was necessary to enforce CCC's compliance with state and federal laws. In March 2011, OCB filed a lawsuit against CCC. In response, CCC cancelled all vending contracts and voided the agreement with OCB in May 2011. CCC then opened up its vending opportunities for proposals. OCB submitted a response, but CCC selected a private vending company that offered CCC a percentage of the revenues.

In July 2011, Bird and six other blind vendors filed a formal complaint with OCB seeking arbitration, prospective relief, and attorney's fees as a consequence of OCB's alleged mishandling of vending contracts and representation of blind vendors' interests. The arbitration panel denied relief, and Bird filed a petition for review in the Oregon District Court. The district court concluded that the Eleventh Amendment did not protect OCB from liability for compensatory damages. *Bird v. U.S. Dep't of Educ.*, No. 3:14-CV-00843-YY, 2017 WL 2365110, at *6 (D. Or. May 31, 2017). The district court's

decision relied primarily upon the Ninth Circuit holding in *Premo*.

In *Premo*, we concluded that Eleventh Amendment sovereign immunity did not apply to an arbitration panel's decision under the RSA, reasoning "[i]t has been widely recognized" that the RSA allows for "arbitration panels to award compensatory relief" because, when the arbitration provision was formulated, it was intended to resolve blind vendors' disputes, which necessarily included "back pay and other forms of compensatory relief." 119 F.3d at 769-70 (first citing *Tenn. Dep't of Hum. Servs. v. U.S. Dep't of Educ.*, 979 F.2d 1162, 1165 (6th Cir. 1992); then citing *Del. Dep't of Health & Soc. Servs. v. U.S. Dep't of Educ.*, 772 F.2d 1123, 1136-37 (3rd Cir. 1985)). We permitted judicial enforcement of the arbitration decisions granting compensatory relief because the RSA provided that any dispute could be arbitrated and that the arbitration panel's decision would be binding on the parties. *Id.* Therefore, although waiver of sovereign immunity from compensatory relief was not expressly contained within the statutory text, we concluded a constructive waiver was sufficient given the "overwhelming implication of the statute." *Id.* at 770-71.

After we issued *Premo*, however, the Supreme Court decided *Sossamon v. Texas*, 563 U.S. 277 (2011). In *Sossamon*, the Court analyzed whether a state waives sovereign immunity from compensatory relief through acceptance of federal funding under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 114 Stat. 803, 42 U.S.C. § 2000cc, *et seq*. *Id.* at 280. Although RLUIPA provides for "appropriate relief against a government" for violations of that statute, the Court held that a state's waiver of

sovereign immunity "must be 'unequivocally expressed' in the text of the relevant statute" and cannot be inferred from context. *Id.* at 282, 284 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)). In addition, the Court ruled that a state's waiver of sovereign immunity from compensatory relief must be unambiguous, regardless of the waiver of sovereign immunity from any other form of relief. *Id.* at 285. Therefore, the Court concluded, RLUIPA's reference to "appropriate relief" did not waive the state's sovereign immunity as to damages because the reference was ambiguous. *Id.* at 286.

The district court here considered *Sossaman* but ultimately distinguished the binding-arbitration text in the RSA from the text found in *Sossamon*. *Bird*, 2017 WL 2365110, at *6. The court concluded that the Eleventh Amendment did not preclude liability because states participating in the RSA grant "explicit consent" to binding arbitration of all disputes. *Id.* The district court considered Oregon's consent to be explicit because of *Premo*'s observation that arbitration is commonly understood to permit compensatory relief. *Id.* Dismissing *Sossamon* as inapposite, the court remanded the matter to the arbitration panel for a determination of compensatory relief and attorney's fees and costs, if appropriate. *Id.* at *8. The arbitration panel, in turn, granted Bird both compensatory relief and attorney's fees and costs.

Bird petitioned for review of the arbitration panel's second decision, and OCB filed a cross-petition arguing that OCB had not waived sovereign immunity from liability by participating in the RSA. The matter was referred to a magistrate judge, who issued Findings and a Recommendation that the district court reaffirm

its original analysis about sovereign immunity from liability. Expanding upon the district court's previous order, the magistrate judge stated that the decision in *Premo* was binding and its reasoning "unequivocal." The magistrate judge noted that the Ninth Circuit was not alone in reaching this conclusion; the Third Circuit came to the same conclusion in *Delaware Department of Health and Social Services*, 772 F.2d at 1138.

In so reasoning, the magistrate judge dismissed OCB's argument that the Supreme Court's decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) (*FMC*), was irreconcilable with *Premo*. In *FMC*, the Supreme Court determined that state sovereign immunity prevented an individual from forcing South Carolina to adjudicate a dispute in front of the Federal Maritime Commission for violations of the Shipping Act of 1984. 535 U.S. at 753. The magistrate judge concluded that *FMC* did not concern a state that voluntarily participated in a statutory scheme such as the RSA, and therefore *FMC* was not relevant to the analysis in this case.

In addition, the magistrate judge reiterated that *Sossamon* considered the ambiguity of the phrase "appropriate relief" in RLUIPA, not the RSA's commitment to binding arbitration of all disputes. The magistrate judge observed that it was well known at the time of *Premo* that a waiver cannot be inferred but must be explicitly stated or overwhelmingly implied. Still, the *Premo* court concluded that the implications of the RSA's text overwhelmingly demonstrate a participating state's waiver of sovereign immunity from liability. Thus, the magistrate judge decided that

Premo remained binding precedent. The district court adopted the magistrate judge's Findings and Recommendation.

On appeal, OCB challenges the arbitration panel's award and seeks review of the district court's determination that participating in the RSA constitutes a waiver of sovereign immunity from compensatory relief and attorney's fees and costs.

II. Discussion

A state cannot be sued without its consent. *See Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996); U.S. Const. amend. XI. In general, constructive waiver is an insufficient indication of waiver of a state's sovereign immunity. *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-86 (1999). Waiver of sovereign immunity must be unequivocally stated within the relevant statute and must be specific as to the type of relief waived. *Sossamon*, 563 U.S. at 284-85. If ambiguous, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Peña,* 518 U.S. 187, 192 (1996) (citations omitted). In light of the Supreme Court's holding in *Sossamon*, we are faced with the question whether *Premo* remains good law. We hold that it does not.

A circuit court may revisit controlling decisions only when a subsequent circuit or Supreme Court decision makes the two "clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). "It is not enough for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to

'cast doubt' on the prior circuit precedent. The intervening higher precedent must be 'clearly inconsistent' with the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (citations omitted).

In *Premo*, we found constructive waiver of sovereign immunity, and held that it was common knowledge that arbitration included compensatory relief at the time the arbitration provision was added to the RSA. 119 F.3d at 769-770. But *Sossamon*'s declaration that a waiver must be explicit within the text of the statute leaves no room for *Premo*'s reliance on constructive waiver.

Although *Premo* found support in decisions from the Third and Sixth Circuits, *Premo*, 119 F.3d at 768, *Sossamon* changed this analysis. Those pre-*Sossamon* cases are also premised upon constructive waiver. *See Del. Dep't of Health & Soc. Servs.*, 772 F.2d at 1137-38; *Tenn. Dep't of Hum. Servs.*, 979 F.2d at 1166-68. In *Delaware*, for example, the Third Circuit concluded that the legislative history of the RSA and common meaning of the term "arbitration" unambiguously demonstrated that a state participating in the RSA agreed to waive sovereign immunity from monetary damages. 772 F.2d at 1136. But the Sixth Circuit subsequently reversed its decision on sovereign immunity from monetary damages and determined that, although Ohio voluntarily participated in the RSA program, "[t]he RSA does not mention any type of available remedy." *Ohio v. U.S. Dep't of Educ.*, 986 F.3d 618, 630 (6th Cir. 2021). The Sixth Circuit noted that the text of the RSA was even more ambiguous than the term "appropriate relief," which was found to be an insufficient expression of waiver in *Sossamon*. *Id.* at 629. As a result, the Sixth Circuit held that Ohio had not

waived immunity from monetary damages. *Id.* at 630; *see also Tyler v. United States Dep't of Educ. Rehab. Servs. Admin.*, 904 F.3d 1167, 1172 (10th Cir. 2018) (holding "state sovereign immunity bars RSA arbitration panels from adjudicating complaints filed by a private party against a nonconsenting State). Thus, the cases upon which *Premo* relied are no longer controlling.

In conclusion, *Premo*'s analysis is clearly irreconcilable with *Sossamon*'s conclusion that sovereign immunity from monetary relief may not be waived through context and must be "'unequivocally expressed' in the text of the relevant statute." 563 U.S. at 284. After *Sossamon*, we can no longer assume waiver from contextual clues such as congressional intent or from a common understanding of the meaning of arbitration. We are bound by the holding in *Sossamon* and must conclude that *Premo*'s irreconcilable analysis is precluded. An agreement to arbitrate all disputes simply does not unequivocally waive sovereign immunity from liability for monetary damages. As a result, OCB did not waive immunity from compensatory damages, and the district court's decision to the contrary was in error.

Insofar as Bird argues that the operating agreements constituted waiver, those agreements, too, incorporated the text of the RSA and contained no express waiver of immunity from money damages. The agreements are, therefore, not proof that the state intended to permit compensatory relief. We now turn to the remaining question of attorney's fees.

III. Attorney's Fees and Costs

The American Rule is the "bedrock principle" applied to the award of attorney's fees. *Hardt v.*

Reliance Standard Life Ins. Co., 560 U.S. 242, 252-53 (2010). Under the American Rule, "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Id.* at 253 (citations omitted) (emphasis added). Whether a statute "limits the availability of attorney's fees to a 'prevailing party' is a question of statutory construction." *Id.* at 251. Federal courts "will not deviate from the American rule 'absent explicit statutory authority.'" *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 602 (2001)).

Because no provision of the RSA or the operating agreements provides for attorney's fees, Bird is not entitled to attorney's fees.

REVERSED and REMANDED.

AMENDED JUDGMENT AND CONFIRMATION OF ARBITRATION AWARD AS MODIFIED (JANUARY 26, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JERRY BIRD,

Petitioner,

v.

OREGON COMMISSION FOR THE BLIND, an Agency of the State of Oregon; and THE UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATION SERVICES ADMINISTRATION,

Respondents.

No. 3:18-cv-01856-YY

Originating Case: No. 3:14-cv-00843-YY

Before: Marco A. HERNÁNDEZ, United States District Judge.

Case History and Disposition of Claims on Review

I. In the Originating Case, Docket No. 3:14-cv-00843-YY, Petitioner, Jerry Bird, sought judicial review of the findings and order of a three (3) person *ad hoc*

arbitration panel (the "Panel") convened by the United States Department of Education ("DOE") pursuant to 20 U.S.C. § 107d-1 and § 107d-2 and 34 C.F.R. § 395.13. Jerry Bird requested injunctive, declaratory, and compensatory relief from the Panel against the State of Oregon (Oregon Commission for the Blind-OCB) for violation of the Randolph-Sheppard Act and Oregon's mini-Randolph Sheppard Act, which had been denied by the Panel. Upon review, the District Court accepted Magistrate Judge Youlee You's Findings and Recommendation that Respondent violated Oregon's mini-Randolph-Sheppard Act, and by Judgment of Remand dated May 31, 2017 (Docket No. 90 in the Originating Case) sent the case back to the Panel for a determination of whether damages, attorney fees or costs should be awarded. All other claims, issues and assignments of error were otherwise finally resolved by the Court's Opinion and Order issued May 31, 2017 (Docket No. 89 in the Originating Case).

II. Following the remand hearing on February 8, 2018 the Panel issued its Findings of Fact, Conclusions of Law, and Award (dated June 26, 2018) and its Final Order (dated July 19, 2018)(both of which are appended to Jerry Bird's Petition for Review of Final Agency Action [1], Exhibits 1 and 9 therein) ordering an Award for compensatory damages, attorney fees and costs. The Panel addressed or otherwise resolved all other issues as directed by the District Court in its Judgment of Remand.

III. This matter came before the Court on Jerry Bird's Petition for Review of Final Agency Action [1]. With regard to judicial review of the remand hearing, Petitioner sought:

a. Confirmation of the Panel's award of compensatory damages, attorney fees, costs and expenses and an order directing the Clerk to enter judgment in favor of Petitioner, Jerry Bird and against the State of Oregon;

b. Review of eight (8) assignments of error *de novo* and an award of additional compensatory damages to Jerry Bird and against the State of Oregon; and,

c. Award to Jerry Bird of supplemental attorney fees, costs and expenses incurred since July 10, 2018.

IV. Thereafter, Respondent filed its Cross-Petition for Review of Final Agency Action and Answer and Affirmative Defenses [16] asserting:

a. First Affirmative Defense: Sovereign Immunity;

b. Second Affirmative Defense: Waiver; and,

c. Third Affirmative Defense: Preservation of Defenses Raised in Defense of Prior Petition for Review.

d. First Assignment of Error: RSA does not Abrogate GCB's Sovereign Immunity; and,

e. Second Assignment of Error: RSA does not Provide for Prevailing Party Attorney Fees.

V. The DOE had no substantive involvement in the proceedings, beyond assembling the Panel and providing the Second Administrative Record (SAR) [21, 21-1 & 21-2]. It did not participate in the pleadings, briefing or arguments [13]. DOE made no claims, and no claims were made against it.

VI. Pursuant to Petitioner's Rule 12 motions to dismiss [18], this Court adopted Magistrate Judge You's Findings and Recommendation [22] and dismissed with prejudice GCB's First and Third affirmative defenses and its First and Second assignments of error [31]. OCB did not assert or otherwise pursue its Second affirmative defense. It is moot.

VII. This Court adopted Magistrate Judge You's Findings and Recommendation [48] with an Order [52] that granted and denied Jerry Bird's Petition [1] as follows:

a. Assignment of Error 1 granted: Compensatory damages modified to a total of $83,040.00;

b. Assignment of Error 2 granted: Pre-judgment interest is allowed on the compensatory damages at the rate of 2.36% for a total of $10,632.47 through June 12, 2020. Interest on the total Award to be assessed at 2.36% until judgment is entered herein.

c. Assignment of Error 3 withdrawn.

d. Assignments of Error 4 through 8 denied.

VIII. Finding that the Panel's decision is otherwise supported by substantial evidence [48], the remainder of the Panel's Award in favor of Jerry Bird is confirmed, including $297,822.96 in legal fees, costs and expenses through July 10, 2018, together with the right to seek an award of attorney fees and costs as the prevailing party herein [1].

JUDGMENT

Now, therefore, finding that all claims, issues and assignments of error herein have been fully and finally adjudicated as to all parties, IT IS ORDERED AND ADJUDGED that Jerry Bird shall have judgment for and against the State of Oregon (OCB) in the following:

Compensatory damages	$83,040.00
Accrued prejudgment interest thru June 12, 2020	$10,632.47
Attorney fees, costs awarded thru July 10, 2018.	$297,822.96
Total Award	**$391,495.43**

Interest shall be assessed on the total Award from the dates provided (damages and prejudgment interest from June 12, 2020 and attorney fees and costs from July 10, 2018) at the rate of 2.36% per annum until the entry of judgment. Thereafter, pursuant to 28 U.S.C. § 1961, post-judgment interest shall be assessed at the rate of 0.11%.

To the extent allowed by applicable law, Petitioner, as prevailing party, may submit his Bill of Costs and Motion for Award of Attorney Fees within fourteen (14) days of entry of this Amended Judgment.

The Clerk of the Court is directed to forthwith enter this Amended Judgment of record to supersede and replace the prior Judgment [54].

DATED January 26, 2021.

/s/ Marco A. Hernández
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (OCTOBER 2, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JERRY BIRD,

Petitioner,

v.

OREGON COMMISSION FOR THE BLIND, an Agency of the State of Oregon; and THE UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATION SERVICES ADMINISTRATION,

Respondents.

No. 3:18-cv-01856-YY

Before: Marco A. HERNÁNDEZ, United States District Judge.

HERNÁNDEZ, District Judge:

Magistrate Judge You issued a Findings and Recommendation [48] on July 12, 2020 in which she recommends that Petitioner's assignments of error contained in his Opening Brief [43] be granted in part and denied in part. Respondent Oregon Commission

for the Blind (OSB) filed timely objections to the Findings and Recommendation. The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall,* 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia,* 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

The Court has carefully considered Respondent's objections and concludes that the objections do not provide a basis to modify the recommendation. The Court has also reviewed the pertinent portions of the record *de novo* and finds no error in the Magistrate Judge's Findings and Recommendation.

CONCLUSION

The Court adopts Magistrate Judge You's Findings and Recommendation [48]. Petitioner's assignments of error contained in his Opening Brief [43] are GRANTED IN PART and DENIED IN PART as follows:

Assignments of error 1 and 2 are GRANTED in that: The arbitration panel's compensatory damages award should be modified to $83,040.00. Interest on the monthly compensatory damages should be assessed at 2.36 percent for a total of $10,632.47. Interest on the total award should be assessed at 2.36 percent until judgment is entered in this case, after which interest should be assessed pursuant to 28 U.S.C. § 1961.

Petitioner has withdrawn assignment of error 3. Petitioner's remaining assignments of error, 4 through 8, are DENIED.

IT IS SO ORDERED.

DATED October 2, 2020.

/s/ Marco A. Hernández
United States District Judge

FINDINGS AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE YOU (JUNE 12, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

JERRY BIRD,

Petitioner,

v.

OREGON COMMISSION FOR THE BLIND, an Agency of the State of Oregon; and THE UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATION SERVICES ADMINISTRATION,

Respondents.

Case No. 3:18-CV-01856-YY

Before: Youlee Yim YOU,
United States Magistrate Judge.

FINDINGS

Petitioner Jerry Bird seeks judicial review of a final agency action by the Oregon Commission for the Blind ("OCB") pursuant to 5 U.S.C. § 706 of the Administrative Procedures Act ("APA"). Petitioner has filed an Opening Brief (ECF #43) with assignments

of error that should be GRANTED IN PART and DENIED IN PART for the reasons discussed below.

I. Procedural History

This petition arises from the proceedings in *Bird v. United States Dep't of Educ.*, No. 3:14-CV-00843-YY, 2017 WL 2365110 (D. Or.) ("*Bird I*"), and is the continuation of a longstanding dispute between petitioner and respondent OCB over Chemeketa Community College ("CCC") vending facilities and the applicability of the Randolph-Shepard Act ("RSA"), 20 U.S.C. §§ 107-107f. In *Bird I*, this court concluded:

> (1) Oregon Revised Statutes §§ 346.520 and 346.530 provide for a right of first refusal for vending services by persons who are blind;
>
> (2) OCB correctly interpreted Oregon regulations and did not violate the RSA regarding the involvement of [the Blind Enterprise Consumer Committee ("BECC")] in the litigation decisions as to the Chemeketa Community College vending contracts; and
>
> (3) OCB, a state agency, is not immune under the Eleventh Amendment from an award of monetary damages under the RSA or Oregon law.

Id. at *8. This court then remanded the matter to the arbitration panel to determine the amount of plaintiff's compensatory damages, if any, whether plaintiff was entitled to attorney's fees, and if so, the amount of attorney's fees to be awarded. *Id.*

On remand, the arbitration panel conducted a hearing and issued "Findings of Fact, Conclusions of

Law, and Award" (hereafter "Award") dated June 26, 2018. Second Administrative Record ("SAR") 1545, ECF #21-2. On July 10, 2018, petitioner filed his Supplemental Petition and Declaration in Support of Attorney Fees, Costs, and Expenses. *Id.* at 1566. The arbitration panel issued its Final Order on July 19, 2018. *Id*. at 1581. Petitioner thereafter filed a Petition for Review of Final Agency Action Following Remand with this court. ECF #1.

II. Standard of Review

An arbitral award under the RSA is subject to judicial review as an agency action under the APA. *Premo v. Martin*, 119 F.3d 764, 768 (9th Cir. 1997) (citing 20 U.S.C. § 107d-2). The court's review of an agency action must be "searching and careful." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (citation and quotation marks omitted). However, the agency decision is "entitled to a presumption of regularity," and the court may not substitute its judgment for that of the agency. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1043 (9th Cir. 2015) (citation and quotation marks omitted). Instead, a reviewing court must uphold the agency action unless it is found to be:

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

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

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

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2).

An agency's findings of fact are upheld if they are supported by "substantial evidence." 5 U.S.C. § 706(2)(E). "Under the substantial-evidence standard, a court looks to an existing administrative record and asks whether it contains 'sufficien[t] evidence' to support the agency's factual determinations." *Biestek v. Berryhill*, 139 S.Ct. 1148, 1154 (2019) (citation omitted). "[W]hatever the meaning of 'substantial' in other contexts, the threshold for such evidentiary sufficiency is not high." *Id.* "Substantial evidence means more than a mere scintilla, but less than a preponderance. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017) (quoting *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988)). If the evidence is susceptible of more than one rational interpretation, the court must uphold the agency's findings. *Bear Lake Watch, Inc. v. F.E.R.C.*, 324 F.3d 1071, 1076 (9th Cir. 2003).

III. Assignments of Error

Petitioner's assignments of error are addressed seriatim below.

A. Number 1: Attorney's Fees Deducted from Compensatory Damages

Petitioner first contends that the arbitration panel erred by offsetting the compensatory damages award by $12,000 "for amounts [petitioner] previously paid to [his attorney], as he will be compensated for that amount in the award of attorneys' fees and costs[.]" Award ¶ IV.1, SAR 1555. OCB "acknowledges that this deduction may have been in error." Resp. 17, ECF #45.

Indeed, there was no basis to deduct from the compensatory award any attorney's fees that petitioner previously paid to counsel; the calculation of attorney's fees is separate from compensatory damages. Accordingly, petitioner prevails on this assignment of error.

B. Number 2: Prejudgment Interest

Petitioner next claims the arbitration panel erred as a matter of law and abused its discretion in failing to award "prejudgment" interest on the compensatory damages. Pet.'s Brief 12, ECF #12. Although petitioner refers to "prejudgment" interest, this case involves administrative review of the arbitration panel's Final Order. Thus, for purposes of this analysis, when the court uses the term "prejudgment" interest, it is referring to interest that would have accrued prior to the issuance of the arbitration panel's Final Order.[1]

---

[1] Petitioner asks for "prejudgment" interest on compensatory damages through the hearing date of February 8, 2018, and "post-judgment" interest on the entire award thereafter. Pet.'s Br. 12, ECF #43. However, it was not until July 19, 2018, that the arbitration panel issued its Final Order, which is akin to a judgment for purposes of the prejudgment interest analysis here. Petitioner's post-judgment argument is addressed separately below.

OCB argues that because compensatory damages in this case are premised on a violation of Oregon's "mini-RSA," state law applies for purposes of determining whether prejudgment interest may be awarded. However, as petitioner correctly contends, federal law, *i.e.*, the RSA, provides for the remedy here. Under the RSA, state agencies, such as OCB, "may make application to the Secretary and agree . . . to cooperate with the Secretary in carrying out the purpose of this chapter," which includes providing dissatisfied blind licenses with "an opportunity for a fair hearing" and agreeing to arbitration. 20 U.S.C. § 107b(1) & (6). It is "widely recognized" that, in this context, an arbitration panel may "award compensatory relief." *Premo*, 119 F.3d at 769. Because federal law constitutes the basis for the compensatory damages in this case, federal law also applies for purposes of determining whether prejudgment interest may be awarded.

Under federal law, "[a]n award of prejudgment interest is reviewed under an abuse of discretion standard." *Acosta v. City Nat'l Corp.*, 922 F.3d 880, 885 (9th Cir. 2019); *see also Wessel v. Buhler*, 437 F.2d 279, 284 (9th Cir. 1971) ("[W]hether [prejudgment] interest will be awarded is a question of fairness, lying within the court's sound discretion, to be answered by balancing the equities."). Federal "[c]ourts have long held that prejudgment interest is a form of compensatory relief." *Sanofi-Aventis v. Apotex Inc.*, 659 F.3d 1171, 1178 (Fed. Cir. 2011); *see also Golden State Transit Corp. v. City of Los Angeles*, 773 F.Supp. 204, 208 (C.D. Cal. 1991) ("Prejudgment interest is an element of compensation[.]"). "Prejudgment interest is a measure that 'serves to compensate for the loss of use of money due

as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.'" *Schneider v. Cty. of San Diego*, 285 F.3d 784, 789 (9th Cir. 2002) (quoting *West Virginia v. United States*, 479 U.S. 305, 311 n.2 (1987)).

Here, the arbitration panel denied prejudgment interest without explanation: "Complainant's request for prejudgment interest is denied." Final Order ¶ 2, SAR 1581. However, awarding prejudgment interest in this case comports with the congressional purpose of the RSA, which is to "provid[e] blind persons with remunerative employment," "enlarge[e] the economic opportunities of the blind," and enable "the blind . . . to make themselves self-supporting." 20 U.S.C. § 107(a). "In the absence of an unequivocal prohibition" on prejudgment interest, the court should fashion a federal rule that grants or denies prejudgment interest based on the congressional purpose of the particular statute. *Rodgers v. United States*, 332 U.S. 371, 373 (1947). Thus, in failing to award prejudgment interest, the arbitration panel abused its discretion.

Petitioner asks the court to award prejudgment interest at the 9% statutory interest rate under ORS 82.010(2). However, as noted, federal law provides the authority for the remedy in this case. "Generally, 'the interest rate prescribed for post-judgment interest under 28 U.S.C. § 1961 is appropriate for fixing the rate of pre-judgment interest unless the trial judge finds, on substantial evidence, that the equities of that particular case require a different rate.'" *Blankenship v. Liberty Life Assur. Co. of Bos.*, 486 F.3d 620, 628 (9th Cir. 2007) (citation omitted). Importantly, "[p]rejudgment interest is an element of compensation, not a

penalty." *Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 988 (9th Cir. 2001). Thus, even where a defendant has acted in bad faith, which the court is not suggesting occurred here, "it should not influence the rate of the interest." *Id.* In this case, the equities do not compel an interest rate higher than the one prescribed by 28 U.S.C. § 1961.

Under 28 U.S.C. § 1961, "interest shall be calculated . . .at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding." The applicable federal interest rate for the week preceding July 19, 2018, the date on which the Final Order was issued, was 2.36 percent. The arbitration panel awarded damages of $2,595 per month from November 2011 through June 2014. Thus, petitioner is entitled to prejudgment interest at 2.36 percent for each of those months. For example, for the $2,595 awarded for the month of November 2011, the arbitration panel should have awarded $411.41 in prejudgment interest, as that is the amount of interest accrued as of the July 19, 2018 Final Order. Total prejudgment interest for all months equals $10,632.47.[2]

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[2] November 2011 ($411.41); December 2011 ($406.38); January 2012 ($401.18); February 2012 ($395.98); March 2012 ($391.11); April 2012 ($385.91); May 2012 ($380.87); June 2012 ($375.67); July 2012 ($370.64); August 2012 ($365.44); September 2012 ($360.24); October 2012 ($355.20); November 2012 ($350); December 2012 ($344.97); January 2013 ($339.77); February 2013 ($334.57); March 2013 ($329.87); April 2013 ($324.67); May 2013 ($319.63); June 2013 ($314.43); July 2013 ($309.40); August 2013 ($304.20); September 2013 ($299); October 2013 ($293.96); November 2013 ($288.76); December 2013 ($283.73); January 2014 ($278.53);

Petitioner also seeks a "*per diem* amount on the total award (cumulative of all months) thereafter (calculated by the rate which the Court approves) through the date of judgment" and "[t]hereafter, post-judgment interest on the full judgment amount, including accumulated prejudgment interest then part of the final judgment." Pet.'s Br. 12, ECF #43. In using the words "judgment" and "post-judgment" in this context, petitioner appears to be referring to the judgment that this court will enter, rather than the arbitration panel's final decision.

Generally, post-judgment interest under "Section 1961 . . . is limited on its face to 'money judgment[s] in a civil case recovered in a district court,' and does not extend to agency awards." *Hobbs v. Dir., Office of Workers Comp. Programs*, 820 F.2d 1528, 1531 (9th Cir. 1987)) (citing 28 U.S.C. § 1961) (emphasis in original); *see also St. Marks v. U.S. Dep't of the Interior*, 746 F. App'x 685, 688 (9th Cir. 2018) (cited pursuant to Ninth Circuit Rule 36-3(b)). However, post-judgment interest is allowed where Congress has otherwise authorized it. *Hobbs*, 820 F.2d at 1531 (noting "[i]t is the prerogative of Congress . . . to establish the circumstances, if any, under which such interest may be available").

Here, the arbitration panel denied petitioner's request for any "prospective damages, including statutory interest." SAR 1549. However, like the "pre-judgment" interest discussed above, awarding interest on the arbitration panel's total award comports with the RSA's objective "to make blind vendors whole for state breaches of contract." *Delaware Dep't of Health & Soc.*

February 2014 ($273.32); March 2014 ($268.63); April 2014 ($263.42); May 2014 ($258.39); June 2014 ($253.19).

Servs., Div. for Visually Impaired v. U.S. Dep't of Educ., 772 F.2d 1123, 1139 (3d Cir. 1985). Accordingly, the arbitration panel abused its discretion in denying interest on the total award. Like "prejudgment" interest, interest on the total award should be calculated at 2.36 percent (the rate in effect on July 19, 2018, the date the Final Order was issued) until judgment is entered in this case. Thereafter, post-judgment interest should be calculated pursuant to 28 U.S.C. § 1961 at the interest rate in effect at the time judgment is entered. *See* https://www.casb.uscourts.gov/post-judgment-interest-rates.

C. Number 3: Increase to Petitioner's Income

Petitioner has withdrawn this assignment of error. Pet.'s Br. 15, ECF #43.

D. Number 4: Mitigation

The arbitration panel awarded petitioner damages through June 2014, but denied damages thereafter because OCB had provided petitioner with "additional and comparable opportunities beginning in July 2014." Award ¶ II.A.3, SAR 1549. The panel noted that petitioner's income had increased in the second half of 2014, and concluded it was the result of the "assignment of vending facilities to [petitioner] from OCB." *Id.* ¶¶ II.A.4, II.A.9, SAR 1549, 1551.

> For a nine-month period, from January 2011 through October 2011 (no operating report was provided for May 2010), Mr. Bird's average monthly net proceeds were $4,416. For November and December 2011, monthly net proceeds dropped to $3,132. In 2012, monthly net proceeds averaged $2,284. In

> 2013, monthly net proceeds averaged $2,833. For the first six months of 2014, monthly net proceeds averaged $1,606. For the second six months of 2014, monthly net proceeds averaged $5,106. This upwards trend in monthly net proceeds continued in 2015 ($9,318), 2016 ($7,692), and 2017 ($8,098).

Id. ¶ II.A.9, SAR 1551. The arbitration panel also observed that in 2012, 2013, and 2014, petitioner's proceeds from vending facilities were $25,124, $34,003, and $40,278 respectively, but in years 2015, 2016, and 2017, "his income increased significantly, to $111,825, $92,310, and $97,181 respectively." *Id.* ¶ II.A.4, SAR 1549. The panel noted petitioner himself admitted "that he received a number of additional facilities since losing the CCC location, and that he has a larger number of facilities then [*sic*] he did at the time of losing CCC." *Id.* ¶ II.A.6, SAR 1550.

The panel found "credible" the testimony of Eric Morris, Director of OCB's Business Enterprise Program,[3] specifically his testimony that "from the time [Morris] began employment with OCB in December 2012, he has been giving [petitioner] business to make up for the loss of the CCC contract." *Id.* In his fourth assignment of error, petitioner alleges that the panel's

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[3] Under ORS 346.546(3), OCB "has final authority and responsibility for the administration and operation of the business enterprise program." ORS 346.546(1) provides that OCB "shall ensure the active participation of the commission's business enterprise consumer committee in the commission's major administrative, policy and program development decisions that impact the commission's business enterprise program."

finding regarding Morris' testimony is not supported by substantial evidence. Pet.'s Br. 14, ECF #43.

The record contains far more than the "scintilla of evidence" necessary to support the administrative panel's finding that Morris "has been giving [petitioner] business to make up for the loss of the CCC contract." *See Revels*, 874 F.3d at 654 (holding that substantial evidence means more than a mere scintilla, but less than a preponderance). In his declaration, Morris explained that "[a]t the point that Chemeketa awarded their contract elsewhere in 2011, [petitioner] was making a monthly gross average of approximately $7,388." Morris Decl. 1 3, SAR 328.

> Subsequently, [petitioner] began receiving additional locations, at both his request (because of losing Chemeketa) and because the OCB wanted to ensure he was adequately compensated for the loss of Chemeketa.

Id. ¶ 4. "By 2013, [petitioner] grossed approximately $7,873 per month," roughly the same amount he was making when he had the CCC account. *Id.* ¶ 6. As of 2016, petitioner had received 13 additional locations, was subcontracting the majority of his facilities to Canteen, a third-party vendor, and was grossing a monthly average of $18,385. *Id.* "For the first six months of 2017, he grossed $149,000.16 in sales." *Id.* "Since 2014, [petitioner] has continually been in the top three earners of the Vending Facility Managers in Oregon." *Id.* ¶ 7. According to Morris, petitioner "would not have received the facilities that compensated him

for Chemeketa but for the loss of the Chemeketa facility."[4] *Id.* ¶ 5.

During his testimony, Morris explained "the thing to keep in mind . . . is that through the whole process," petitioner was "constantly reminding . . . the [BECC] and us that . . . Chemeketa was some of the thought process behind why he should be getting it."[5] SAR 814. Morris further explained that "[t]he fact that [petitioner] had taken a loss back in 2011, I believe it was, is a factor of why he got most of this stuff. I believe that's why the [BECC] recommended it." SAR 815. According to Morris, the "BECC always supported what [petitioner] was saying that he wanted,"[6] and "[w]hen it came to recommendations of [petitioner] saying I want this because of Chemeketa, the elected committee voted that[.]"[7] SAR 817-18. When asked if "what petitioner asked for [petitioner] got from the

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[4] Randy Hauth, chair of the BECC, testified he did not recall that petitioner was awarded these facilities to compensate for his CCC losses, and claimed the BECC tried to stimulate new opportunities for all blind vendors. SAR 732. However, the arbitration panel was entitled to accept Morris' testimony, which was supported by other evidence in the record.

[5] At one point, Morris described it as "constant chatter amongst the elected committee" and from petitioner. SAR 820. Petitioner himself testified that after he lost the CCC facility, he approached the BECC and requested financial assistance. SAR 589.

[6] For instance, the Bonneville Dam account was awarded to petitioner "based on [BECC's] recommendations and getting [petitioner] back to a living wage that he felt was appropriate." SAR 823.

[7] In fact, on at least one occasion, Morris recommended that an account should not go to petitioner, but it was nevertheless awarded to him. SAR 817.

BECC committee," Morris responded, "Yes, I do believe that." SAR 818-19. As Morris described it:

> The emotion of losing a facility, and then wanting to support their fellow managers, their family, as a lot of people phrase it, I think is a tough—is a tough position for them to be in.[8]
>
> It's also tough because Mr. Bird has served on the [BECC] in several different capacities. So I think it's a tough spot.

SAR 818.

Morris himself was swayed to approve the assignments because of petitioner's loss of Chemeketa. SAR 815. When asked whether there were any other "factors" for why he approved the assignments, Morris said, "No." SAR 816. Even where Morris did not expressly "communicate to [petitioner] or the committee that [he was] doing so in connection with or as a follow through from the termination of Chemeketa," there "was a basic understanding that that's why it was being done." SAR 820.

During the hearing, petitioner admitted that his gross income in 2011 was $25,280, SAR 638, and he grossed "a little over" $200,000 in 2017. SAR 617. He also admitted that he had a larger number of facilities than when he lost the CCC account. SAR 617-18. Petitioner suggested that he was entitled to all of the

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[8] *See* May 11, 2012 email from BECC to Art Marshall ("Right now, Jerry and his family are at risk of losing their home. His livelihood has been stripped away from him because CCC contract was terminated early. . . . Time is of the essence for Jerry and his family. Time should not be wasted. . . . ").

facilities because they were located within his "territory." SAR 598. However, Hauth testified that the geographic boundaries were not "as sharp as a tack." SAR 735. Morris also testified that, if one looked at the "numbers of the program and [petitioner's] income[,] there's very little equity based on the recommendations coming from the elected committee." SAR 821.

Petitioner contends the record reflects that "OCB, and Mr. Morris individually, [were] antagonistic towards [him] and sought to minimize or diminish his vending business." Pet.'s Br. 16, ECF #43. However, if Morris' testimony is believed, the opposite is true. Morris described the many efforts he and OCB made to provide petitioner with additional facilities, more than doubling his gross income. The arbitration panel found Morris credible, and its decision is supported by substantial evidence. *See Aguilera-Cota v. United States INS*, 914 F.2d 1375, 1381 (9th Cir. 1990) ("We review credibility findings under a substantial evidence standard."). Even if the evidence in this case is susceptible of more than one rational interpretation, the court must uphold the arbitration panel's findings. *Bear Lake Watch*, 324 F.3d at 1076.

Petitioner also claims the arbitration panel erred in accepting Morris' testimony because he "acted beyond the scope of his authority and in a manner in which he was not authorized rendering the effect and purpose of his actions regarding the assignment of vending locations void or voidable." Reply 9, ECF #47. Petitioner contends "there is no established criteria for when [OCB] does or does not implement those considerations (whatever they may be)," and "GCB's conduct of the RSA program is the epitome of random, capricious, arbitrary and feckless administration."

Pet.'s Br. 16, ECF #43. In essence, petitioner contends that the arbitration panel was not permitted to offset his damages if OCB and Morris acted ultra vires, *i.e.*, without authority, when they assigned him the vending accounts at issue. *See City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013) (holding that when agencies "act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires").

But to resolve this question, the court would have to first consider whether OCB was in fact required to create rules relating to the assignment of vending facilities. Any arguments related to OCB's lack of rulemaking are foreclosed by this court's decision in *Bird I*. In *Bird I*, petitioner claimed that "OCB failed and refused to promulgate any written rules, regulations or policies regarding the effective conduct of the State's vending facility program." Pet.'s Br. 26, *Bird I*, ECF #44. Because petitioner had failed to raise those arguments in the administrative proceeding, this court determined they were not properly preserved.[9] This case was remanded to the arbitration panel solely to "determine the amount of Plaintiff's compensatory damages, if any; to determine whether Plaintiff is entitled to an award of attorneys' fees; and, if so, to determine the amount of attorneys' fees to which Plaintiff is entitled." Opinion and Order 20, *Bird I*, ECF #89. To allow petitioner to challenge OCB's management of the RSA program would permit an end-run

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[9] *See* Findings and Recommendations 14-15, *Bird I*, ECF #74 (noting "this is the first instance in which Bird . . . alleged that the OCB's rulemaking efforts were insufficient to meet a statutory or regulatory mandate" and concluding "the alleged lack of sufficient rulemaking is not properly part of this appeal"), adopted in part by Opinion and Order, *Bird I*, ECF #89.

around the court's previous ruling. Therefore, any arguments pertaining to the lack of rulemaking were foreclosed by *Bird I* and are not within the scope of judicial review in this appeal.

Moreover, as the arbitration panel found, OCB had the authority to act as it did. OCB was created through ORS 346.120, which broadly authorizes it to establish and administer programs for blind persons:

> The Commission shall:
>
> (1) Establish and be responsible for the administration of a program or programs for persons who are blind which will promote, in the manner set forth in ORS 346.110 to 346.270, the welfare of persons with visual impairments, including but not limited to cooperation by contract or otherwise with public and private agencies in providing services, programs and facilities for persons with visual impairments.

ORS 346.120(1) (emphasis added). Also, importantly, under ORS 346.540(3), OCB is authorized to "[r]ecruit, select, train, license and install qualified persons who are blind as managers of vending facilities in public buildings or properties." (Emphasis added.) Thus, as the panel correctly concluded, OCB had the authority and discretion to "select" and "install" petitioner in certain accounts for purposes of offsetting his losses.

E. Numbers 5-7: Allocation of Sites to Other Vendors; Creation and Assignment of Vending Facilities; "Satisfactory Income" Standard

Petitioner's fifth, sixth, and seventh assignments of error relate to the arbitration panel's conclusions of law. In its conclusions of law, the arbitration panel found in pertinent part:

1) "OCB, as the state licensing agency pursuant to the [RSA], is not precluded by the [RSA], its implementing regulations, nor state law or regulations from determining that the community of blind vendors would have been best served by allocating some of the individual sites operated by [petitioner] to other vendors." Award III.2, SAR 1552.

2) OCB "clearly ha[s] discretion to determine which vending machines will be combined to create a vending facility, and to assign a vendor to such facility subject to regulations issued in accordance with 20 U.S.C. § 107b(5) and the committee of blind vendors 'participation, with the State agency, in the development and administration of a transfer and promotion system for blind licensees.'" Award III.2, SAR 1553 (quoting 20 U.S.C. § 107b-1 (3)(C)).[10]

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[10] The panel cited to 20 U.S.C. § 107b-1(2)(C); however, it appears this was a typographical error as the language it cited appears in 20 U.S.C. § 107b(3)(C).

3) "If OCB determines that certain vending facilities in the Salem area should be allocated to other licensed vendors, it is entitled to do so, especially where a division can provide satisfactory income for a blind vendor." Award III.4, SAR 1553.

Again, petitioner argues that because there were no rules and regulations authorizing OCB to offset his CCC losses, the panel's conclusions are arbitrary and capricious, an abuse of discretion, and not in accordance with the law. Reply 9, ECF #47. Those arguments are foreclosed for the reasons discussed in Section D, *supra*. Under ORS 346.540(3), OCB had broad authority to "select" and "install" petitioner in certain vending facilities for purposes of offsetting his losses.

F. Number 8: Record of Compensation from New Sites

Petitioner's final assignment of error challenges the arbitration panel's finding that "based on the net proceeds earned by [petitioner] after [June 2014], and the OCB's discretion to allocate vending sites and/or machines so as to provide satisfactory income to blind vendors, that OCB provided [petitioner] with sufficient sites to compensate him for the loss of the CCC contract." Award ¶ III.5, SAR 1553. This is a finding of fact that must be upheld if there is substantial evidence in the record.

According to Morris' testimony, which the arbitration panel found credible, the Bonneville Dam, Tigard Police Department, Immigration and Naturalization Services ("ICE"), Oregon Employment Department, Eugene Unemployment Insurance Center, Oregon State Hospital, Junction City, and University of Oregon

vending facilities were assigned to petitioner in response to the loss of the CCC contract. SAR 812-13. Petitioner contends that OCB failed to provide records of the net revenues from those locations, and argues there is no way to calculate what he "actually gained organically through new customers in his territory." Pet.'s Br. 27, ECF #43. Petitioner also contends "the increased revenues do not account for inflation and the increased pricing on products sold." *Id*.

Petitioner's evidentiary demands go a step too far. The substantial evidence standard does not demand clear and convincing evidence, nor even a preponderance of the evidence. As noted above, the administrative record need only contain "more than a mere scintilla, but less than a preponderance" of evidence to support the arbitration panel's factual findings. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007); *see also Biestek*, 139 S.Ct. at 1154 (noting that, with respect to the substantial evidence standard, "the threshold for such evidentiary sufficiency is not high").

Nevertheless, the documented evidence shows a significant increase in petitioner's net earnings during the time OCB assigned additional sites to petitioner. As OCB notes, petitioner's gross income in 2011, the year in which he lost the Chemeketa contract, was $25,280. SAR 637-38. His net profit in 2014 was $35,852.08. SAR 1252, 1144-62 (March-December 2014 worksheets in reverse chronological order). Petitioner's net profit increased to $91,008.87 in 2015 (SAR 1253, 1120-43 January to December worksheets in reverse chronological order), $85,859.66 in 2016 (SAR 1254, 1096-1119 January to December worksheets in reverse chronological order), and $86,497.14 in 2017 (SAR 1255, 1072-95 January to December worksheets in

reverse chronological order). This evidence is sufficient such that "a reasonable mind might accept [it] as adequate to support [the arbitration panel's] conclusion." *Lingenfelter*, 504 F.3d at 1035.

RECOMMENDATIONS

Petitioner's assignments of error contained in his Opening Brief (ECF #43) should be GRANTED IN PART and DENIED IN PART as follows:

Assignments of error 1 and 2 should be GRANTED in that: The arbitration panel's compensatory damages award should be modified to $83,040.00. Interest on the monthly compensatory damages should be assessed at 2.36 percent for a total of $10,632.47. Interest on the total award should be assessed at 2.36 percent until judgment is entered in this case, after which interest should be assessed pursuant to 28 U.S.C. § 1961.

Petitioner has withdrawn assignment of error 3. Petitioner's remaining assignments of error, 4 through 8, should be DENIED.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due by Friday, June 26, 2020. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED June 12, 2020.

/s/ Youlee Yim You
United States Magistrate Judge

OPINION AND ORDER OF THE DISTRICT COURT FOR THE DISTRICT OF OREGON (SEPTEMBER 3, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

JERRY BIRD,

Petitioner,

v.

OREGON COMMISSION FOR THE BLIND, an Agency of the State of Oregon; and THE UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATION SERVICES ADMINISTRATION,

Respondents.

Case No. 3:18-CV-01856-YY

Before: Youlee Yim YOU, United States Magistrate Judge.

YOU, Magistrate Judge:

Respondent Oregon Commission for the Blind ("OCB") has filed a Motion for Entry of FRCP 54(b) Judgment and Stay of Proceedings Pending Appeal. ECF #32. The court finds this matter suitable for decision without oral argument pursuant to LR 7-1(d)

(1). For the reasons discussed below, the motion is DENIED.[1]

I. Legal Standard

Federal Rule of Civil Procedure 54(b) provides:

> When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

A determination whether to enter a final judgment pursuant to Rule 54(b) is "exclusively within the discretion of the district court." *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1078 (9th Cir. 1994) (quoting *Ill. Tool Works, Inc. v. Brunsing*, 378 F.2d 234, 236 (9th Cir. 1967)). "It is left to the sound judicial

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[1] A Rule 54(b) motion is akin to a motion for stay. The Ninth Circuit has held that a motion for stay that does not dispose of claims or effectively deny the ultimate relief sought is non-dispositive, and therefore falls within magistrate judge jurisdiction under 28 U.S.C. § 636(b)(1)(A). *S.E.C. v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1260 (9th Cir. 2013).

discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980).

Before entering judgment pursuant to Rule 54(b), the court must have rendered a "final judgment," *i.e.*, "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Wood v. GCC Bend*, 422 F.3d 873, 878 (9th Cir. 2005). The court then "determine[s] whether there is any just reason" to delay appeal. *Wood*, 422 F.3d at 878. In making this determination, the court considers the interests of sound judicial administration and the equities involved in the case. *Curtiss-Wright*, 446 U.S. at 8. The principle of sound judicial administration requires the court to consider "whether the claims under review [are] separable" legally and factually, and whether granting the Rule 54(b) request might result in multiple appellate decisions or duplicate proceedings on the same issues. *Id.* The court considers "juridical concerns," like avoiding "piecemeal appeals" in a case that "should be reviewed only as [a] single unit[ ]," and "equitable factors such as prejudice and delay." *Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009) (quoting *Curtiss-Wright*, 446 U.S. at 10) (internal quotations omitted).

Rule 54(b) certification is generally disfavored. It "must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants." *Morrison-Knudsen v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). While "Rule 54(b) certification is proper if it will aid in 'expeditious decision' of the case," *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir.

1991) (citation omitted), granting a Rule 54(b) motion is "not routine" and "should not become so." *Wood*, 422 F.3d at 879. "Therefore, the burden lies on the party moving for certification to show that their case's circumstances are unusual enough to merit departure from the court's general presumption against Rule 54 (b)." *Birkes v. Tillamook Cty.*, No. 3:09-CV-1084-AC, 2012 WL 2178964, at *3 (D. Or. June 13, 2012) (citing *U.S. Fire Ins. Co. v. Williamsburg Nat'l Ins. Co.*, No. 1:07-CV-00718, 2009 WL 650578, at *2 (E.D. Cal. Mar. 12, 2009)).

II. Discussion

OCB seeks a Rule 54(b) judgment of "this Court's June 1, 2019, order . . . dismissing with prejudice GCB's cross-petition for review alleging that sovereign immunity bars any award of retrospective money damages or attorney fees under the Randolph-Sheppard Act (RSA)." Mot. 2, ECF #32. Petitioner first argues that sovereign immunity is not a claim for relief but rather an affirmative defense to which Rule 54(b) does not apply. *Id.* at 7. Indeed, the language of Rule 54(b) specifically refers to "a claim for relief." While the Ninth Circuit has not decided this issue, as petitioner notes, other circuits have held that Rule 54(b) does not authorize judgment for an affirmative defense. *Id.* (citing *Flynn & Emrich Co. v. Greenwood*, 242 F.2d 737, 741 (4th Cir. 1957) ("[I]t is as well settled as anything can be that Rule 54(b) does not authorize appeal from a judgment with respect to a mere affirmative defense."); *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.*, 154 F.2d 814, 814-15 (2d Cir. 1946) (same); *Smith v. Benedict*, 279 F.2d 211, 213 (7th Cir. 1960) (same).

Even assuming arguendo that respondent could obtain a Rule 54(b) judgment on the issue of sovereign immunity, judicial administration and equitable considerations strongly favor denying its motion. OCB contends that granting the motion would promote judicial economy because if OCB prevails on appeal, it would obviate "the need to litigate the remaining claims at all." Mot. 5, ECF #32. OCB argues there is little to no risk of harm, and that "requiring the case to go forward could result in unnecessary litigation on petitioner's eight assignments of error, all of which contend in some form or another that the arbitration panel should have awarded petitioner more money." *Id.*

Petitioner, on the other hand, contends that OSB has foregone the right to raise this issue on appeal and its actions have otherwise been dilatory. Petitioner notes that "this Court in 2017 expressly considered and rejected OCB's sovereign immunity argument, issuing a final, appealable judgment on the matter in 2017," yet OCB failed to appeal that decision. Resp. 3, ECF#35. Petitioner asserts that by making this motion, OCB is attempting to repair an obvious error in its litigation strategy, and it actions "simply smack[ ] of naked obstructionism." *Id.* at 5.

As previously noted, a Rule 54(b) judgment should be avoided "unless the pressing needs of the litigants outweigh the potential for multiple, duplicate appeals." *Birkes*, 2012 WL 2178964, at *3. Here, there is no pressing need to send this matter to the Ninth Circuit for adjudication. The procedural posture of this case is no different than the vast majority of cases before this court. Judicial economy will not be advanced by bifurcating the litigation of this case; however, the prejudice to petitioner, whose case has been pending

"after five plus years total of litigation" (Resp. 5, ECF #35), would be great. While "Rule 54(b) certification is proper if it will aid in 'expeditious decision' of the case," given the stage of this litigation, the most expeditious manner of resolving this case is to proceed with the resolution of the remaining issues. *See Texaco*, 939 F.2d at 797. In sum, this is not the type of "unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants." *Id.*

ORDER

Respondent's Motion for Entry of FRCP 54(b) Judgment and Stay of Proceedings Pending Appeal (ECF #32) is DENIED.

DATED September 3, 2019.

/s/ Youlee Yim You
United States Magistrate Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (JUNE 1, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

JERRY BIRD,

Petitioner,

v.

OREGON COMMISSION FOR THE BLIND, an Agency of the State of Oregon; and THE UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATION SERVICES ADMINISTRATION,

Respondents.

No. 3:18-CV-01856-YY

Before: Marco A. HERNÁNDEZ, United States District Judge.

HERNÁNDEZ, District Judge:

Magistrate Judge You issued a Findings and Recommendation [22] on March 11, 2019 in which she recommends that Petitioner's Motion to Dismiss [18] be granted in part and denied in part. Petitioner and Defendant Oregon Commission For The Blind (OSB)

filed timely objections to the Findings and Recommendation. The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

The Court has carefully considered all objections and concludes that the objections do not provide a basis to modify the recommendation. The Court has also reviewed the pertinent portions of the record *de novo* and finds no error in the Magistrate Judge's Findings and Recommendation.

CONCLUSION

The Court adopts Magistrate Judge You's Findings and Recommendation [22]. Petitioner's Motion to Dismiss [18] is granted in part and denied in part as follows:

(1) Petitioner's Rule 12(b)(6) and Rule 12(c) motions to dismiss OSB's first and third affirmative defenses and first and second assignments of error are granted. As amendment would be futile, the dismissals are with prejudice;

(2) Petitioner's motion to dismiss the second affirmative defense is denied; and

(3) Petitioner's alternative motion to strike pursuant to Rule 12(f) is denied as moot.

IT IS SO ORDERED.

DATED this 1 day of June, 2019.

/s/ Marco A. Hernández
United States District Judge

FINDINGS AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE (MARCH 11, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

JERRY BIRD,

Petitioner,

v.

OREGON COMMISSION FOR THE BLIND, an Agency of the State of Oregon; and THE UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATION SERVICES ADMINISTRATION,

Respondents.

Case No. 3:18-CV-01856-YY

Before: Youlee Yim YOU, United States Magistrate Judge.

YOU, Magistrate Judge:

Petitioner Jerry Bird has filed a motion pursuant to FRCP 12(c) and 12(b)(6) for judgment on the pleadings and dismissal of respondent Oregon Commission for the Blind's ("OCB") affirmative defenses and assignments of error, or in the alternative, a motion to strike

pursuant to FRCP 12(f). ECF #18. The court finds this matter suitable for decision without oral argument pursuant to LR 7-1(d)(1). The motions should be granted in part and denied in part for the reasons discussed below.

FINDINGS

I. Background

The factual background of this case is set forth in the February 24, 2017 Findings and Recommendation in *Bird v. United States Department of Education*, 3:14-cv-00843-YY. This court previously held that:

1. ORS 346.520 and 346.530 provide for a right of first refusal for vending services by persons who are blind;
2. The OCB correctly interpreted Oregon regulations and did not violate the Randolph-Sheppard Act ("RSA"), 20 U.S.C. §§ 107-107f, regarding the involvement of the Business Enterprise Consumer Committee ("BECC") in the litigation decisions as to the Chemeketa Community College vending contracts; and
3. OCB, a state agency, is not immune under the Eleventh Amendment from an award of monetary damages under the RSA or Oregon law.

Opinion and Order 19 (May 31, 2017), 3:14-cv-00843-YY, ECF #89. The case was remanded to the Department of Education arbitration panel ("panel") to determine the amount of petitioner's compensatory damages and attorney's fees, if any. Judgment of Remand, 3:14-cv-00843-YY, ECF #90.

Following remand, the arbitration panel rendered its Findings of Fact, Conclusions of Law, and Award on June 26, 2018. Petition, Ex. 1, ECF #1. Thereafter, on July 10, 2018, petitioner filed his Supplemental Petition and Declaration in Support of Attorney Fees, Costs, and Expenses, and the panel issued its Final Order on July 19, 2018. *Id*., Exs. 2, 9.

On October 19, 2018, petitioner filed a Petition for Review of Final Agency Action Following Remand to Arbitration Panel with this court. Petition, ECF #1. Petitioner has raised eight assignments of error, which he contends entitle him to additional compensatory damages. *Id.* ¶¶ 14-21.

OCB has filed a Cross-Petition for Review of Final Agency Action and Answer and Affirmative Defenses. Cross-Petition, ECF #16. OCB alleges the affirmative defenses of (1) sovereign immunity, (2) waiver, and (3) continued preservation of defenses raised in defense of prior petition for review. *Id.* ¶¶ 15-17. OCB also raises two assignments of error: that (1) the RSA does not abrogate GCB's sovereign immunity, and (2) the RSA does not provide for prevailing party attorney's fees. *Id.* ¶¶ 23-25.

II. Relevant Standards

A. Rule 12(b)(6): Failure to State a Claim

Rule 12(b)(6) permits a motion for "failure to state a claim upon which relief can be granted." Generally, the purpose of a motion to dismiss for failure to state a claim under Rule 12(b)(6) "is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "A complaint may be dismissed as a matter of law for one of

two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim." *Robertson. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

Here, a petition and cross-petition have been filed, instead of a complaint. Nonetheless, Rule 12(b)(6) and other federal rules of civil procedure apply. *See* FRCP 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81."). Therefore, in resolving petitioner's Rule 12(b)(6) motion to dismiss, this court determines whether GCB's affirmative defenses and assignments of error lack a cognizable legal theory or insufficient facts under a cognizable legal claim.

B. Rule 12(c): Judgment on the Pleadings

A party may move for judgment on the pleadings after the pleadings are closed but early enough not to delay trial. FRCP 12(c). "Analysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6) because, under both rules, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1155 (9th Cir. 2015) (citation and quotation marks omitted). Accordingly, "[a] judgment on the pleadings is properly granted when, taking all allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (quotation marks omitted).

Petitioner contends that respondent's affirmative defenses must meet the heightened pleading standards required pursuant to *Bell Atl. Corp. v. Twombly*, 550

U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Mot. 3-4, ECF #18. There is no consensus in this district on that issue. *See Estate of Marjorie Gail Thomas Osborn-Vincent v. Ameriprise*, 3:16-cv-02305-YY, Findings and Recommendations 6-7 (January 3, 2019) (discussing cases), adopted by Opinion and Order (February 25, 2019). Some cases have held that *Iqbal/Twombly* applies. Others have followed *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979), in which the Ninth Circuit held that "[t]he key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense." In any event, it is unnecessary to decide which standard applies in this case for the reasons discussed below.

C. Rule 12(f): Motion to Strike

Rule 12(f) provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The decision to grant or deny a Rule 12(f) motion to strike is within the court's discretion. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 963 (9th Cir. 2018).

A matter is redundant if it is superfluous and can be omitted without a loss of meaning. *See Wilkerson v. Butler*, 229 F.R.D. 166, 170 (E.D. Cal. 2005) (noting that a redundant matter is one that constitutes "needless repetition"). A matter is immaterial if it "has no essential or important relationship to the claim for relief or the defenses being plead." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994)). A matter is impertinent if it "consists of

statements that do not pertain, and are not necessary, to the issues in question." *Id.* (quoting *Fantasy*, 984 F.2d at 1527). A matter is scandalous if it "unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court." 2 MOORE'S FEDERAL PRACTICE § 12.37[3] (Bender 3d ed.).

"The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial[.]" *Whittlestone*, 618 F.3d at 973 (citation omitted). However, courts may not resolve disputed and substantial factual or legal issues in deciding a motion to strike. *Id.* Unlike a motion to dismiss under Rule 12(b), a Rule 12(f) motion does not test the sufficiency of the complaint. *Id.*; *see also Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). "The court must view the pleadings in the light most favorable to the non-moving party. . . . Any doubt concerning the import of the allegations to be stricken weighs in favor of denying the motion to strike." *Park v. Welch Foods, Inc.*, No. 5:12–cv–06449–PSG, 2014 WL 1231035, at *1 (N.D. Cal. March 20, 2014). A Rule 12(f) motion to strike "is disfavored and should only be granted if the asserted defense is clearly insufficient as a matter of law under any set of facts the defendant might allege." *Griffin v. Gomez*, No. C 98-21038 JW (NJV), 2010 WL 4704448, at *4 (N.D. Cal. Nov. 12, 2010); *see also* 5C Fed. Prac. & Proc. Civ. § 1381 (3d. ed. 2004) ("Motions to strike a defense as insufficient are not favored by the federal courts because of their somewhat dilatory and often harassing character.") (footnotes omitted).

III. First Affirmative Defense and First Assignment of Error: Sovereign Immunity

In its first affirmative defense, OCB asserts that "[s]overeign immunity bars Petitioner's claim against OCB for monetary damages." Cross-Pet. ¶ 15. Similarly, in its first assignment of error, OCB contends that "money damages and attorney fees awarded against OCB, an agency of the State of Oregon, are barred by sovereign immunity." *Id.* ¶ 23. Petitioner argues that OCB's first affirmative defense and first assignment of error should be dismissed because they are precluded by binding Ninth Circuit precedent and law of the case.

A. Doctrine of Law of the Case

"The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs." *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990) (*citing Lockert v. U.S. Dept. of Labor*, 867 F.2d 513, 518 (9th Cir. 1989). "Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court[.]" *Id.* The doctrine "concerns courts' general practice of refusing to reopen questions previously decided in the same case." *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 601 (9th Cir. 1991). For the doctrine to apply, the issue in question must have been "decided explicitly or by necessary implication in [the] previous disposition." *Milgard*, 902 F.2d at 715.

However, the doctrine "is not a limitation on [the courts'] power." *Rent-A-Ctr.*, 944 F.2d at 602. It is an "equitable doctrine that should not be applied if it would be unfair." *Id.* Application of the doctrine is discretionary. *Milgard*, 902 F.2d at 715. "A court may

have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

B. Analysis

In its May 31, 2017 Opinion and Order, this court held that "Eleventh Amendment sovereign immunity does not apply to arbitration proceedings under the RSA and does not preclude an award of compensatory damages against OCB by the arbitration panel." Opinion and Order 15 (May 31, 2017), 3:14-cv-00843-YY, ECF #89. In reaching its decision, this court applied binding Ninth Circuit precedent set forth in *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997).

In *Premo*, the Ninth Circuit found "the evidence that Congress conditioned state participation in the Randolph-Sheppard program on consent to federal judicial enforcement of compensatory awards is overwhelming." *Id.* at 769. The court arrived at this conclusion based on the terms of the RSA itself:

> The statute explicitly requires participating states to agree to a number of conditions. Specifically, each state agency "shall . . . agree" to provide any dissatisfied blind vendor with the opportunity for a fair hearing and "to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration." 20 U.S.C. § 107b. The statute further provides that arbitration "shall be final and binding on the parties." 20 U.S.C.

> § 107d-1(a) (emphasis added). In addition, the arbitration decision "shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such title 5 [5 U.S.C. §§ 701-706 of the APA]." *See* 20 U.S.C. § 107d-2. The APA provides that "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703. Thus, by requiring the states to submit to "binding" arbitration, and by providing for appeal and review under the APA, the Randolph-Sheppard Act unequivocally guarantees that arbitration awards will be judicially enforceable.

Id. at 770-71. The court held that "these statutory provisions . . . reflect participating states' consent to the enforcement of arbitration awards in federal court." *Id.* at 771. Although "the Act does not specifically designate federal courts as the proper tribunals for the enforcement of such awards[,]" "the mere possibility of state court enforcement satisfies the statute's command that arbitration must be binding." *Id.*

The Ninth Circuit's holding in *Premo* could not be more unequivocal. The court found "[t]he State's position that the Eleventh Amendment deprives Randolph-Sheppard arbitration panels of the authority to award compensatory relief is wholly unsupported." *Id.* at 769 (emphasis added).

> Under these circumstances, there is no "room for any other reasonable construction" of the statute. . . . The overwhelming implication of the statute is that by agreeing to participate in the Randolph-Sheppard program, states

> have waived their sovereign immunity to enforcement of such awards in federal court.

Id. at 771.

The Third Circuit reached the same conclusion in *Delaware Dep't of Health & Soc. Servs. v. U.S. Dep't of Educ.*, 772 F.2d 1123 (3d Cir. 1985). There, the court held that "Delaware has entered into a contractual relationship with the United States, and is thus bound under the terms of the Randolph-Sheppard Act to arbitrate [the] claim." *Id.* at 1137. In rejecting the contention that sovereign immunity applied, the court stated:

> Delaware, by applying to participate in the Randolph-Sheppard program, has agreed to the remedies which that program requires. Assuming without deciding that the amendment has any possible application to proceedings before arbitrators—a proposition hardly supportable by the text—such application plainly has been waived by Delaware when, after full notice of the Act's requirements, one of which was an agreement to arbitration, it voluntarily made application with the Secretary to participate in the Randolph-Sheppard program. *Parden v. Terminal Ry.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964); *Petty v. Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959). The waiver of sovereign immunity with respect to arbitration could hardly have been made more clearly.

Id. at 1137-38.

Although this court has previously decided this issue, OCB invites the court to reconsider its ruling in light of a 2018 decision from the Tenth Circuit, *Tyler v. United States Dept. of Education Rehabilitation Servs. Admin.*, 904 F.3d 1167 (10th Cir. 2018). In *Tyler*, the district court affirmed an RSA arbitration panel award of damages and attorney's fees to a blind vendor. *Id.* at 1173. The Tenth Circuit reversed, holding that the Supreme Court's decisions in *Federal Maritime Commission v. South Carolina State Ports Authority* ("*FMC*"), 535 U.S. 743 (2002), and *Sossamon v. Texas*, 563 U.S. 277 (2011), compelled a determination that sovereign immunity extends to RSA arbitration proceedings.

This court has previously rejected GCB's arguments that *Premo* was abrogated by the Supreme Court's decisions in *FMC* and *Sossamon*. Opinion and Order 13-15 (May 31, 2017), 3:14-cv-00843-YY, ECF #89. Nevertheless, at respondent's request, the court reexamines the issue. As it did before, the court first turns to Ninth Circuit case law for guidance on how to handle "the sometimes very difficult question of when [the court] may reexamine normally controlling precedent in the face of an intervening United States Supreme Court decision." *Miller v. Gammie*, 335 F.3d 889, 892 (9th Cir. 2003) (*en banc*). "It is not enough for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to 'cast doubt' on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (citations omitted). Rather, "[t]he intervening higher precedent must be 'clearly inconsistent' with the prior circuit precedent." *Id.* (citation omitted). This is a "high standard." *Id.* Both

the circuit and Supreme Court cases must be "closely on point." *Miller*, 335 F.3d at 899 (citations and quotation marks omitted). The issues "need not be identical in order to be controlling." *Id.* at 900. "Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.*

In *FMC*, the Supreme Court considered "the question whether state sovereign immunity precludes [FMC] from adjudicating a private party's complaint that a state-run port has violated the Shipping Act of 1984[.]" 535 U.S. at 747. The private party in that case was a cruise ship operator, which asked the South Carolina Ports Authority for permission to dock its ship in the Port of Charleston. The Ports Authority declined the request because passengers would be permitted to gamble on board the cruise ship. The cruise ship operator thereafter filed a complaint with the FMC, claiming that the Ports Authority's refusal violated the Shipping Act.

The Supreme Court held that sovereign immunity applied to FMC adjudications. *Id.* at 753. The Court examined whether FMC adjudications were "the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union," and noted that "the similarities between FMC proceedings and civil litigation are overwhelming." *Id.* at 756, 759.

The Court went on to recognize that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Id.* at 760. "The founding generation thought it 'neither becoming nor convenient

that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Id.* (quotation omitted).

> Given both this interest in protecting States' dignity and the strong similarities between FMC proceedings and civil litigation, we hold that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State. Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC. . . . The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court. In both instances, a State is required to defend itself in an adversarial proceeding against a private party before an impartial federal officer.

Id. at 760-61.

However, as discussed in this court's previous opinion, *FMC* is not "closely on point" with *Premo*. Opinion and Order, 14 (May 31, 2017), 3:14-cv-00843-YY, ECF #89. Importantly, in *FMC*, the state had not opted into a federal statutory scheme such as the RSA—something that the Ninth Circuit expressly considered and relied upon in *Premo*. As the Ninth

Circuit stated, "by requiring the state to submit to 'binding' arbitration, and by providing for appeal and review under the APA, the Randolph-Sheppard Act unequivocally guarantees that arbitration awards will be judicially enforceable." 119 F.3d at 770-71. Thus, *FMC* does not "undercut the theory or reasoning underlying" *Premo* "in such a way that the cases are clearly irreconcilable." *Miller*, 335 F.3d at 900.

Nor does *Tyler* contain analysis that persuades this court to change its previous recommendation. In *Tyler*, the Tenth Circuit held that the "[t]he RSA's mandatory arbitration scheme . . . affronts states' dignity because it effectively 'compel[s] a State to [answer private complaints] before the administrative tribunal of an agency.'" 904 F.3d at 1187. However, the Tenth Circuit did not specifically address the fact that states have the choice of opting into the RSA—the central premise of the decisions in *Premo* and *Delaware*. As petitioner correctly observes, *Tyler* fails to address the "essentially contractual" relationship between the state licensing agency and blind vendor that allows an arbitration panel to award compensatory relief, including attorney fees. Reply, 8 (citing *Delaware*, 772 F.2d at 1137).

The Tenth Circuit also relied on *Sossamon*, which this court previously considered during the last go-around on this issue. Importantly though, as this court noted before, *Sossamon* analyzed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), not the RSA.

Sossamon, an inmate, sued the State of Texas and various prison officials in their official capacities under RLUIPA's private cause of action, seeking injunctive and monetary relief. 563 U.S. at 282. The

relevant provision of the RLUIPA provides that "[a] person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). "Government" includes, inter alia, States, counties, municipalities, their instrumentalities and officers, and persons acting under color of state law. 42 U.S.C. § 2000cc-5(4)(A). The Supreme Court concluded that the RLUIPA's use of the term "appropriate relief" is insufficient to constitute a waiver of sovereign immunity:

> RLUIPA's authorization of "appropriate relief against a government," § 2000cc-2(a), is not the unequivocal expression of state consent that our precedents require. "Appropriate relief" does not so clearly and unambiguously waive sovereign immunity to private suits for damages that we can "be certain that the State in fact consents" to such a suit.

563 U.S. at 285-86.

However, the RSA is distinguishable for the reasons identified by the Ninth Circuit in *Premo*. As the Ninth Circuit observed, the RSA provides that each state agency "shall . . . agree" to provide any dissatisfied blind vendor with the opportunity for a fair hearing and "to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration." 119 F.3d at 770 (citing 20 U.S.C. § 107b). The statute further provides that arbitration "shall be final and binding on the parties." *Id.* (citing 20 U.S.C. § 107d-1 (a)) (emphasis in original). Additionally, the RSA states that the arbitration decision "shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such title 5 [5 U.S.C. §§ 701-706 of the

APA]." *Id.* (citing 20 U.S.C. § 107d-2). The APA provides that "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." *Id.* (citing 5 U.S.C. § 703). "Thus, by requiring the states to submit to 'binding' arbitration, and by providing for appeal and review under the APA, the Randolph-Sheppard Act unequivocally guarantees that arbitration awards will be judicially enforceable." *Id.* at 770-71.

Moreover, the holding in *Sossamon*—that "[w]aiver may not be implied"—is nothing new. 563 U.S. at 284; *see, e.g.*, *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) (recognizing the "traditional principle that the Government's consent to be sued 'must be 'construed strictly in favor of the sovereign,' . . . and not 'enlarge[d] . . . beyond what the language requires'") (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1997), and *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (quoting *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927)). In fact, *Premo* recognizes long-standing Supreme Court case law that "waiver will be found 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" 119 F.3d at 770 (quoting *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990)) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). Applying that well-established principle, the Ninth Circuit nevertheless found "the evidence that Congress conditioned state participation in the Randolph-Sheppard program on consent to federal judicial enforcement of compensatory awards is overwhelming." 119 F.3d at 770 (emphasis added).

In sum, the "high standard" established by the Ninth Circuit has not been met. *Lair*, 697 F.3d at 1207. It is not enough for an intervening Supreme Court case to "cast doubt" on Ninth Circuit precedent. *Id*. While *Tyler* and other cases have reached a different result,[1] *Premo* remains binding on this court. *See O.D. Jennings & Co. v. Maestri*, 22 F.Supp. 980, 983 (E.D. La. 1938), *decree aff'd*, 97 F.2d 679 (5th Cir. 1938) ("The obligation of a district court to follow the decision of its own Circuit Court of Appeals is of course too fundamental to require other than mere statement.").

Thus, with respect to GCB's first affirmative defense and first assignment of error based on sovereign immunity, OCB has failed to state a cognizable legal theory and petitioner is entitled judgment as a matter of law and dismissal under Rules 12(b)(6) and 12(c). Because amendment would be futile, the dismissal should be with prejudice. Rulings to this effect would

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[1] *See New Hampshire v. Ramsey*, 366 F.3d 1, 21-22 (1st Cir. 2004) ("At best, there is disagreement as to whether the R-S Act arbitration panels can award damages, with reasoned arguments made on both sides."); *Wisconsin Dep't of Workforce Dev. v. U.S. Dep't of Educ.*, 667 F.Supp.2d 1007, 1015 (W.D. Wis. 2009) (holding that agreeing to arbitration under RSA means that states can be found liable for violations of the Act and subject to some form of relief, but does not mean that they are required to submit to awards of money damages); *Tennessee Dep't of Human Servs. v. U.S. Dep't of Educ.*, 979 F.2d 1162, 1168 (6th Cir. 1992) ("The text of the Randolph-Sheppard Act reflects neither an unmistakable intention by Congress to abrogate the states' sovereign immunity nor a clear statement that participation in the program will constitute a waiver of immunity."); *McNabb v. United States Dep't of Educ.*, 862 F.2d 681, 683-84 (8th Cir.1988) (refusing to enforce compensatory damages awarded by Randolph-Sheppard arbitration panel, in per curiam judgment with each judge writing separately).

make petitioner's alternative motion under Rule 12(f) moot.[2]

IV. Second Affirmative Defense: Attorney's Fees Under RSA

Petitioner also moves to dismiss OCB's second assignment of error in which it contends that "[e]ven if sovereign immunity did not bar an award of attorney fees against OCB, the RSA does not provide for prevailing party attorney fees." Cross-Petition, ¶ 25.

In *Delaware*, the Third Circuit held that, although the RSA does not expressly address prevailing attorney's fees, congressional intent supports a finding that such fees are allowed:

> It must be answered by determining what Congress intended—or perhaps might have said had the precise issue been addressed—when it required participating states to contract on the terms it specified. . . . The overall congressional intent is clear enough, and is characterized by an unusually heightened concern for persons handicapped by blindness who could, with help, become self-sufficient. The evolution of the Randolph-Sheppard Act from 1936 through 1974 shows increasing concern that the contractual remedies available

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[2] The parties spend quite a bit of briefing on the issue of whether OCB is foreclosed from asserting sovereign immunity because it failed to appeal this court's 2017 judgment. Mot. 7-9; Resp. 4-5. However, it is unnecessary to decide whether this court's 2017 judgment was a final order that should have been appealed. The fact remains that this court is bound by *Premo*.

> to those vendors be expeditious and completely effective. Although the statute does not deal specifically with pre-arbitration legal expenses, the overall scheme strongly suggests that the states must undertake to make blind vendors whole for breaches of the contractual obligations imposed on them by virtue of participation in the Federal Blind Vendors Program. Unlike the back pay remedy discussed in part III A, the fee question is, in our judgment, a close one. We conclude on balance that the undertaking of the states participating in the Randolph-Sheppard program is to make blind vendors whole for state breaches of contract, and that an award of attorneys' fees as contract damages is, in this unique circumstance, an appropriate means to that end.

772 F.2d at 1139 (emphasis added).

In *Premo*, the parties did not "dispute that, as a matter of statutory construction, the Randolph-Sheppard Act gives arbitration panels the authority to award compensatory relief." 119 F.3d at 769. Citing *Delaware*, the Ninth Circuit nonetheless noted it was "widely recognized" that the arbitration provisions of the RSA permitted the arbitration panel to "award compensatory relief." *Id.* at 769-70 (citing *Delaware*, 772 F.2d at 1137 (noting that "the statutory language is unambiguous" in allowing compensatory relief); *Tennessee*, 979 F.2d at 1165 ("The natural reading of these provisions is that the arbitration panel may consider and resolve any complaint of a vendor arising out of the program, including a complaint that the state agency has taken money to which the vendor is

entitled.")). "In drawing this conclusion, courts have emphasized that the prevailing conception at the time the Act was passed was that arbitral resolution of disputes involved awards of back pay and other forms of compensatory relief." *Id.* at 770 (citing *Delaware*, 772 F.2d at 1136; *Tennessee*, 979 F.2d at 1165). On this basis, the *Premo* court upheld the arbitration panel's award, which included attorney's fees. *Id.* Thus, respondent's second assignment of error is foreclosed by *Premo*, and petitioner's motions to dismiss under Rule 12(b)(6) and Rule 12(c) should be granted.[3]

V. Second Affirmative Defense: Waiver

OCB also asserts a "second affirmative defense" of "waiver," specifically, that petitioner has "waived any issue or argument not raised to the arbitration panel." Cross-Pet. ¶ 16. "Waiver" is included in the non-exhaustive list of affirmative defenses in Rule 8 (c)(1). It is the voluntary, intentional relinquishment of a known right. *Slep-Tone Entm't Corp. v. Wired for Sound Karaoke & DJ Servs., LLC*, 676 F. App'x 654, 656 (9th Cir. 2017) (cited pursuant to Ninth Circuit Rule 36-3). Waiver constitutes an affirmative defense that must be raised in responsive pleadings. *Id.* "The purpose of such pleading is to give the opposing party notice of the [affirmative defense] and a chance to argue, if [it] can, why the imposition of an [affirmative defense] would be inappropriate." *Id.* (quoting *Blonder–*

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[3] Other jurisdictions have held otherwise. *See, e.g., Schlank v. Williams*, 572 A.2d 101, 110 (D.C. 1990) (finding there is no statutory basis under RSA for an award of attorneys' fees). However, those cases are not binding on this court.

Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971)).

Petitioner contends that respondent's waiver defense is insufficient because "[s]imply stating that an opposing party has waived 'any issue or argument not raised' does not provide the 'fair notice' required under FRCP 8." Mot. 14. Respondent provides no response to this argument in its opposing brief.

Nevertheless, this portion of petitioner's motion should be denied. While OCB has not made clear what it contemplates petitioner could assert in terms of new issues and arguments, that is likely because, at this stage of the case, OCB is unaware of what new issues and arguments petitioner might raise. Otherwise stated, that information is in currently in petitioner's hands. Requiring OCB to provide more specificity at this point would be requiring it to speculate. Accordingly, petitioner's motion with respect to the second affirmative defense should be denied.

VI. Third Affirmative Defense: Preservation

Respondent's third affirmative defense is entitled "Continued Preservation of Defenses Raised in Defense of Prior Petition for Review." Cross-Petition, ¶ 17. OCB more specifically asserts that it "continues to preserve all defenses it raised in related District Court Case Number 3:14-cv-00843-YY for purposes of appeal to the Ninth Circuit upon entry of a final judgment in this case." *Id.*

This "preservation" defense is vague. It also appears to be neither an affirmative defense nor a negative defense. "[A]ffirmative defenses, if proven, shield the defendant from liability even if the plaintiff

can prove her case; negative defenses simply assert that the plaintiff cannot prove her case." *Ear v. Empire Collection Authorities, Inc.*, No. 12-1695-SC, 2012 WL 3249514, at *2 (N.D. Cal. Aug. 7, 2012); *see also Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense."). If anything, this "affirmative defense" is not a defense but more an argument that respondent would make on appeal that it preserved its claims for review. Accordingly, because this "affirmative defense" lacks any cognizable legal theory, petitioner's motion to dismiss under Rule 12(b)(6) and Rule 12(c) should be granted.

RECOMMENDATIONS

Petitioner's motion to dismiss (ECF #18) should be granted in part and denied in part as follows:

(1) Petitioner's Rule 12(b)(6) and Rule 12(c) motions to dismiss against OCB's first and third affirmative defenses and first and second assignments of error should be granted. As amendment would be futile, the dismissal should be with prejudice.

(2) Petitioner's motion to dismiss the second affirmative defense should be denied.

(3) Petitioner's alternative motion to strike pursuant to Rule 12(f) should be denied as moot.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Monday, March 25, 2019. If no objections are filed,

then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED March 11, 2019.

/s/ Youlee Yim You
United States Magistrate Judge

FINAL ORDER OF THE DEPARTMENT OF EDUCATION (JULY 19, 2018)

UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION

In the Matter of the Arbitration Remand

JERRY BIRD,

Complainant,

v.

OREGON COMMISSION FOR THE BLIND,

Respondent.

Case No. R-S/11-05

Duplicate Original

This Final Order disposes of any and all claims, counterclaims, arguments, and contentions relating to the scope of the appeal and remand, the merits and the amount of damages. This matter is closed.

1. Attorney for Complainant has brought to the Panel's attention that a typographical error was contained at page 11, Section IV, paragraph 1 of the Panel's Findings of fact, Conclusions of Law, and Award. The figure of $81,400 is accordingly replaced with the figure $83,040. The total damages awarded

remain at $71,040. Complainant's request to reconsider the deduction for attorneys' fees that he will be reimbursed for is denied.

2. Complainant's request for prejudgment interest is denied.

3. Complainant's supplemental petition for attorneys' fees is granted in part, and denied in part. Complainant is awarded $30,415 in attorneys' fees representing all fees sought in Complainant's Supplemental Petition and Declaration in Support of Attorney Fees, Costs, and Expenses, with the exception of those incurred May 1, 2018, motion was not authorized by the Panel. Complainant is awarded is costs in the amount of $4,668.59.

Dated July 19, 2018.

/s/ Thomas Levak
Panel Chair

/s/ Peter Nolan
Respondent's Appointed Panel Member

/s/ Susan Rockwood Gashel
Complainant's Appointed Panel Member

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND AWARD
(JUNE 26, 2018)**

UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION

In the Matter of the Arbitration Remand

JERRY BIRD,

Complainant,

v.

OREGON COMMISSION FOR THE BLIND,

Respondent.

Case No. R-S/11-05

I. Background

Pursuant to the Randolph-Sheppard Act, 20 U.S.C. §§ 107 through 107f (R-S Act), an arbitration was convened in the above-captioned matter, as authorized by 20 U.S.C. § 107d-2. Complainant appointed Susan Rockwood Gashel as his arbitrator, and Respondent selected Peter Nolan as its arbitrator. Thomas Levak was selected as the neutral arbitrator.

A. The September 2013 Arbitration

An arbitration hearing took place September 24 and 25, 2013, at Portland, Oregon. The Panel, with Mr. Levak and Mr. Nolan concurring and Ms. Gashel dissenting, ruled, on March 24, 2014, summarized as follows:

1. The Oregon Commission for the Blind (OCB) does not have a right of first refusal on vending contracts/permits when its submits a reasonable bid for those contracts, thus allowing agencies subject to ORS § 346.530(2) to accept a "better offer" from a non-blind operated concern.

2. Vending contracts/permits entered into by OCB on property other than Federal property are not required, under the R-S Act, to be for an indefinite period of time.

3. OCB was not required to seek the active participation of the Business Enterprise Consumer Committee (BECC[1]) as to the contract/permit at issue concerning Chemeketa Community College (CCC) in this case, as it was not a major administrative decision affecting the overall administration of the Business Enterprise Program (BEP) operated by the OCB.

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[1] The BECC is the committee of blind vendors elected by all vendors in a State program is required by 20 U.S.C. § 107b-1(3) to, *inter alia,* participate with OCB, "in major administrative decisions and policy and program development."

4. As Complainants did not prevail on any of their contentions they are not entitled to an award of damages or attorneys' fees.

B. Mr. Bird's Appeal to the United States District Court for the District of Oregon

On May 22, 2014, Mr. Bird filed his appeal of the Panel's decision in the United States District Court for the District of Oregon, Case No. 3:14-cv-00843-YY, as authorized by 20 U.S.C. § 107d-1(a). On February 24, 2017, Magistrate Judge Youlee Yim You issued Findings and Recommendations (You Findings and Recommendations), summarized as follows:

1. The requirement pertaining to indefinite permits applies only to Federal properties.
2. The Panel ruling regarding the participation of the BECC at to the contract/permit at issue should be affirmed.
3. The Panel's decision that a "better offer" may be accepted by an agency subject to ORS § 346.530(2) should be reversed.
4. Mr. Bird is entitled to retrospective compensatory relief, and he should be awarded damages in the amount of $54,000 plus reasonable attorneys' fees and costs, together with pre and post order interest on the award at the federal statutory rate, and $2,000 per month thereafter until such time as the OCB regains the vending facility at issue and restores it to Mr. Bird or finds suitable alternative vending opportunities for Mr. Bird.

Thereafter, Mr. Bird and OCB each filed objections to portions of the Finding and Recommendation.

C. District Court Order; Authority of Panel

The Hon. Ann J. Brown's May 31, 2017 Opinion and Order in the United States District Court for the District of Oregon, Case No. 3:14-cv-00843-YY (Order) remanded this case to the Arbitration Panel. The Order is summarized as follows: (1) With respect to the "better offer" interpretation of ORS § 346.530(2), the Court agreed that Oregon law creates a right of first refusal for vending services by blind vendors; (2) Eleventh Amendment sovereign immunity does not apply to arbitration proceedings under the R-S Act and does not preclude an award of compensatory damages against OCB by the arbitration panel. Accordingly, the case was remanded to this Panel to: 1) "to determine the amount of Plaintiff's compensatory damages, if any" (Order, p. 20) and to support any determination with "factual findings or legal conclusions" (Order, p. 17); and (2) "to determine whether Plaintiff is entitled to an award of attorneys' fees; and if so, to determine the amount of attorneys' fees to which the plaintiff is entitled (Order, p. 20), and to make "factual findings or legal conclusions" in support thereof (Order, p. 18). The Panel was reappointed and on February 8, 2018 a hearing was held in Portland Oregon, pursuant to the Order.

II. Findings of Fact

A. Compensatory Damages

1. OCB, in its April 20, 2018 Closing Brief, argues that Mr. Bird waived his claim for damages,

because he failed to request them in his complaint for arbitration. The Panel concludes that the Order addressed this issue in its ruling that:

> the Court has already agreed with the Magistrate Judge that OCB violated Oregon law; that OCB does not have sovereign immunity under the circumstances; and, therefore, that Plaintiff is entitled to compensatory damages.

Order, p. 17. Accordingly, the Panel concludes that OCB's waiver argument is moot.

2. OCB next argues that there is "no basis to conclude that any failures of OCB caused Mr. Bird to lose income from CCC." The Panel concludes that the Order addressed this issue in its ruling that: "Oregon law creates a right of first refusal for vending services by blind vendors" (Order, p. 12), and its adoption of the Magistrate's decision that "the OCB has an express legislative charge to ensure that its licensed blind vendors 'operate vending facilities in or on any public buildings or properties'" and its failure to object to the cancellation of the CCC contract are failures that caused Mr. Bird to lose income from CCC. You Findings and Recommendation, p. 34. Accordingly, the Panel concludes that this second argument is likewise moot.

3. OCB argues that it "provided Mr. Bird with additional and comparable opportunities." Based on testimony adduced at the hearing, Mr. Bird's operating agreements submitted as evidence by OCB, and monthly reports provided to OCB by Mr. Bird, the Panel finds OCB did provide such additional and comparable opportunities beginning in July 2014. Accordingly, the Panel computes Mr. Bird's retrospective damages as

set out below, and finds that Mr. Bird is not entitled to prospective damages, including statutory interest.

4. The contract with CCC was terminated in August 2011. Transcript of hearing in R-S/11-05 of February at page (TR) 62, lines (I.) 4-10. The operating reports submitted by Mr. Bird to OCB, and contained in OCB Ex. R 20 document that, for the years 2012, 2013, and 2014, Mr. Bird's net proceeds from the vending facilities assigned to him were $25,124, $34,003, and $40,278, respectively. Thereafter, in the years 2015, 2016, and 2017 his income increased significantly, to $111,825, $92,310, and $97,181 respectively. The Panel finds that the increase in income was due to the assignment of vending facilities to Mr. Bird by OCB.

5. According to Complainant's Exhibit (C Ex.) 57, Mr. Bird is presently assigned, for the period commencing 12/31/2017 and terminating 12/31/2019, vending facility Salem Vending Route #2447 (Salem route). C Ex. 57, Ex. A is a list of 25 sites associated with the Salem Route. Mr. Bird's uncontroverted testimony is that he does not have machines at all 25 sites, although he was awarded the sites, OCB did not obtain permits for all sites. TR 60, I. 12-15, I. 19-23. Mr. Bird's uncontroverted testimony is that after CCC terminated the CCC contract in 2011, he received some facilities in the Salem route, and one facility, Bonneville Dam, that is not in his area. TR 73, I. 5-12. Mr. Bird testified that he would have been able to acquire additional sites in the Salem route even if the CCC contract/permit had not been terminated. TR 73, I. 19-22. Mr. Bird also testified that OCB makes the final decision as to areas and facilities that are awarded to him or to any other blind vendor. TR 59, I. 19.-23.

6. On cross-examination, Mr. Bird testified that he received a number of additional facilities since losing the CCC location, and that he has a larger number of facilities then he did at the time of losing CCC. TR 92, I. 16-19. The Panel finds credible the testimony of Mr. Morris that, from the time he began employment at OCB in December 2012, he has been giving Mr. Bird business to make up for the loss of the CCC contract. TR 267, I. 21-25.

Based on C Ex. 58, Mr. Morris testified that the following facilities were granted to Mr. Bird, beginning in early 2013: Bonneville Dam, Tigard Police Department, Immigration and Naturalization, Oregon Employment Department Eugene UI Center, Oregon State Hospital, Junction City, University of Oregon. TR 287-298.

7. Vance Hoddle, Regional Vice President of Canteen Division of Compass Group USA testified that Canteen Division currently has a contract with CCC for vending rights. TR 123. Mr. Hoddle also testified that if OCB had a contract with CCC and Mr. Bird was assigned to that contract, that Canteen would guarantee $32,000 annually in commissions to Mr. Bird. TR 128, I. 3-10.

8. The Panel finds that monthly damages are to be computed based upon the testimony of Certified Public Accountant William Holmes, who was accepted as an expert without objection from OCB. TR 148, I. 18-20. Mr. Holmes calculated the monthly value of lost profits to be $2,595. C Ex. 62. The panel finds that Mr. Holmes' conclusion was a reasonable calculation of the monthly value of lost profits.

9. For a nine-month period, from January 2011 through October 2011 (no operating report was provided for May 2010), Mr. Bird's average monthly net proceeds were $4,416. For November and December 2011, monthly net proceeds dropped to $3,132. In 2012, monthly net proceeds averaged $2,284. In 2013, monthly net proceeds averaged $2,833. For the first six months of 2014, monthly net proceeds averaged $1,606. For the second six months of 2014, monthly net proceeds averaged $5,106. This upwards trend in monthly net proceeds continued in 2015 ($9,318), 2016 ($7,692), and 2017 ($8,098).

10. Accordingly, the Panel finds that Mr. Bird is entitled to damages computed at a monthly rate of $2,595 for the following months: November and December 2011, January through December 2012, January through December 2013, and January through June 2014, a period of 32 months, for an amount of $83,040.

11. Mr. Bird testified that he paid $12,000 to the Harris law firm for arbitration attorneys' fees for trying to get CCC back from being removed without cause. TR 96.

B. Attorneys' Fees

12. In its opening statement, OCB stated that it does not "dispute that Mr. Harris is entitled to be recognized as an experienced attorney and what the fees—general fees are in the Portland area . . . or even the hours that were spent." TR 34, I. 17-21. OCB does not "challenge the fee schedules of the three attorneys and the paralegal and the number of hours." TR 36. OCB clarified that it was not challenging the amount of $246,057, that "Mr. Harris has the ability to charge that and that these hours were spent," . . . that it is "not

challenging that specific issue." TR 40, I. 21-25, TR 41, I. 1-3.

13. Dacia Johnson, Executive Director, OCB, testified as to how an award of damages and attorneys' fees would affect OCB. TR 226-232. The panel finds that Ms. Johnson's testimony is irrelevant, given the narrow focus of the Panel's discretion pursuant to the Order.

14. The Panel finds that the fees of the attorneys representing Mr. Bird in this matter are reasonable, based on the hourly rates of other attorneys of similar skill and experience in Oregon. OCB is not challenging the hours spent, and the Panel finds the number of hours spent to be reasonable. The costs are found to be reasonable.

15. The Panel finds the total attorneys' fees and costs and related expenses of $262,739.37 to be reasonable.

III. Conclusions of Law

1. OCB claims that Mr. Bird failed to seek damages in the complaint, and thus waived the right to damages. OCB also brings forth arguments that have already been decided by the District Court, and which are outside of the authority of this Panel to determine. *See* Section I.C. above.

2. The Panel finds that OCB, as the state licensing agency pursuant to the R-S Act, is not precluded by the R-S Act, its implementing regulations, nor state law or regulations from determining that the community of blind vendors would have been best served by allocating some of the individual sites operated by Mr. Bird to other vendors.

3. The R-S Act requires that the SLAs "give preference to blind persons in need of employment" (20 U.S.C. § 107a(b)), provides for the SLAs to, with the approval of the appropriate federal agency, select the location and type of vending facility on Federal property (20 U.S.C. § 107a(c)), for the SLAs to collect vending machine income on Federal property pursuant to 20 U.S.C. § 107d-3 for the purpose of establishment of retirement or pension plans, for health insurance contributions and for provision of paid sick leave and vacation time for blind licensees. While the SLA cannot impose a limitation on "income from vending machines, combined to create a vending facility, which are maintained, serviced, or operated by a blind licensee" (20 U.S.C. § 107d-3(a)) the SLAs clearly have discretion to determine which vending machines will be combined to create a vending facility, and to assign a vendor to such facility, subject to regulations issued in accordance with 20 U.S.C. § 107b(5) and the committee of blind vendors "participation, with the State agency, in the development and administration of a transfer and promotion system for blind licensees." 20 U.S.C. § 107b-1(2)(C).

4. Oregon's blind vending law expansively defines "public building" or property to mean "a building, land or other real property, or a portion of a building, land or other real property, that is owned, leased, managed or occupied by a department or an agency of the State of Oregon or by a political subdivision," with certain exceptions, not applicable in this case. Or. Rev. Stat. § 346.510(5). Accordingly, as a statutory matter, ORS can permissibly divide a public building or state property into smaller subdivisions. If OCB determines that certain vending facilities in the Salem area should be

allocated to other licensed vendors, it is entitled to do so, especially where a division can provide satisfactory income for a blind vendor.

5. Accordingly, the Panel concludes, based on the net proceeds earned by Mr. Bird after that date, and the OCB's discretion to allocate vending sites and/or machines so as to provide satisfactory income to blind vendors, that OCB provided Mr. Bird with sufficient sites to compensate him for the loss of the CCC contract.

6. In calculating the attorneys' fees, the Panel determined lodestar figures for Mr. Bird's counsel, Harris Berne Christensen LLP, by multiplying reasonable hourly rates by reasonable hours expended. There is a "strong presumption that the lodestar represents a reasonable fee[.]" *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992). The lodestar amount may only be adjusted "in 'rare' and 'exceptional' cases, such as when a particular factor bearing on the reasonableness of the attorney's fee is not adequately taken into account in the lodestar calculation." *Trimble v. Kroger Co.*, No. 3:17-CV-230, 2017 WL 6419115, at *2 (D. Or. Dec. 15, 2017), *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert denied,* 425 U.S. 951 The Panel concludes that there are no rare or exceptional circumstances that would warrant the adjustment of the lodestar, especially given that neither Complainant nor Respondent have sought an adjustment.

7. The factors to be considered in determining the reasonableness of the lodestar are:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3)

> the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

8. Having considered these factors, the Panel concludes that it has no factual or legal basis to deny Harris Berne Christensen LLP's claim for attorneys' fees and costs, and accordingly, grants same.

IV. Award

1. OCB shall pay compensatory damages to Jerry Bird in the amount of $81,400; the Panel deducts $12,000 from the award to Mr. Bird, for amounts he previously paid to Harris Berne Christensen LLP's, as he will be compensated for that amount in the award of attorneys' fees and costs, for a total award of $71,040.

2. OCB shall pay legal fees and costs in the amount of $262,739.37, together with all other reasonable fees and costs incurred in bringing about the implementation of the remedy ordered herein.

3. Mr. Bird's request to submit a supplemental attorney fee petition for approval to cover all fees and

expenses incurred following the hearing from February 8, 2018 through the date of the submission is granted. The supplemental petition is to be submitted within 14 days of the date of issuance of the decision by the United States Department of Education.

Dated June 26, 2018.

/s/ Thomas Levak
Panel Chair

Consenting to the amount of damages and attorneys' fees.

/s/ Peter Nolan
Respondent's Appointed Panel Member

I concur that the panel has correctly determined the amount of damages and attorney's fees, and that was our charge. I do not dissent from the panel's decision. I will file a dissent that the court was correct that damages are available.

/s/ Susan Rockwood Gashel
Complainant's Appointed Panel Member

Concurring with the decision of the Ninth Circuit and concurring with the amount of damages and attorneys' fees

PANEL MEMBER NOLAN'S DISSENT
(JUNE 26, 2018)

UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION

In the Matter of the Arbitration Remand

JERRY BIRD,

Complainant,

v.

OREGON COMMISSION FOR THE BLIND,

Respondent.

Case No. R-S/11-05

A. The District Court Erred by Finding That Monetary Damages Could Be Awarded to Altstatt

The District Court's Judgment violates the State of Oregon's sovereign immunity. The Eleventh Amendment of the United States Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens of any foreign state.

Although the Eleventh Amendment refers to the jurisdiction of federal courts to consider suits against a state by citizens of another state or a foreign state, it is settled law that the Eleventh Amendment re-affirmed the principle that individual states are sovereign and may not be sued by an individual without the state's consent.[1]

> As recently explained by the Supreme Court:
>
> Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts. For over a century now, this Court has consistently made clear that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" A State, however, may choose to waive its immunity in federal court at its pleasure,
>
> Accordingly, "our test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." A State's consent to suit must be "unequivocally expressed" in the text of the relevant statute. Waiver may not be implied.
>
> For these reasons, a waiver of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane*

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[1] *See Seminole Tribe v. Florida*, 517 U.S. 44, 53 (1996); *Hans v. Louisiana*, 134 U.S. 1(1890).

v. Peña, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996).[2]

In *Sossamon v. Texas,* (interpreting the Religious Land Use and Institutionalized Persons Act of 2000 (the "RLUIPA")), the Court held that even a statute that provides for "appropriate relief against a government" will not act to waive a state's immunity to money damages for violations of the statute.[3] The Court described the test for determining if sovereign immunity has been waived as a "stringent one" and held that "[a] state's consent to suit must be 'unequivocally expressed' in the text of the relevant statute" and that "waiver may not be implied."[4] The Court further held that "a waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign."[5]

In the specific federal statute at issue in *Sossamon,* the law authorized "appropriate relief against a government," and the Court held that in the context of a proceeding against a sovereign defendant, monetary damages are not appropriate relief.[6] "Where a statute is susceptible of multiple plausible interpretations, including one preserving immunity [from monetary damages], we will not consider a State to have waived its sovereign immunity."[7] Essentially, to find a waiver,

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[2] *Sossamon v. Texas,* 563 US. 277, 284 (2011)

[3] *Id.* at 285.

[4] *Id.* at 284.

[5] *Id.* at 285.

[6] *Id* at 287.

[7] *Id.*

the statute must include clear language expressly establishing that the waiver of sovereign immunity includes monetary claims.[8]

The Randolph-Sheppard Act includes no such express language, as demonstrated in the analysis found in *Wisconsin Dep't of Workforce Dev. v. United States Dep't of Educ.*, 667 F.Supp.2d 1007 (W.D. Wis. 2009). Although that case preceded the *Sossamon* decision discussed above, it applies a similar analysis to the R-S Act. There, the court noted that "[a]s in RLUIPA, the Randolph-Sheppard Act makes no reference to monetary relief or even to sovereign immunity generally."[9] The court found:

> The Randolph-Sheppard Act requires states to agree to consent to resolving disputes by arbitration proceedings as a condition of their participation in the program. Agreeing to arbitration means that states can be found liable for violations of the Act and subject to some form of relief; it does not mean that they are required to submit to awards of money damages. States should not be subject to damage awards that could expose them to potentially significant financial liability without being fully and clearly informed of this possibility.[10]

The court went on to expressly reject the Ninth Circuit's reasoning in *Premo v. Martin*, 119 F.3d 764

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[8] *Id.*

[9] *Wisconsin Dep't of Workforce Dev. v. United States Dep't of Educ.*, 667 F.Supp.2d 1007, 1014 (W.D. Wis. 2009).

[10] *Id.* at 1015.

(9th Cir. 1997), which allowed the award of monetary damages by Randolph-Sheppard arbitration panels, as "no longer good law."[11] As the analysis of the *Wisconsin* decision shows, *Premo is* undoubtedly incorrect under the Supreme Court's precedent in *Sossamon.* Under the *Sossamon* test for finding a waiver of sovereign immunity, arbitration panels convened under the R-S Act cannot award monetary damages of any kind against a state.

The District Court here reasoned that the state's agreement to submit to binding arbitration of any action arising from the operation of the vending facility program was the unequivocal textual expression required to waive sovereign immunity from monetary relief required by *Sossamon.* However, as in *Sossamon,* the Randolph-Sheppard Act makes no reference to monetary relief of any nature or even to sovereign immunity generally. Courts may not enlarge the waiver beyond what the language of the statute requires. *Nelson v. Miller*, 570 F.3d 868, 883-84 (7th Cir. 2009) citing *Lane v. Peña,* 518 U.S. 187, 192 (1996). Yet the District Court enlarged the waiver to resolve disputes about the operation of the vending program to encompass a waiver of immunity from money damages. Although arbitration might be read to include damage awards, it is at least plausible that it might not, as the differing opinions of the courts of appeals demonstrate.

> *Compare Premo*, 119 F.3d 764, and *Delaware Dept. of Health & Social Services*, 772 F.2d 1123, with *Ramsey*, 366 F.3d at 1, *Tennessee Dept. of Human Services*, 979 F.2d 1162

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[11] *Id.* at 1013.

> (Eleventh Amendment does not permit blind licensee to sue state in federal court for enforcement of arbitration award), and *McNabb*, 862 F.2d 681. States should not be held subject to damage awards that could expose them to potentially significant financial liability without being fully and clearly informed of this possibility. *Pennhurst State School & Hospital*, 451 U.S. at 17-18 (states must be 'cognizant of the consequences of their participation' in federal programs); *see also McNabb*, 862 F.2d at 686-87 (Fagg, J., concurring and dissenting) (stating that exposing states to monetary awards under the Randolph-Sheppard Act is 'entirely at odds with the principle that the congressional power to impose conditions on participating states rests on the indispensable requirement that its conditions are expressly articulated').

That different court of appeals have disagreed on the "unequivocal" nature of the expression, shows, as a matter of law, the equivocal expression of the waiver of sovereign immunity to monetary damages.

B. The District Court Erred by Finding That Attorneys' Fees Could Be Awarded to Altstatt

Likewise, the District Court's approval of an award of attorneys' fees runs afoul of the Eleventh Amendment for the same reason that the monetary award against Oregon is improper. Further, more than forty years ago, the Supreme Court decreed that the Judiciary will not create a general rule, independent of any statute, allowing awards of attorneys' fees in

federal courts.[12] The Supreme Court has held that Under the American Rule it is well established that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract proceeding therefore.[13] and, the Supreme Court expressly applied the American Rule to bar recovery of attorney's fees incurred during an administrative proceeding of the national Labor Relators Board.[14] The R-S Act does not provide for an award of attorneys' fees to a prevailing party, and therefore, the District Court erred when it allowed the award of attorneys' fees to Altstatt. Such a ruling up ends the American Rule and the prohibition of fee shifting absent a contract, statute, or exceptional circumstances.

/s/ Peter Nolan
Respondent's Appointed Panel Member

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[12] *See generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-49 (1975).

[13] *Summit Valley Indus., Inc.* 456 U.S. 717, 721 (1982).

[14] *Id.* at 721-22.

JUDGMENT OF REMAND OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (MAY 31, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JERRY BIRD,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATIONS SERVICES ADMINISTRATION, and the OREGON COMMISSION FOR THE BLIND,

Defendants.

No. 3:14-CV-00843-YY

Before: Anna J. BROWN,
United States District Judge

BROWN, Judge.

Pursuant to the Court's Opinion and Order issued May 31, 2017, the Court REMANDS this matter to the Department of Education Arbitration Panel for further proceedings consistent with this Court's Opinion and Order.

IT IS SO ORDERED.

DATED this 31st day of May, 2017.

/s/ Anna J. Brown
United States District Judge

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (MAY 31, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JERRY BIRD,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATIONS SERVICES ADMINISTRATION, and the OREGON COMMISSION FOR THE BLIND,

Defendants.

No. 3:14-CV-00843-YY

Before: Anna J. BROWN,
United States District Judge

BROWN, Judge.

Magistrate Judge Youlee Yim You issued Findings and Recommendation (#74) on February 24, 2017, in which she recommends this Court: (1) deny the Motion (#50) for Summary Judgment filed by Defendant Oregon Commission for the Blind (OCB); (2) vacate the Order of Defendant United States Department of Education

(DOE) Arbitration Panel issued March 17, 2014, denying Plaintiff Jerry Bird's request for a determination that OCB violated the requirements of state and federal law regarding the operation of vending facilities by blind vendors; and (3) award Plaintiff compensatory damages, including attorneys' fees and costs. Plaintiff and OCB have each filed timely Objections to portions of the Findings and Recommendation. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

For the reasons that follow, the Court ADOPTS in part and DECLINES to ADOPT in part the Magistrate Judge's Findings and Recommendations and REMANDS this matter to the Arbitration Panel as herein specified.

STANDARDS

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1). *See also Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*).

If no objections to the Magistrate Judge's Findings and Recommendation are timely filed, this Court is relieved of its obligation to review the record *de novo*, but reviews only the legal principles *de novo* for any errors. *Id.*

Because this is an appeal from an arbitration award under the Randolph-Sheppard Act (RSA), 20 U.S.C. § 107, *et seq.*, it is reviewed as an agency action under the Administrative Procedures Act (APA), 5

U.S.C. § 706. *Premo v. Martin*, 119 F.3d 764, 768 (9th Cir. (1997). The agency decision is "entitled to a presumption of regularity," and the court may not substitute its judgment for that of the agency. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1043 (9th Cir. 2015) (quoting *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 948, 950 (2015)). The court must uphold the agency action unless the court finds the decision was

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

5 U.S.C. § 706(2).

BACKGROUND

I. Regulatory Background

The RSA is a federal law that provides opportunities for blind persons who desire to operate

vending facilities on federal property. The stated purposes of the RSA are to "provid[e] blind persons with remunerative employment, [to] enlarg[e] the economic opportunities of the blind, and [to] stimulat[e] the blind to greater efforts in striving to make themselves self-supporting." 20 U.S.C. § 107(a). The Rehabilitation Services Administration within the DOE administers the RSA with the help of state agencies. 20 U.S.C. §§ 107a, 107b. These state agencies, referred to as "state licensing agencies" (SLA), issue licenses to blind persons to make them eligible to operate vending facilities on federal properties.

OCB is an agency of the State of Oregon responsible for providing services to Oregon citizens who are blind. Or. Rev. Stat. §§ 346.110-346.270. OCB is also the SLA responsible for administering the RSA in Oregon. OCB advocates to provide vending services in state public buildings or on public property on behalf of blind persons who are licensed under the Oregon state law sometimes referred to as the "Oregon mini-RSA." Or. Rev. Stat. §§ 346.510-346.570.

The Blind Enterprise Consumer Committee (BECC) is a group of elected managers from the blind-vendors community who actively participate with OCB in major administrative decisions and who affect the overall administration of the blind-vendors program and policies under the RSA and Oregon law. *See* 34 C.F.R. § 395.14.

Oregon Revised Statutes § 346.540(1) obligates OCB to: (1) look for locations in state public buildings or state properties suitable for vending services to be operated by persons who are blind; (2) make leases or licensing agreements with agencies or departments in such locations to establish vending facilities; (3)

select, train, license and establish qualified persons who are blind as managers of such vending facilities; and (4) adopt rules to assure the proper and satisfactory operation of such vending facilities.

Oregon Revised Statutes § 346.520 sets out the statutory preference for blind vendors in public buildings:

> (1) For the purposes of providing persons who are blind with remunerative employment, enlarging the economic opportunities of those persons and stimulating them to greater efforts to make themselves self-supporting with independent livelihoods, persons who are blind and who are licensed . . . shall operate vending facilities in or on any public buildings or properties where, in the discretions of the head of the department or agency in charge of the maintenance of such buildings or properties, such vending facilities may properly and satisfactorily operate.

Oregon Revised Statutes § 346.530 requires:

> (1) Each head of the department or agency in charge of the maintenance of public buildings or properties shall:
>
> (a) Periodically notify [OCB] in writing of any and all existing locations where vending facilities are in operation or where vending facilities might properly and satisfactorily be operated.
>
> (b) Not less than 30 days prior to the reactivation, leasing, re-leasing, licensing or issuance of permit for operation of any vending facility, inform [OCB] of such contemplated action.

. . .

(2) If [OCB] makes an offer to operate a vending facility under the provisions of this section and the offer is not accepted for reasons other than the decision to have no vending facility on the premises, such head of the department or agency shall notify the commission in writing of the reasons for refusing its offer, including but not limited to the terms and conditions of the offer which was accepted, if any.

(3) Any contract or agreements entered into subsequent to July 1, 1975, which is not in compliance with or in violation of ORS 346.2220 and 346.510 to 346.570, shall be null and void.

II. Factual Background

Plaintiff is a licensed blind vendor under the RSA and Oregon law. In late 2005 Plaintiff and OCB discussed the possibility of Plaintiff relinquishing his interest in a vending facility he operated at the Oregon Lottery in exchange for interests in other vending facilities, including Chemeketa Community College.

In July 2006 OCB entered into an agreement with Chemeketa to provide vending services, but Plaintiff and OCB were "in a standoff" over the assignment of the vending contract at Chemeketa to Plaintiff. Instead OCB contracted with Courtesy Vending to provide these vending services from July 1, 2006, through June 30, 2007. The OCB/Courtesy contract also required Courtesy to pay commissions on the gross sales to OCB. In the summer of 2006 Plaintiff filed a grievance with OCB regarding this dispute, and OCB appointed an arbitration panel to resolve Plaintiff's grievance.

In 2007 OCB entered into a five-year agreement with Chemeketa regarding the operation of vending services at their facilities, and Plaintiff was assigned the vending rights under this agreement. This agreement gave OCB the exclusive right to operate food and coffee vending services at the Chemeketa main campus and required a $100 per month payment to Chemeketa to be used to replace existing vending machines. The agreement also had a "no-cause" termination clause.

In 2008 Chemeketa entered into another contract with Northwest Innovations, Inc. (NWI) to provide food services at Chemeketa. At the same time NWI entered into a separate agreement with Pepsi Bottling for "pouring rights" for carbonated-beverage services at Chemeketa.

In July 2009 the arbitration panel that OCB appointed in 2006 to resolve Plaintiff's grievance at that time issued an award to Plaintiff. The panel found OCB had violated the RSA and ordered OCB (1) to pay Plaintiff an amount equal to net revenues from the Chemeketa contract retroactive to 2007, (2) to award Plaintiff the Chemeketa vending contract, and (3) to consult with BECC regarding further actions regarding vending that might become available at Chemeketa.

When OCB became aware of the Chemeketa contract with NWI following the July 2009 arbitration award, OCB contended Chemeketa had neither given OCB the notice required by Oregon law nor given OCB an opportunity to bid on these vending services as required by Oregon law. Despite negotiations this dispute was not resolved, and in March 2011 OCB filed a complaint in Marion County Circuit Court against Chemeketa alleging it failed to comply with Oregon

law and seeking to have the contracts nullified under Oregon law. Chemeketa settled the lawsuit by terminating the vending agreements, including the agreement with OCB that was managed by Plaintiff.

In July 2011 Chemeketa submitted all vending services for competitive bid, and OCB and two other private vending companies responded to the bid request. In August 2011 Chemeketa awarded the contract for all vending services to Courtesy Vending. Chemeketa provided written notice to OCB of the reasons for not accepting OCB's bid, including the fact that the Courtesy bid was a "better offer." Plaintiff and BECC encouraged OCB to protest Chemeketa's notice, but, based on advice from the Oregon Attorney General's Office that there was no valid basis to do so, OCB did not protest.

In August 2012 Plaintiff filed a complaint with the DOE in which Plaintiff contended OCB violated the provisions of the RSA and Oregon law. The Secretary of the DOE appointed an arbitration panel (Panel) to resolve Plaintiff's complaint. In September 2013 the Panel held a hearing. In March 2014 the Panel issued a decision in which it concluded OCB had not violated provisions of the RSA or Oregon law and that Plaintiff was not entitled to any award of damages or attorneys' fees. The Panel found specifically that:

1. "Chemeketa had the discretion under Oregon law to determine which bid was satisfactory to Chemeketa, and no violation of the law occurred when [OCB] did not challenge Chemeketa's discretion to select Courtesy Vending."

2. "[T]he law does not require that contracts for vending services on Other Property be for an indefinite period of time."

3. "[A]ctive participation by the BECC was not required" and was not "a major administrative decision affecting the overall administration of the program."

4. "Because Chemeketa has the discretion to award vending contracts to vendors presenting superior bids for those contracts, [OCB] was not obligated by state or federal law to try to stop or to prevent those vending contracts."

On May 22, 2014, Plaintiff filed this action for review of the Panel's decision and named OCB, among others, as a defendant. Plaintiff alleged the Panel erred in its decision that OCB had not violated the RSA or Oregon law. Plaintiff requested this Court set the Panel's Order aside and award him monetary damages together with attorneys' fees and costs.

On October 30, 2015, OCB filed a Motion (#50) for Summary Judgment.

On February 24, 2017, the Magistrate Judge issued her Findings and Recommendation (#74), and the matter was referred to this Court. On April 10, 2017, Plaintiff and OCB each filed Objections to the Magistrate Judge's Findings and Recommendation.

III. Magistrate Judge's Findings

The Magistrate Judge made the following Findings:

1. The RSA does not require permits for vending services on other properties to be issued for

an indefinite period, and the Panel was correct when it concluded OCB did not violate the RSA when it entered into an agreement with Chemeketa that contained a "no-cause" termination clause.

2. The Panel correctly concluded OCB is not required to allow BECC to actively participate in the litigation decisions regarding the Chemeketa vending contracts.

3. The Panel erroneously concluded Chemeketa has the discretion under Oregon law to refuse an offer by OCB in favor of a "better offer" by a non-blind vendor.

4. The Eleventh Amendment does not provide OCB, as an agent of the State of Oregon, with sovereign immunity from an award of damages in an arbitration proceeding under the RSA.

5. The Panel erroneously failed to award damages to Plaintiff.

Thus, the Magistrate Judge recommends this Court reverse the decision of the Panel, deny OCB's Motion for Summary Judgment, award Plaintiff damages of $54,000.00 plus reasonable attorneys' fees and costs, and award Plaintiff $2,000.00 per month until OCB regains the Chemeketa facility vending contracts on behalf of Plaintiff "or finds suitable alternative vending opportunities" for Plaintiff.

DISCUSSION

As noted, Plaintiff and OCB have each objected to portions of the Magistrate Judge's Findings and Recommendation.

I. Portions of the Findings and Recommendation to Which Neither Party Objects

Neither party objects to that portion of the Findings and Recommendation in which the Magistrate Judge concludes OCB did not violate the RSA when it entered into an agreement with Chemeketa that contained a "no-cause" termination clause. The Court, therefore, is relieved of its obligation to review the record *de novo* as to this portion of the Findings and Recommendation. *See Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009). *See also United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*).

Having reviewed the legal principles *de novo*, the Court does not find any error in this portion of the Findings and Recommendation.

II. OCB's Objections to the Findings and Recommendation

OCB concedes the Magistrate Judge correctly determined OCB did not violate the RSA by agreeing to operate the vending facilities at Chemeketa under a permit that allowed for "no-cause" termination and that OCB was not required to allow BECC to participate in OCB's litigation decisions regarding vending at Chemekata. OCB, however, objects to the Magistrate Judge's Findings and Recommendation that Oregon law requires a mandatory preference or right of first

refusal for blind vendors and an agency does not have the discretion to refuse an offer by OCB in favor of a "better offer." OCB also objects to the Magistrate Judge's recommended award of money damages and attorneys' fees on the grounds that (1) the Eleventh Amendment precludes an award of money damages against OCB as an agent of the state; (2) even if Plaintiff could recover damages, the record is incomplete and the issue of damages should be remanded to the Panel for determination; and (3) an award of attorneys' fees is premature and unwarranted under the law.

A. Right of First Refusal

The Panel found the language of Oregon Revised Statutes § 346.520 was ambiguous and does not create a right of first refusal when read in conjunction with Oregon Revised Statutes § 346.530. The Panel, therefore, concluded Chemeketa had the discretion to accept the "best offer" for vending services. The Magistrate Judge, however, finds the Panel incorrectly interpreted Oregon law based on principles of statutory construction, recommends reversal of the Panel's decision, and concludes Oregon law creates a right of first refusal for vending services by blind vendors. The Court agrees.

In its Objections to this portion of the Magistrate Judge's Findings and Recommendation, OCB merely reiterates the arguments contained in its summary judgment briefings and made at oral argument before the Magistrate Judge.

This Court has carefully considered OCB's Objections and concludes they do not provide a basis to modify the Findings and Recommendation. The Court also has reviewed the pertinent portions of the record

de novo and does not find any error in the Magistrate Judge's Findings and Recommendation.

B. Sovereign Immunity

The Magistrate Judge relied on Ninth Circuit precedent in *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997), to conclude that the Eleventh Amendment does not apply to RSA arbitration proceedings and does not preclude an award of compensatory relief. In *Premo* the Ninth Circuit held:

> We conclude that the Eleventh Amendment does not apply to Randolph-Sheppard arbitration proceedings and thus does not limit the authority of arbitration panels convened under the Act to award compensatory relief. In addition, we believe the overwhelming implication of the Act is that participating states have waived their sovereign immunity to suit in federal court for the enforcement of such awards.

119 F.3d at 769. OCB, however, contends subsequent holdings by the United States Supreme Court in *Federal Maritime Commission v. South Carolina State Ports Authority (FMC)*, 535 U.S. 743 (2002), and *Sossamon v. Texas*, 563 U.S. 277 (2011), abrogate *Premo*. This Court disagrees with OCB's contention.

In *FMC* the defendant filed a complaint with the Federal Maritime Commission against the South Carolina State Port Authority for violation of the Shipping Act, 46 U.S.C. § 1701, *et seq.*, after the Port Authority denied permission to berth one of defendant's cruise ships. An administrative law judge found the Port Authority was an arm of the state and entitled to

sovereign immunity. The Commission on its own motion reversed that decision and concluded sovereign immunity did not extend to executive branch proceedings. The Fourth Circuit reversed, and the Commission petitioned for review. The Supreme Court held state sovereign immunity precluded the Commission from adjudicating a private party's complaint against a nonconsenting state. As the Magistrate Judge correctly noted, the *FMC* court does not discuss waiver of sovereign immunity when a state opts into a federal statutory scheme, which was the central issue in *Premo*.

In *Sossamon v. Texas* a state prisoner brought a civil-rights action under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc, against prison officials who refused to allow the inmate to participate in religious services while on cell restriction and barred his use of the prison chapel. The district court granted summary judgment for the state on the ground that sovereign immunity barred the plaintiff's claim for monetary relief. The court of appeals affirmed and held the statutory phrase "appropriate relief against a government" in RLUIPA did not unambiguously notify the state that its acceptance of federal funds was conditioned on a waiver of sovereign immunity as to claims for monetary relief. The Supreme Court affirmed. The Supreme Court noted a state's consent to waiver of immunity must be "unequivocally expressed" in the text of the relevant statute, and RLUIPA's authorization of "appropriate relief against a government" is not an unequivocal expression of such consent. 563 U.S. at 285-86.

Here the clear language of the RSA that the state agrees to "submit grievances of any blind licensee . . . to arbitration" as authorized in the RSA is explicit consent to such a process that will be final and binding on the parties. 20 U.S.C. § 107d-1. *See also Premo*, 119 F.3d at 769. The *Premo* court also noted it was "widely recognized that this language permits arbitration panels to award compensatory relief." *Id.*

On this record the Court agrees with the Magistrate Judge that Eleventh Amendment sovereign immunity does not apply to arbitration proceedings under the RSA and does not preclude an award of compensatory damages against OCB by the arbitration panel.

C. Damages

OCB contends even if the Court finds sovereign immunity does not apply, the record is incomplete and the issue of damages should be remanded to the Panel for determination. OCB argues the question of damages was never decided by the Panel. In particular, OCB emphasizes it never had the opportunity to challenge the assumption that its actions caused Plaintiff to lose income or to present evidence that such loss should be offset by the money that Plaintiff earned in other employment.

Plaintiff responds that evidence submitted during the arbitration hearing regarding his income at the time of the Chemeketa contracts is sufficient to support an award of damages. Plaintiff also argues OCB failed to raise or even to brief the issue of damages before the Panel and, therefore, should be precluded from raising any objections to this Court's award of damages.

The Court notes Plaintiff's complaint for arbitration filed with the DOE on August 29, 2012, did not raise the issue of damages, but sought only an award of attorneys' fees and costs. Moreover, the record reflects the four issues identified by the Panel did not directly relate to an award of monetary damages, and, in fact, the Panel only addressed the legal issues arising from Plaintiff's allegations that OCB violated the RSA and/or Oregon law. The Panel's analysis resulted in its determination that OCB did not violate either. Consequently, the Panel summarily concluded Plaintiff was "not entitled to an award of damages or attorney fees."

The Court notes Plaintiff does not allege in his Complaint that the Panel's failure to award damages was an error, but asserted only that the Panel erred in its determination that OCB had not violated the RSA or Oregon law.

As noted, a court reviews decisions of an arbitration panel convened under the RSA as final agency actions under the APA. 20 U.S.C. § 107d-2(a). The standard of review applicable to agency actions depends on whether the challenged action rests on factual findings or legal conclusions. When a case is reviewed on the record of an agency, the agency's findings of fact must be upheld if they are supported by substantial evidence. 5 U.S.C. § 706(1)(E).

Here the record reflects the Panel did not make any finding or address the amount of damages that Plaintiff may have been entitled to if the Panel had determined OCB violated Oregon law and was not protected by sovereign immunity. Under the RSA, as noted, decisions by an arbitration panel are reviewable on the record as a "final agency action." Because the

Panel did not make any "factual findings or legal conclusions" as to the amount of damages, this Court concludes that issue is not ripe for review in this proceeding. *See* 5 U.S.C. § 706.

On this record the Court has already agreed with the Magistrate Judge that OCB violated Oregon law; that OCB does not have sovereign immunity under the circumstances; and, therefore, that Plaintiff is entitled to compensatory damages. The amount of Plaintiff's compensatory damages, however, was not addressed by the Panel in its Order and, therefore, cannot be the subject of this Court's review. Accordingly, the Court does not adopt the Magistrate Judge's recommendation to award Plaintiff damages in the amount of $54,000.00 and monthly income of $2,000.00.

D. Attorneys' Fees

OCB also objects to the Magistrate Judge's award of attorneys' fees on the ground that there is not any authority for such an award, but Plaintiff does not specifically respond to this Objection. The Court notes the Panel did not award attorneys' fees to Plaintiff in its Order.

Again, because the Panel did not make any "factual findings or legal conclusions" as to an award of attorneys' fees, that issue is not before this Court for review. *See* 5 U.S.C. § 706.

Accordingly, the Court does not adopt the Magistrate Judge's recommendation for an award of attorneys' fees to Plaintiff.

III. Plaintiff's Objections to the Findings and Recommendation

The Magistrate Judge upheld the Panel's determination that OCB was not required to allow BECC's active participation in the decisions regarding the Chemeketa contracts and, therefore, did not violate the RSA.

Plaintiff objects to this portion of the Findings and Recommendation and contends the arbitration decision in July 2009 required OCB to allow BECC to participate actively. According to Plaintiff, therefore, that decision is *res judicata* in this dispute. To support his position, however, Plaintiff merely reiterates the arguments contained in his summary-judgment briefs.

This Court has carefully considered Plaintiff's Objections and concludes they do not provide a basis to modify the Findings and Recommendation. The Court also has reviewed the pertinent portions of the record *de novo* and does not find any error in the Magistrate Judge's Findings and Recommendation.

SUMMARY

In summary, the Court concludes:

1. Oregon Revised Statutes §§ 346.520 and 346.530 provide for a right of first refusal for vending services by persons who are blind;

2. OCB correctly interpreted Oregon regulations and did not violate the RSA regarding the involvement of BECC in the litigation decisions as to the Chemeketa Community College vending contracts; and

3. OCB, a state agency, is not immune under the Eleventh Amendment from an award of monetary damages under the RSA or Oregon law.

CONCLUSION

The Court ADOPTS in part Magistrate Judge Youlee Yim You's Findings and Recommendation (#74) and, accordingly, DENIES Defendant Oregon Commission for the Blind's Motion (#50) for Summary Judgment to the extent that it seeks a determination that there is not a right of first refusal for vending services provided by blind vendors pursuant to Oregon law. The Court DECLINES to adopt the Findings and Recommendation (#74) for an award of monetary damages and attorneys' fees to Plaintiff as beyond the scope of this Court's authority to review agency action under the APA.

As explained herein and consistent with the Magistrate Judge's Findings and Recommendation, the DOE Arbitration Panel's decision is VACATED in part, and this matter is REMANDED to the Arbitration Panel to determine the amount of Plaintiff's compensatory damages, if any; to determine whether Plaintiff is entitled to an award of attorneys' fees; and, if so, to determine the amount of attorneys' fees to which Plaintiff is entitled.

IT IS SO ORDERED.

DATED this 31st day of May, 2017.

/s/ Anna J. Brown
United States District Judge

FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE YOULEE YIM YOU (FEBRUARY 24, 2017)

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

JERRY BIRD,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATION SERVICES ADMINISTRATION, and the OREGON COMMISSION FOR THE BLIND,

Defendants.

Case No. 3:14-cv-00843-YY

Before: Youlee Yim YOU,
United States Magistrate Judge.

YOU, Magistrate Judge:

INTRODUCTION

Plaintiff, Jerry Bird ("Bird"), appeals the decision of an arbitration panel convened by the Department of Education, Rehabilitation Services Administration

("DOE") to consider an Arbitration Complaint ("Complaint"), AR 1-4, filed by Bird and other blind vendors[1] under the Randolph-Sheppard Act ("RSA"), 20 U.S.C. §§ 107-107f. In the Complaint, the Business Enterprise Consumer Committee ("BECC")[2] asserted that the Oregon Commission for the Blind ("OCB") violated the RSA and its state law counterpart, the "Oregon mini-Randolph-Sheppard Act," ORS 346.510-.570 and ORS 190.110 ("Oregon mini-RSA"), by failing and refusing to take certain actions with respect to vending facilities on the campus of Chemeketa Community College ("CCC"). As a result, CCC did not award a vending contract to Bird or any other blind vendor.

After the filing of the Complaint, the DOE convened a three-person arbitration panel ("Panel"), which then conducted a hearing pursuant to 20 U.S.C. §§ 107d-1, 107d-2 and 34 U.S.C. § 395.13 on September 24 and 25, 2013. Following that hearing, the Panel issued a decision on March 24, 2014 ("Arbitration Order") (Complaint, Ex. 3). The Arbitration Order denied the relief requested and found that the OCB acted lawfully and did not violate the RSA. Complaint, Ex. 3, at 2-16.

On May 22, 2014, Bird filed this appeal under 20 U.S.C. § 107d-2. After Bird filed a Brief on Appeal

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[1] Additional complainants included Randy Houth, Miranda Lewanda, and Art Stevenson. However, Bird is the only plaintiff on this appeal of the arbitration decision.

[2] This is the "Elected Committee of Blind Vendors, in Oregon termed the Business Enterprise Consumer Committee," established by the RSA, 20 U.S.C. §§ 107b-1. Arbitration Complaint, ¶ 3; AR 1.

(ECF #44), the OCB filed a Motion for Summary Judgment (ECF #50). The American Council for the Blind and Randolph-Sheppard Vendors of America filed amicus briefs (ECF ##45, 53). Following a hearing on the matter, the parties filed additional briefing, copies of related state court pleadings, and supplemental materials regarding the legislative history of the Oregon mini-RSA (ECF ##57-59), the application for OCB's designation as the State Licensing Agency under the RSA (ECF #69), and related briefing (ECF ##71-73).

For the reasons that follow, this court concludes that the Arbitration Order should be vacated. The OCB's Motion for Summary Judgment (ECF #50) should be denied and judgment should be entered in favor of Bird.

REGULATORY BACKGROUND

The federal RSA and various Oregon statutes create a program for blind individuals to operate vending facilities on certain types of property. 20 U.S.C. § 107; 34 C.F.R. § 395; ORS 346.510-.570. The OCB is an agency of the State of Oregon responsible for providing services to Oregonians who are blind and is also the State Licensing Agency ("SLA") responsible for administering the RSA in Oregon. AR 5. Bird is a licensed vendor under the RSA. The Oregon mini-RSA obligates the OCB to:

> (a) Make surveys of public buildings or properties to determine their suitability as locations for vending facilities to be operated by persons who are blind and advise the heads of departments or agencies charged with the maintenance of such buildings or properties as to their findings.

(b) With the consent of the head of the department or agency charged with the maintenance of the buildings or properties, establish vending facilities in those locations which the [OCB] has determined to be suitable, and may enter into leases or licensing agreements therefor.

(c) Select, train, license and install qualified persons who are blind as managers of such vending facilities.

(d) Adopt rules as it may from time to time deem necessary to assure the proper and satisfactory operation of such vending facilities, and for the benefit of vending facility operators.

(e) Provide for the continued operation of established vending facilities if a qualified person who is blind is not available until a qualified person who is blind is available for assignment as manager.

ORS 346.540(1).

The OCB is entitled to written notice "of the reasons why consent is not given" to the establishment of vending facilities in locations determined suitable by the OCB from the "head of the department or agency charged with the maintenance of buildings or properties" ORS 346.540(2).

UNDISPUTED MATERIAL FACTS

Some time prior to 2003, CCC entered into a four-year contract with Northwest Innovations Inc. ("NWI") to provide food service management from January 1, 2003, through December 31, 2007. AR 797.

In late 2004, during the pendency of that contract, the OCB inquired of the Oregon Department of Justice ("ODOJ") whether a state agency may "make its receipt of a percentage of revenues from vending machines a condition of entering into a vending facility contract with the [OCB]" and whether the OCB's "refusal to pay a percentage of revenues, or refusal to pay as high a percentage as another bidder, constitute a valid basis for a state or local government agency to reject the [OCB]'s offer to operate a vending facility." AR 612, 823. The ODOJ responded on April 28, 2005. AR 823-27. On July 25, 2005, the ODOJ responded to follow-up questions specifically in relation to community college districts. AR 185-88. The ODOJ opinions state that "a public agency could decide to contract with another vendor instead of OCB if the agency received a better offer from the private vendor." AR 178. The opinions also state that "a better offer included receiving a higher commission than OCB was willing to pay." *Id.*

These inquiries coincided with a discussion between Bird and the OCB in late 2005 regarding Bird relinquishing his interest in a vending facility at the Oregon Lottery in exchange for other vending facilities. AR 609-10. As part of that discussion, the vending facilities both at CCC and at Santiam Correctional Facility ("Santiam") were discussed as possible venues which could make up the loss of income Bird would experience as a result of relinquishing vending facilities at the Oregon Lottery. *Id.*

Following receipt of the ODOJ's letters, the OCB "notified CCC that it wished to exercise its statutory rights *vis-à-vis* the vending on the CCC campuses."

AR 613. This resulted in a July 1, 2006 Intergovernmental Agreement between the OCB and CCC ("2006 OCB/CCC IGA") covering vending services on CCC campuses. AR 613, 832-40. The 2006 OCB/CCC IGA required the payment of commissions by the OCB to CCC on gross sales of 23% on beverages, 15% on candy/snacks, and 7% on cold foods. AR 832. The OCB, in turn, contracted with Courtesy Vending ("Courtesy") to provide those vending services from July 1, 2006, until June 30, 2007. AR 841-43 ("2006 OCB/Courtesy contract"). The 2006 OCB/Courtesy contract required the payment of commissions by Courtesy to OCB on gross sales of 27.5% on snacks, 10.1% on fresh foods, and 37.5% on hot beverages.[3] AR 841.

Beginning in late 2005, Bird and representatives of OCB's Blind Enterprises Program ("BEP") were in a standoff over the assignment of the vending contract at CCC. The thrust of that dispute was Bird's contention that the CCC vending contract was promised to him as part of his relinquishment of the vending facilities at the Oregon Lottery. Ultimately, Bird filed a grievance with the OCB in the summer of 2006, resulting in administrative proceedings spanning the next three years.

On April 13, 2007, the OCB and CCC executed a second IGA ("2007 OCB/CCC IGA") covering vending services at CCC from April 13, 2007, through April 13, 2012. AR 844-51. The 2007 OCB/CCC IGA gave the OCB the exclusive right to operate food and coffee

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[3] CCC "had an existing contract with Pepsi covering the cold beverages on the main campus; it agreed to give OCB a chance to bid on that vending when that contract came up for renewal." AR 613.

vending facilities at the CCC main campus, and food and beverage facilities at the CCC satellite campuses. AR 845. The OCB was not required to pay a percentage of gross receipts to CCC; instead, the OCB was entitled to all net revenues,[4] subject only to the payment of $100 per month to CCC to be set aside and used to replace the existing vending machines on the CCC main campus. *Id*. The 2007 OCB/CCC IGA also contained a termination clause permitting either party to terminate the IGA with or without cause upon 90 days' prior written notice to the other party. AR 66.

In November 2008, CCC entered into a contract with NWI to provide food services on CCC's campuses. AR 102-23. At the same time, NWI and CCC entered into a "Sponsorship Agreement" with Pepsi Bottling Group, LLC ("Pepsi") for "pouring rights" as the exclusive supplier of beverages on CCC campuses, in exchange for paying NWI 40% of gross revenue from carbonated beverages and 20% of gross revenue from non-carbonated beverages and energy drinks. AR 124-45. The Sponsorship Agreement was for a five-year term from October 1, 2008 through September 30, 2013. AR 126.

Bird's 2006 grievance ultimately resulted in arbitration proceeding before an Arbitration Panel, which issued a July 17, 2009 Arbitration Award finding that the OCB violated the RSA and, among other things, ordering that the OCB: (1) pay Bird an amount equal

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[4] OCB was entitled to "all revenues and proceeds from the operation of the vending machines" but was "responsible for all state and local taxes, licenses, permits, authorizations, and any other state and local requirements with regard to its ownership, use or operation of vending machines and provision of services under [the 2007 OCB/CCC IGA]." AR 845.

to the net revenues from vending at CCC retroactive to April 2007; (2) award Bird the vending contract at CCC; and (3) consult with the BECC regarding any further actions regarding any additional vending that may become available at CCC. AR 608-32.

At a meeting a few weeks after the 2009 Arbitration Award issued, the BECC agreed to award the CCC vending contract to Bird, and to award the cold beverage vending contract to "the manager" of vending at CCC (Bird) upon expiration of the Sponsorship Agreement. AR 896. However, upon learning that the term of the Sponsorship Agreement extended through the fall of 2013, Bird requested that OCB take "whatever action" was needed "to force CCC to be in compliance with all laws." AR 899.

The OCB concluded CCC had not complied with its duties to provide it with notice and an opportunity to bid on vending and food services opportunities. AR 2112. Despite lengthy negotiations to craft an IGA that both addressed the additional vending and food service opportunities and provided further financial benefits to the then-assigned vendor (Bird), no agreement was reached. AR 397-411. Instead, at an emergency meeting on March 22, 2010, the BECC directed the OCB to send a letter to CCC "declaring the current contract concerning all vending facilities at that location null and void, and that we take over those contracts." AR 904.

On March 23, 2010, in response to the BECC's recommendation, the General Counsel Division at the Oregon Attorney General's ("AG's") office sent a letter to the OCB urging careful consideration of its options. AR 173-88, 905-11. Noting that CCC had not followed the Oregon mini-RSA when it entered into the

Sponsorship Agreement, the AG's office cautioned that declaring the contracts null and void presented a variety of risks, not the least of which was uncertain and expensive litigation. AR 178-79.

After about a year of letters back and forth between CCC and the AG's office (AR 912-22), on March 10, 2011, the State of Oregon filed suit against CCC in Marion County Circuit Court. Bird's Notice of Lodging Supplemental Record (ECF #57), attaching AR 2131-71. The state-court complaint sought declaratory relief that CCC violated ORS 346.530(1) by failing to notify the OCB of potential vending opportunities and sought a declaration that the NWI/CCC contract was null and void. In response, on May 17, 2011, CCC removed all vending from its contract with NWI. AR 923. In addition, CCC terminated the CCC/OCB IGA, effective August 20, 2011. *Id*.

On July 14, 2011, CCC issued an RFP regarding vending services. AR 927-64. About a week later on July 22, 2011, six licensed blind vendors, including Bird, filed an "official complaint." AR 453. The OCB filed its RFP response on August 1, 2011. AR 985-1036. Ten days later, on August 11, 2011, in a hearing that lasted about 1.5 hours, the OCB conducted an Administrative Review (#11-01) "regarding the situation with [CCC] and Jerry Bird." AR 1037-57. Four days later, CCC awarded the contract to Courtesy. AR 1058-62. On August 17, 2011, CCC issued a letter rejecting OCB's RFP. AR 1063, 66.

ISSUES PRESENTED

Arbitral awards under the RSA are reviewed as an agency action under the standards of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *Premo v.*

Martin, 119 F.3d 764, 768 (9th Cir. 1997) (citing 20 U.S.C. § 107d-2). A bedrock principal that accompanies such review is that, in order to be considered by the court, an issue must have been raised at the administrative level. *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004) ("It is a well-known axiom of administrative law that 'if a petitioner wishes to preserve an issue for appeal, he must first raise it in the proper administrative forum.'") (quoting *Tejeda–Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980)). Therefore, this court can only consider issues that the parties raised below.

In each pleading Bird filed in this court, he raises seven Assignments of Error, one of which has nine subparts. Complaint and Appeal of Order (ECF #1), ¶¶ 16-22; First Amended Complaint and Appeal of Order (ECF #7), ¶¶ 16-22; Second Amended Complaint and Appeal of Order ("Second A/C") (ECF #15), ¶¶ 17-23. Both the DOE and the OCB contend that, with four exceptions specifically identified and addressed in the Arbitration Order, those issues were not raised below and are not preserved for appeal. Bird counters that multiple other related issues were properly raised, considered, and preserved. As discussed below, the scope of these proceedings is considerably larger than suggested by defendants but does not include one category of issues brought into this case only when Bird filed his pre-hearing brief before the Panel in September 2013.

In their July 22, 2011 "official complaint" initiating this case, Bird and the other complainants contended that the OCB had failed to: (1) allow the active participation or provide pertinent information to the BECC; (2) failed to take official action to "intervene by

injunction," as recommended by the BECC; (3) failed to protect the legal rights of the affected licensed blind vendor (Bird) and to preserve the integrity, structure, and intent of the Business Enterprise Program of Oregon; and (4) failed to protect the preference and right of first refusal. AR 453. That "official complaint," as well as the "administrative review hearing" on August 11, 2011 (AR 1037-57), took place after CCC issued its notice of termination of the 2007 OCB/CCC IGA (AR 923), but before CCC awarded the vending contract to Courtesy Vending, LLC, on August 15, 2011.

OCB Administrator, Linda Mock, opened the administrative review hearing by asking the complainants: "What specifically is your complaint regarding how the agency has handled the [CCC] situation?" AR 1037. Thereafter, the parties discussed multiple issues, including whether the "no cause" termination clause in the 2007 OCB/CCC IGA was permissible or discussed with the BECC prior to execution of that IGA (AR 1040, 1048), whether OCB was entitled to a "first right of refusal" on providing vending services at CCC (AR 1037, 1039, 1046, 1050, 1053-54), the intent of the Oregon mini-RSA to preclude agencies on public properties from forcing the OCB and licensed blind vendors into a competitive bidding situation versus enforcing their statutory preference (AR 1037-39, 1045, 1049), and whether the BECC—or even Bird, who was assigned as the licensed blind vendor at CCC—had been allowed to actively participate in decisions made concerning the CCC vending situation (AR 1043, 1054). They did not mention the issue of whether the payment of commissions could constitute a "better offer," which would then give CCC the right to reject the OCB's offer, likely because CCC had not yet

awarded the contract to Courtesy. However, the question of whether the OCB could be forced to "pay commissions just to have the right to . . . provide the service" was raised by the complainants as an issue they hoped would be addressed and could be addressed if, in fact, CCC rejected OCB's offer. AR 1044-45, 1050-51.

On August 18, 2011, a few days after CCC awarded the contract to Courtesy and rejected the OCB's offer, Serena Hewitt, Assistant Attorney General, advised Linda Mock that the OCB had no grounds upon which to contest the award of the vending contract to Courtesy. AR 552. In her view, "commissions were only one part of the overall score" and that "aside from the commissions, Courtesy simply made a better offer" and CCC "provided a detailed response to [OCB's] request for the reasons of denial." *Id*.

Based on other references in the record (*e.g.*, AR 515), Linda Mock apparently issued an Administrative Decision on August 26, 2011, and an Amended Notice of Contested Case and Opportunity for a Fair Hearing apparently was issued December 8, 2011. However, these documents are nowhere to be found in the administrative record.

On September 9, 2011, the complainants requested a hearing on their grievance which was referred to the Office of Administrative Hearings ("OAH"). AR 508. The parties proceeded on cross-motions for summary determination. On June 4, 2012, the OAH issued a Ruling on Motions for Summary Determination and a Final Order ("Summary Determination Order"). AR 508-41. The Summary Determination Order sets out the issues raised by the parties in their cross-motions (AR 509-10) and follows up with a lengthy legal analysis

adverse to the complainants, concluding that: (1) insertion of the "cancellation clause" (no cause termination in 2007 IGA) was not "illegal" and OCB had no legal basis to prohibit CCC from terminating the 2007 OCB/CCC IGA (AR 523-24); (2) ORS 346.530(2) permits the acceptance of a "better offer" as outlined in the 1975 AG's Opinion (AR 524); (3) "other property" is not included in the priority afforded on federal properties (AR 526 and 535-36); (4) the RSA does not apply to vending contracts between OCB and CCC (AR 526); (5) no "right of first refusal" applies to CCC and OCB had no authority to preclude CCC from issuing an RFP (AR 528-530); (6) the BECC was not entitled to be involved in discussions between OCB and its DOJ attorneys and that, to the degree OCB was required to keep the BECC informed of decisions, it met that obligation (AR 530-33, 537-38); and (7) the OCB had no obligation to pursue further litigation with CCC (AR 533-37).

Following the Summary Determination Order, complainants filed their Arbitration Complaint on August 29, 2012, which specifically requests findings on four issues.[5] AR 1-4. After a lengthy discussion at the arbitration hearing (AR 36-49), the parties agreed, and the Panel understood, to decide the four issues set forth in the Arbitration Complaint (AR 3) and summarized in the letter back from the DOE authorizing the convening of the arbitration (AR 5-6). Accordingly, the Panel decision sets out the following four issues:

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[5] The fifth issue, involving whether complainants were denied a full evidentiary hearing (AR 3) was ultimately not pursued when the arbitration hearing convened. AR 44-45.

1. Whether [CCC] is subject to the preference guaranteed by Oregon law, and to ORS 346.220, and whether the [OCB]'s actions failed to protect the preference in violation of state law or the [RSA].
2. Whether the burden is on [CCC] as a public agency to show that it is not subject to the blind vending facility preference imposed by Oregon law, and whether the [OCB] refused to insist that [CCC] adhere to the law in violation of Oregon and federal law.
3. Whether the [BECC] was allowed by the [OCB] to actively participate in a major program decision involving strategy on the [CCC] controversy, in violation of the [RSA].
4. Whether the [OCB] was obligated to object to, and prevent, [CCC's] contracts with both NWI, Inc. and Courtesy Vending, and was the [OCB's] failure to stop these contracts a violation of state law and the [RSA].

AR 2111.

However, the Arbitration Complaint also alleges that OCB entered into the 2007 OCB/CCC IGA that allowed termination without cause and "failed and refused to take further action against CCC," "should have taken action against CCC for terminating the OCB-CCC [IGA]; taken action to prevent the issuance by CCC of the [RFP] and award of contract to Courtesy Vending . . . [and] failed to allow the BECC to actively participate in strategic decisions on the entire CCC matter, in violation of the [RSA]." AR 1-2.

At the arbitration hearing, counsel for the complainants argued that the underlying cause of the OCB's failures, both to protect the preference and to afford the BECC active participation in major program decisions, was the failure of the OCB to enact any rules, regulations, or policies implementing the Oregon mini-RSA. AR 42-43. That is the substance of the nine issues identified both in complainant's pre-hearing briefing and part of the assignments of error in this appeal. AR 568-69; Second A/C, ¶ 23.

As had the "official complaint," the Arbitration Complaint focused on the 2007 OCB/CCC IGA and vending contract specifically, not on system-wide failures by the OGA to implement the blind vending program. Indeed, the "official complaint" specified that it related to the threat to a licensed blind vendor as a result of CCC's 90-day notice, and the relief requested in the Arbitration Complaint was narrowly focused on the CCC situation, requesting that the Panel:

> require . . . OCB to take legal and other action against [CCC] sufficient to protect the blind vending facility program and the blind vendor assigned to CCC, including a demand that any compensation, commissions, or benefits accruing to NWI, Inc. and Courtesy Vending be paid over to Jerry Bird, the assigned blind vendor, and a demand that CCC take such other actions as are necessary to bring it into conformity with Oregon law.

AR 3-4.

Nevertheless, in pre-hearing briefing, Bird identified nine specific violations, three of which challenge OCB's actions of failing and refusing to cooperate with

the DOE in applying the RSA in a uniform manner with respect to "other property," agreeing to an IGA that contained a "no-cause" termination clause, and failing to assert Bird's rights when CCC terminated the IGA. AR 569 ¶¶ (e)-(g). Each of these issues is within the scope of issues previously addressed in the Administrative Review Hearing before the OCB on August 11, 2011, and the Summary Determination Order issued by the OAH on June 4, 2012.

However, the remaining seven alleged violations are grounded in OCB's alleged failure and refusal to "promulgate rules and regulations." AR 568-69 ¶¶ (a)-(d), (h)-(i). At the arbitration hearing on September 24, 2013, Bird's counsel identified this as the central issue. AR 1609 ("This case primarily is about the fact that the [OCB] has fundamentally failed or refused to promulgate any written rules and regulations that meet the requirements of the [RSA]."). Yet, this is the first instance in which Bird or the other complainants alleged that the OCB's rulemaking efforts were insufficient to meet a statutory or regulatory mandate. In resisting OCB's efforts to carve the rulemaking issues out of this case, Bird asserts that the lack of objective guidelines and criteria leaves the blind vendors subject to the whims of managers and the uncertainty of shifting bureaucratic priorities, citing as an example the OCB's failure to consult with the BECC and misrepresent the existence of a nonexistent program.

Viewed in their favor, the record certainly supports the conclusion that the lack of comprehensive rules and regulations or other guidance has left all parties struggling to implement the relevant statutes and cooperate to improve the lot of the state's licensed blind vendors. However, this court is constrained by

the administrative record. Indeed, the one example cited is the subject of a separate administrative review that may still be ongoing. AR 1546-53 (Administrative Review Decision #11-03 dated March 28, 2012, regarding the "Partners in Excellence" program). Tempting though it may be to decide whether the OCB's rulemaking efforts have fallen short, this court concludes that the alleged lack of sufficient rulemaking is not properly part of this appeal.

This court concludes that, with the exception of six of the nine "rulemaking" issues raised in the seventh Assignment of Error (Second A/C, ¶ 23(a)(d), (h)-(i)), each of the issues raised in the pleadings is properly before this court. The issues that have been properly preserved are alleged in the Second Amended Complaint as follows:

(1) The Panel erred and exceeded its mandate and authority in interpreting and relying upon the statutory construction of Oregon Revised Statutes, as advocated by the OCB re: blind vendor programs. Second A/C, ¶ 17.

(2) The Panel erred in concluding that the OCB's interpretation and implementation of Oregon Revised Statutes re: blind vendor programs, complies with and meets the SLA's obligations under the RSA. *Id.* ¶ 18.

(3) The Panel erred when it concluded that CCC had discretion in awarding vendor contracts to employ the "better offer" criteria and that the OCB was not obligated to declare the CCC contracts with non-blind vendors null and void or otherwise challenge their legality. *Id.* ¶ 19.

(4) The Panel erred when it concluded that blind vendors' permits on "other property" in Oregon are not required to be indefinite in duration or, otherwise, terminable only for cause.[6] *Id.* ¶ 20.

(5) The Panel erred when it concluded the OCB was not required nor under any obligation to invite or allow the BECC to be involved with or otherwise actively participate in the CCC vendor contracting controversy.[7] *Id.* ¶ 21.

(6) The Panel erred when it concluded that the OCB was under no requirement or other obligation to prevent, challenge or otherwise object, on behalf of Oregon blind vendors, to the CCC contracts with non-blind vendors. *Id.* ¶ 22.

(7) The Panel erred when it failed to consider and find that OCB violated the RSA by:

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[6] Bird contends that OCB denied the BECC active participation when it inserted this clause into the 2007 OCB/CCC IGA in the first place; then erred when it did not challenge the termination of the 2007 OCB/CCC IGA; then erred again by allowing CCC to move forward with an RFP and not instead insisting that it had to be given a first right of refusal and instead add the additional vending to the 2007 OCB/CCC IGA.

[7] The focus of the debate in prior decisions was whether the BECC was entitled to be privy to attorney/client communications between the Oregon AG's office attorneys and the OCB. Bird more generally challenges the level of information (or complete lack of information) provided to the BECC and decisions made with no input by the BECC. Bird also asserts that a portion of this was already decided in his favor by the 2009 Arbitration Award entitling the BECC to active participation specific to vending opportunities of the magnitude of those at CCC.

(a) Failing and refusing to cooperate with the DOE Secretary in applying the "requirements of . . . [RSA] in a uniform manner" regarding "other property."

(b) Failing and refusing to take "effective action" to carry out full responsibility for the supervision and management of each vending facility in its "program" by agreeing to permits that contained a "no-cause" termination clause.

(c) Failing and refusing to take "effective action" to carry out full responsibility for the supervision and management of each vending facility in its "program" by allowing Chemeketa to exercise a "no-cause" termination clause in a permit and/or failing to take "effective action" to assert Jerry Bird's rights under the RSA when Chemeketa terminated his permit. *Id.* ¶ 22 (e-g).

LEGAL STANDARD

As mentioned above, an arbitral award under the RSA is reviewed as an agency action under the APA, 5 U.S.C. § 706. *Premo*, 119 F.3d at 768 (citing 20 U.S.C. § 107d-2). A court's review of agency action must be "'searching and careful.'" *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). However, the agency decision is "entitled to a presumption of regularity" and the court may not substitute its judgment for that of the agency. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1043 (9th Cir. 2015) (quoting *San Luis &*

Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 948, 950 (2015)). Instead, the court must uphold agency action unless it is found to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

5 U.S.C. § 706(2).

Agency action is arbitrary and capricious if the agency has

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation of the decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Ctr. for Biological Diversity, 807 F.3d at 1042-43 (quoting *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001)).

FINDINGS

Bird's preserved claims are addressed in turn below:

I. "No Cause" Termination Clause

Bird asserts that the OCB violated the RSA by agreeing to operate vending facilities at CCC under a permit that contained a "no cause" termination clause. ECF #44, at 20; *see also* Second Amended Complaint, ¶ 23 (f, g). Because, as the OCB correctly contends, the requirement pertaining to "indefinite" permits applies only to federal properties, Bird's claim fails.

A. Background Facts

On April 13, 2007, the OCB obtained a permit from CCC for the "exclusive right to operate food and beverage facilities" at CCC campuses. AR 844-45. The term of the agreement was from April 13, 2007 to April 13, 2012 unless "earlier terminated in accordance with its terms." AR 845. The agreement further stated that it "may be terminated upon mutual agreement of the parties in writing, or by either party, with or without cause, upon ninety (90) days' prior written notice to the other party." AR 847.

On July 17, 2009, Bird was awarded vending at CCC pursuant to an Arbitration Panel Award. AR 632. In September 2009, Bird began operating vending at CCC pursuant to the award. AR 1657-58. On May 17,

2011, CCC informed the OCB by letter that it was providing 90 days' notice that it was "terminating" its agreement with the OCB without cause effective August 20, 2011. AR 922. CCC further explained that the termination was in response to the State's lawsuit against CCC filed earlier that year. *Id.*

B. Analysis

The question is whether a permit to operate a vending facility at an "other property," such as CCC in this case, must be for an "indefinite period," as Bird contends, or whether this requirement exists only for federal properties, as the OCB contends. The answer to this question turns on statutory construction.

"'[T]he starting point for interpreting a statute is the language of the statute itself.'" *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 25 (1989) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The court interprets "statutory terms in accordance with their ordinary meaning, unless the statute clearly expresses an intention to the contrary." *United States v. Thomsen*, 830 F.3d 1049, 1057 (9th Cir. 2016). The court must "interpret [the] statut[e] as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Id.* (quoting *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991)). Notwithstanding the importance of the text itself, the court "'must avoid a literal interpretation of the statute that produces an "absurd" result.'" *Id.* at 1058 (quoting *United States v. Shill*, 740 F.3d 1347, 1353 (9th Cir. 2014)).

"Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme." *United States v. Lewis*, 67 F.3d 225, 228-29 (9th Cir. 1995) (citing *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990)). "Interpretation of a word or phrase . . . depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *United States v. Leal-Felix*, 665 F.3d 1037, 1042 (9th Cir. 2011) (*en banc*) (citation and internal quotation marks omitted)).

"Generally, [the court] may turn to legislative history for guidance only '[w]hen a statute is susceptible to two or more meanings.'" *Thomsen*, 830 F.3d at 1058 (citations omitted). "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." *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (citations and internal quotation marks omitted). Moreover, "'the plainer the language, the more convincing contrary legislative history must be.'" *Schroeder v. United States*, 793 F.3d 1080, 1085 (9th Cir. 2015) (quoting *Church of Scientology of Cal. v. U.S. Dep't of Justice*, 612 F.2d 417, 422 (9th Cir. 1979)).

The code provision at issue, 34 C.F.R. § 395.35(b), states: "The permit shall be issued for an indefinite period of time subject to suspension or termination on the basis of compliance with agreed upon terms." A "permit" is defined as "the official approval given a State licensing agency by a department, agency or instrumentality in control of the maintenance, operation, and protection of Federal property, or person in control of other property, whereby the State licensing

agency is authorized to establish a vending facility." 34 C.F.R. § 395.1(o).

Subsection 35(b) does not expressly state whether this "indefinite" period requirement applies to federal properties, other properties, or both. However, the context of subsection 35(b) shows that it applies only to federal properties. Subsection 35(b) is contained in Subpart C of 34 C.F.R. § 395, which is entitled "Federal Property Management." While "a subchapter heading cannot substitute for the operative text of the statute . . . statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'" *Fla. Dep't of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (quoting *Porter v. Nussle*, 534 U.S. 516, 528 (2002)) (remaining citation omitted).

Additionally, the code provisions contained in Subpart C clearly pertain only to federal properties. For example, subsection 30 pertains to the "location and operation of vending facilities for blind vendors on Federal property." Perhaps most importantly, subsection 34, which immediately precedes subsection 35, is entitled "Application for permits" and expressly pertains to applications for permits on federal properties. Subsection 35, which is entitled "Terms of permit," obviously follows up on those federal permit applications previously referred to in subsection 34. Thus, contrary to Bird's contention, subsection 35(b) pertains only to permits for federal property not to "other property," including CCC.[8]

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[8] While the regulations are not ambiguous, there is at least one plausible reason the legislature may have intended to create a distinction between federal and other properties. Other properties,

Bird points to code provisions pertaining to licenses in support for his claim that permits must be issued for an indefinite period of time. A license is "a written instrument issued by the State licensing agency to a blind person, authorizing such person to operate a vending facility on Federal or other property." 34 C.F.R. § 395.1(i) (emphasis added). 34 C.F.R. § 395.7(b) requires the state licensing agency to provide licenses for an "indefinite period" unless the agency finds the facility is not being operated in accordance with its rules and regulations. *See also* 20 U.S.C. § 107a(b) (each license "shall be issued for an indefinite period" but may be terminated by the state licensing agency if the facility is not being operated in accordance with agency rules and regulations).

However, "a vendor's license is distinct from his or her specific vending opportunities." ECF #50, at 25. As the court recognized in *Crocker v. Cal. Dep't of Rehab.*, No. 2:14-cv-01944-MCE-DAD, 2015 WL 106361, at *2 (E.D. Cal. Jan. 7, 2015), termination of a vending operating agreement "only affect[s] [the licensee's] existing operating agreement[ ]." The licensees "retain their vendor licenses and [are] able to bid on other vending contracts." *Id.*

Because the RSA does not require permits for other properties to be issued for an indefinite time period, the OCB did not violate the RSA when it entered into an agreement with CCC that contained a "no cause" termination clause.

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such as CCC in this case, might not as readily enter into agreements for indefinite periods of time. Requiring indefinite permits for non-federal properties could reduce vending opportunities, an outcome the legislature reasonably may have wished to avoid.

II. BECC Participation

Bird next claims that the Panel erred in finding that the OCB was not required to allow the BECC to actively participate in the OCB's litigation decisions regarding vending at CCC. ECF #44, at 29. The Panel's interpretation of the relevant rules and regulations was correct and its decision, therefore, should be affirmed.

A. Issue Preclusion

Bird contends that he prevails on this claim under the doctrine of issue preclusion. He asserts that the July 17, 2009 Arbitration Award, which states that the OCB "shall consult with the . . . [BECC] regarding any further actions vis-à-vis any additional vending . . . at Chemeketa" is binding on the OCB and resolves this claim. AR 632.

Defendants assert Bird failed to argue issue preclusion before the Panel and the argument is, therefore, unpreserved. ECF #49, at 4; ECF #50, at 14 n. 8. Bird concedes that he "did not specifically present the argument" in the arbitration proceeding, but contends that "because the issue is specifically addressed in the dissenting opinion," it was "passed upon" by the Panel and this court, therefore, should consider it. ECF #52, at 5-6.

"Generally, the preclusive effect of a former adjudication is referred to as '*res judicata.*'" *Robi v. Five Platters, Inc.*, 838 F.2d 318, 321 (9th Cir. 1988). "The doctrine of *res judicata* includes two distinct types of preclusion, claim preclusion and issue preclusion." *Id.*

The Supreme Court has held that *res judicata* is "an affirmative defense ordinarily lost if not timely

raised." *Arizona v. California*, 530 U.S. 392, 410, *supplemented*, 531 U.S. 1 (2000) (citing Fed. R. Civ. P. 8 (c)). The Supreme Court explained: "We disapprove the notion that a party may wake up because a 'light finally dawned,' years after the first opportunity to raise a defense, and effectively raise it so long as the party was (though no fault of anyone else) in the dark until its late awakening."[9] *Id*. Here, Bird failed to timely raise this issue before the Panel. Accordingly, he has lost his opportunity to assert it.

Bird also maintains that this court may apply the doctrine of issue preclusion because the Panel "passed upon" it. In support, Bird cites *Citizens United v. FEC*, 558 U.S. 310 (2010), in which the Supreme Court considered an issue that was raised for the first time on appeal because "it was addressed by the court below." *Id.* at 323 (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)). In doing so, the Supreme Court stated, "Our practice 'permit[s] review of an issue not pressed [below] so long as it has been passed

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9 The Supreme Court recognized that there are "special circumstances" in which a court might exercise its discretion to consider the issue of *res judicata sua sponte*. This is because *res judicata* is "not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *Id.* at 412 (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)). That special circumstance might be presented where the court has "previously decided the issue presented" and faced the "prospect of redoing a matter once decided." *Id.* However, "where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication." *Id.* at 412-13. Here, that special circumstance is not present as no judicial resources have been spent on previously deciding this issue.

upon. . . .'" *Id.* at 330 (quoting *Lebron*, 513 U.S. at 379). Bird also cites *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699 (D.C. Cir. 2009), in which the District of Columbia Circuit considered an unpreserved argument because the district court had "passed upon" it. *Id.* at 708.

In *Citizens United*, however, the unpreserved argument was addressed in the lower court's *majority* per curium opinion. 558 U.S. at 323 (citing *Citizens United v. FEC*, 530 F.Supp.2d 274, 277 (D.D.C. 2008), *as amended* (Jan 16, 2008)). Here, as Bird acknowledges, the issue was discussed only by the Panel's lone dissenter in a dissenting opinion. This court cannot be sure that the entire panel "passed upon" the issue when it is referred to only in the dissent, Bird never expressly presented the issue to the Panel, and it is not discussed in the majority opinion. While it is possible that the entire panel "passed upon" the issue, it is also possible that the lone dissenting panel member came up with this theory solely on her own. To assume that the entire panel "passed upon" the issue when in fact it did not would deprive the Panel of the first opportunity to consider the issue, as well as violate the well-established rule that arguments must be preserved for judicial review. For these reasons, the court should decline to consider whether this claim is controlled by the doctrine of issue preclusion.

B. Analysis

Bird's claim otherwise lacks merit. 20 U.S.C. § 107b-1 requires state licensing agencies to create a committee to represent all blind licensees in the state. The pertinent portion of the statute provides as follows:

> In addition to other requirements imposed in this title and in this chapter upon State licensing agencies, such agencies shall
>
> . . .
>
> (2) conduct the biennial election of a Committee of Blind Vendors who shall be fully representative of all blind licensees in the State program,[1] and insure that such committee's responsibilities include (A) participation, with the State agency, in major administrative decisions and policy and program development, (B) receiving grievances of blind licensees and serving as advocates for such licensees, (C) participation, with the State agency, in the development and administration of a transfer and promotion system for blind licensees, (D) participation, with the State agency, in developing training and retraining programs, and (E) sponsorship, with the assistance of the State agency, of meetings and instructional conferences for blind licensees.

(emphasis added).

The OCB adopted Business Enterprise Program Rules and Regulations ("Rules") pursuant to OAR 585-010-0015 in 2001. AR 636. Section XVIII(A)(1) of the Rules define the BECC and its duties as follows:

> 1. The Business Enterprise Consumer Committee (BECC) is a group of elected managers who actively participate with BEP staff in major administrative decisions and policy and program decisions affecting the overall administration of the program, including:

a. The development of policies which govern duties, supervision, transfer, promotion and financial participation of the managers; and

b. Setting out the method of determining the set-aside charges to be levied against the net proceeds of the managers[;]

c. Receive and transmit to the Commission grievances at the request of licensees and serve as advocates for such licensees in connection with such grievances

d. Actively participate with the Commission in the development of training and retraining programs for licensees, and

e. Sponsor, with the assistance of the Commission, meetings and instructional conferences for licensees within the state[;]

f. Meet at least bimonthly and more often if necessary.

AR 25-26 (emphasis added).

In its decision, the Panel noted that the Rules "define active participation" as "major administrative decisions and policy and program decisions affecting the overall administration of the program." AR 2118. The Panel further recognized that the Rules provided "examples of these major administrative decisions affecting the overall administration of the program." *Id.* The Panel concluded that "[n]one of those examples include negotiating a particular contract for a particular vendor or even litigating an issue for a particular vendor." *Id.* Rather, "[t]he examples are of issues which affect the overall administration of the program such as policies which govern duties, supervision, transfer,

promotion and final participation of all of the managers, not just one." *Id.* While Bird's litigation may have been "of interest to many managers," the Panel found "that is not the definition of a major administrative decision affecting the overall administration of the program." AR 2118-19. Otherwise stated, "[i]f the Commission is dealing with one manager's contract with a state agency, that is not a major administrative decision affecting the overall administration of the program." AR 2119. On that basis, the Panel concluded that "active participation by the BECC was not required" in Bird's litigation. AR 2118.

The Panel correctly interpreted the Rules. Section XVIII(A)(1) specifically defines active participation as decisions "affecting the overall administration of the program." All of the examples contained in Section XVIII(A)(1) pertain to situations that would affect all vendors, not a single vendor. As the OCB correctly argues, "[a]ctive participation was not required for the negotiations at issue here, which affected only a single vendor." ECF #50, at 21. The Panel's decision, therefore, should be affirmed on this claim.

III. "Better Offer"

Bird argues that the arbitration panel erred in adopting the OCB's interpretation of the Oregon mini-RSA, specifically where it found that an agency has the discretion to refuse an offer by the OCB if it has received a "better offer." Because the Panel incorrectly interpreted Oregon statutes in this regard, its decision should be reversed.

Several statutes and authorities are at issue here. First, ORS 346.520(1) provides:

> For the purposes of providing persons who are blind with remunerative employment, enlarging the economic opportunities of those persons and stimulating them to greater efforts to make themselves self-supporting with independent livelihoods, persons who are blind and who are licensed under the provisions of ORS 346.510 to 346.570 by the Commission for the Blind, as set forth in ORS 346.510 to 346.570, shall operate vending facilities in or on any public buildings or properties where, in the discretion of the head of the department or agency in charge of the maintenance of such buildings or properties, such vending facilities may properly and satisfactorily operate.

(emphasis added). The Panel found ORS 346.520(1) to be "somewhat ambiguous because on the one hand it states that licensed blind managers 'shall' operate vending facilities in public buildings, but on the other hand it modifies that 'shall' with the phrase 'where, in the discretion of the head of the department or agency in charge of the maintenance of such buildings or properties, such vending facility may properly and satisfactorily operate.'" AR 2114.

The Panel also relied on ORS 346.530(2), which provides:

> If the Commission for the Blind makes an offer to operate a vending facility under the provisions of this section and the offer is not accepted for reasons other than the decision to have no vending facility on the premises, such head of the department or agency shall

> notify the commission in writing of the reasons for refusing its offer, including but not limited to the terms and conditions of the offer which was accepted, if any.

The Panel concluded that "[t]his provision expresses the intent of the legislature that the head of the department or agency may decline the offer of the Commission to operate a vending facility for reasons other than a decision to have no vending facility on the premises." AR 2115. The Panel found that "[t]he head of an agency can decide that vending is appropriate but that in his discretion, the Commission's bid is not satisfactory because another bid is much better." *Id.* The Panel found support for this conclusion in a 1975 Attorney General Opinion (AR 814-822), which states in pertinent part:

> We think the language utilized [in ORS 346.520] does not allow the agency head discretion to refuse to permit the operation of a vending stand on public property merely because it is operated by a blind person.
>
> . . .
>
> [ORS 346.530(2)] makes it clear the agency head must consider the commission's offer. While it may be rejected, we believe there must be sufficient cause for such rejection which perhaps might be a better offer.

AR 817-18.

Oregon courts have not interpreted these statutes. Accordingly, this court must predict how the state's highest court would resolve this issue, applying Oregon law regarding statutory construction. *Giles v. Gen.*

Motors Acceptance Corp., 494 F.3d 865, 872 (9th Cir. 2007) ("Where the state's highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it.") (quoting *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (1986) *as amended* 810 F.2d 1517 (9th Cir. 1987)). Under Oregon law, the first step in statutory construction is "an examination of text and context" of the statute. *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042, 1050 (2009) (*en banc*). Whether or not there is an ambiguity in the statute, the court may also consider legislative history "where that legislative history appears useful to the court's analysis." *Id.* at 172, 206 P.3d at 1050. "[T]he extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine." *Id.* Otherwise stated, the court is obligated "to consider proffered legislative history only for whatever it is worth—and what it is worth is for the court to decide." *Id.* at 173, 206 P.3d at 1051. "If the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.* at 172, 206 P.3d at 1051.

The plain language of ORS 346.520(1) is unambiguous. It expressly mandates that blind vendors "shall operate vending facilities in or on any public buildings or properties." *Id.* (emphasis added). The only caveat is that "in the discretion of the head of the department or agency in charge of the maintenance of such buildings or properties, such vending facilities may properly and satisfactorily operate." *Id.*

The Panel misinterpreted this last clause to mean that a public agency has broad discretion to accept a "better offer." In doing so, the Panel ignored that the discretion lies with the individual "in charge" of "maintenance." The significance of this limitation is apparent when the entire statutory scheme is examined.

The terms "properly and satisfactorily" are repeated elsewhere in Chapter 346 in conjunction with the topic of maintenance. For example, ORS 346.530(1) requires the head of maintenance to periodically notify the OCB in writing of existing and potential locations where vending facilities might "properly and satisfactorily be operated":

> (1) Each head of the department or agency in charge of the maintenance of public buildings or properties shall:
>
> (a) Periodically notify the Commission for the Blind in writing of any and all existing locations where vending facilities are in operation or where vending facilities might properly and satisfactorily be operated.
>
> . . .
>
> (c) Inform the Commission for the Blind of any locations where such vending facilities are planned or might properly and satisfactorily be operated in or about other public buildings or properties as may now or thereafter come under the jurisdiction of the department or agency for maintenance, such information to be given not less than 30 days prior to leasing, re-leasing, licensing or issuance of permit for operation of any vending facility in such public building or on such property.

(emphasis added).[10] The head of maintenance is referred to again in ORS 346.540(1)(b) in conjunction with the locations of vending facilities:

> With the consent of the head of the department or agency charged with the maintenance of the buildings or properties, establish vending facilities in those locations which the Commission for the Blind has determined to be suitable, and may enter into leases or licensing agreements therefor.

The repeated reference to "maintenance" and "locations" in conjunction with the terms "properly and satisfactorily" indicates that the discretion mentioned in ORS 346.520(1) pertains solely to maintenance and location issues.

ORS 346.530(1)(a) is also important because it helps to explain the discretion referred to in ORS 346.520(1). ORS 346.530(1)(a) requires the head of maintenance to "periodically notify" the OCB about "existing locations" where vending facilities "might properly and satisfactorily be operated." Thus, the statute contemplates that the head of maintenance must exercise the discretion referred to in ORS 346.520(1) on an ongoing basis. In its decision, the Panel neglected to examine or recognize this language

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[10] As Bird argues, it logically follows from this statutory scheme "that the Oregon legislature wanted to ensure that as more licensed blind vendors were recruited, trained and licensed . . . that the OCB had, at all times, the most current and accurate data regarding the universe of possible suitable vending sites and nature of vending concession whether in existence or planned." ECF #44, at 48.

in ORS 346.530(1)(a), and instead inexplicably concluded that this discretion somehow applied to future prospects of a "better offer."

The legislature's choice of the word "proper" provides further support for the conclusion that this discretion pertains only to maintenance and location issues. "Proper" is defined as suitable or appropriate. *See State v. Turnidge*, 359 Or. 364, 383, 374 P.3d 853, 870 (2016) (equating "suitable" and "proper" with "appropriate") (citing *Webster's Third New Int'l Dictionary* 420 (unabridged ed. 2002)). It is a term regularly and historically used in Oregon cases and statutes in the context of safety-related issues in the workplace. *See, e.g., Knahtla v. Or. Short-Line & U.N. Ry. Co.*, 21 Or. 136, 144, 27 P. 91, 93 (1891) ("It is the duty of the master to exercise reasonable care to provide safe and proper appliances for the use of a servant . . . and, for a violation . . . he is liable in damages to an injured servant."); ORS 654.022 (requiring employers to do "everything necessary or proper" to comply with safety rules). The word "proper" is not a term that is normally connected with the concept of business dealings, contracts, or "better offers."

Thus, it is clear from the text and context of ORS 346.520(1) that blind vendors "shall operate vending facilities in or on any public buildings or properties" unless, in the discretion of the head of maintenance, a vending facility cannot be operated due to issues pertaining to maintenance and location.[11] This interpretation of ORS 346.520(1) is consistent with the mandate of the RSA, which requires that "priority

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[11] These issues do not have to be defined for purposes of this case but might include, for example, safety, repairs, public access, etc.

shall be given to blind persons licensed by a State agency." 20 U.S.C. § 107(b) (emphasis added). ORS 346.530(3) recognizes the importance of this mandate by nullifying contracts that are not in compliance with the Oregon mini-Act:

> Any contract or agreement entered into subsequent to July 1, 1975, which is not in compliance with or in violation of ORS 346.220 and 346.510 to 346.570, shall be null and void.

(emphasis added). As Bird argues, to read the Oregon mini-RSA in any other way creates only an illusory preference because "the intended beneficiaries of the preference, the blind and one of the most economically disadvantaged groups in society, enjoy such 'preference' only when they can otherwise compete with the sighted world of corporate vendors." ECF #44, at 39.

Given the plain language of the statutes, it is unnecessary to look at legislative history. However, legislative history also supports this conclusion.

On April 20, 1965, Clifford Stocker, Administrative Secretary for the OCB, testified before the Senate Committee on State and Federal Affairs regarding HB 1483, which was later codified as ORS 346.530(2). He explained that the purpose of requiring the agency to provide written explanation for refusing an offer is, in part, to "prevent[ ] any display of partiality against the blind":

> Mr. Clifford Stocker, Administrative Secretary for the Oregon State Commission for the Blind testified in support of HB 1483. Mr. Stocker stated that this measure would

> simply require any building or property manager who might turn down an application of the Commission to put his rejection of the Commission's application in writing setting forth his reasons for the rejection and affixing his signature thereto. The purpose of the bills he said, is to make sure that any application the Commission may submit for the establishment of a vending stand on public property will receive the thoughtful consideration of the manager of said property and will not be rejected because of any misunderstanding of the manager or failure on the part of the Commission to fully explain its vending stand program to the manager. It will, furthermore, materially assist in preventing any display of partiality against the blind. It should enhance the number of employment opportunities of this sort for the blind. Finally, it will enable the Commission to develop ways of overcoming various objections property managers may have to permit the establishment of such vending stands on the property under their management.

AR 1336. This legislative history says nothing about giving agencies broad discretion to accept another bid because it is "much better."

The legislative history also recognizes the "preference" to be accorded to blind vendors. On May 9, 1975, State Representative Stan Bunn spoke on the Oregon House floor on behalf of HB 2437, codified in ORS 346.530(3), the statute that nullifies contracts that are not in compliance with the Oregon mini-RSA. He repeatedly emphasized that the purpose of the statute

was to ensure that blind vendors received preferential treatment "first":

> and, third, and I think the most important provision of the bill, it provides that, in those cases where we have under existing state law a requirement that the blind be given preferential treatment in contracts for vending concessions in state facilities—that if that preferential treatment is not, in fact, given to blind persons first, that the contracts can be declared null and void, so that the blind persons would, in fact, have first opportunities at those contracts.

AR 1358 (emphasis added).

On April 23, 1975, Wally Menning of the Oregon Council for the Blind, in advocating for HB 2437 before the House Committee on Human Resources, also recognized that the preference for blind vendors was "already in the law":

> We wondered as to how much teeth this bill had and we asked the Attorney General for his opinion on the bill. . . . And, I think that I, individually, gave most of you people copies of this Attorney General's opinion. . . . It states, in effect, that we have a law that governs this[.] We are to be given preference, agencies are supposed to obey this preference, but, if they don't, there is nothing much that we can do about it. . . . And, so, we have inserted language that (inaudible) contract entered into in violation of that will be null and void. We like this way of approaching the problem, (inaudible) better than (inaudible)

> a Class C Felony, or, what have you, or (inaudible) fines or (inaudible) jail sentences, all the type of thing, because we don't think that that accomplishes anything. . . . We just want this preference recognized, which is already in the law. . . .

AR 1356 (emphasis added).

The OCB argues that the legislature had the AG's 1975 opinion in front of it when it made these statutory amendments, and its failure to take specific action to remedy the "better offer" issue is therefore significant. ECF #58, at 6. That fact is of less significance than the OCB believes. The AG's opinion was just that—an opinion. An AG's opinion "does not have the force and effect of law, and is clearly not binding[.]" *Matter of Sawyer*, 286 Or. 369, 381, 594 P.2d 805, 811 (1979). The fact that the legislature did not expressly address the AG's opinion is proof of nothing. If anything, it supports the view that the AG ultimately lacked any authority in determining this issue.[12]

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[12] The OCB also cites other, earlier legislative history from 1957, arguing that it suggests the Oregon mini-RSA does not contain such a strong preference for blind vendors. ECF #58, at 3-4. Specifically, the OCB cites to testimony by George Schmidt, a representative of the OCB, who stated that the "intent of the bill is to give blind people the preference to operate stands, providing it is feasible for them to do so." Minutes, House Comm. on Pub. Health and Welfare, HB 438, March 6, 1957, at 3 (AR 1278) (emphasis added). The OCB also cites testimony by Clifford Stocker, Administrator for the OCB who stated as follows:

> What the Commission is trying to do is sell the competence of blind people to the public and not make it a compulsory matter to hire the blind, or to make it a matter of sympathy. The prerogative is still within the authority of the particular management of the

In sum, the OCB has an express legislative charge to ensure that its licensed blind vendors "operate vending facilities in or on any public building or properties" in order to provide "persons who are blind with remunerative employment, enlarg[e] the economic opportunities of those persons and stimulat[e] them to greater efforts to make themselves self-supporting." ORS 346.520(1). However, hamstrung by the Oregon AG's 40-year-old opinion, the OCB did not object to CCC's cancellation of Bird's contract. The Panel's own reliance on the AG's 1975 opinion and erroneous interpretation of Oregon statutes was "not accordance with law" and its decision should be reversed. 5 U.S.C. § 706(2)(A).

IV. Damages

A. Sovereign Immunity

The OCB argues that "as an agency of the State of Oregon, [it] is immune from suit for money damages and retrospective injunctive relief in federal court." ECF #50, at 26. Binding Ninth Circuit precedent,

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> property that is being considered as a location for a vending stand.

Minutes, House Comm. on Pub. Health and Welfare, HB 438, April 10, 1957 (emphasis added) (AR 1283). Mr. Stocker later reiterated that "[t]he bill does not require that a blind person be hired but gives [an] opportunity [for] the Commission to present their program." Minutes, Senate Comm. on Pub. Health, HB 438, April 23, 1957, at 3 (AR 1284) (emphasis added).

This legislative history does not contradict ORS 346.520(1). Rather it recognizes that the preference to be given blind vendors is still subject to the discretion of the head of maintenance regarding where "vending facilities may properly and satisfactorily operate."

however, holds that by agreeing to participate in the RSA program, Oregon has waived sovereign immunity. *Premo*, 119 F.3d at 771.

The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This applies to suits against state agencies brought "by private parties seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). A state may waive its constitutional protection under the Eleventh Amendment, but the court "will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.'" *Id.* at 673 (citation and internal parentheses omitted).

In *Premo*, the Ninth Circuit held that "by agreeing to participate in the Randolph-Sheppard program, states have waived their sovereign immunity to enforcement of such awards in federal court." 119 F.3d at 771. The court found "the evidence that Congress conditioned state participation in the Randolph-Sheppard program on consent to federal judicial enforcement of compensatory awards is overwhelming." *Id.* at 770. The court noted that the RSA "explicitly" requires states to submit to "binding" arbitration and "unequivocally guarantees that arbitration awards will be judicially enforceable" by providing for appeal and review under the APA. *Id.* at 770-71. The court found these provisions "reflect participating states' consent to the enforcement of arbitration awards in federal court." *Id.* at 771

(emphasis in original). "The overwhelming implication of the statute is that by agreeing to participate in the Randolph-Sheppard program, states have waived their sovereign immunity to enforcement of such awards in federal court." *Id*.

The Third Circuit has agreed with the Ninth Circuit on this question. In *Del. Dep't of Health & Soc. Servs., Div. for Visually Impaired v. U.S. Dep't of Educ.*, 772 F.2d 1123, 1137-38 (3rd Cir. 1985), the Third Circuit held that "Delaware, by applying to participate in the Randolph-Sheppard program, has agreed to the remedies which that program requires." After "full notice of the Act's requirements," the state "voluntarily made application with the Secretary to participate in the Randolph-Sheppard program." *Id.* at 1138. "The waiver of sovereign immunity with respect to arbitration could hardly have been made more clearly." *Id.*

The Sixth Circuit reached the opposite result in *Tenn. Dep't of Human Servs. v. U.S. Dep't of Educ.*, 979 F.2d 1162 (6th Cir. 1992). The court held that the "text of the [RSA] reflects neither an unmistakable intention by Congress to abrogate the states' sovereign immunity nor a clear statement that participation in the program will constitute a waiver of immunity." *Id.* at 1168. "[I]t follows that a state enjoys sovereign immunity from a blind vendor's attempt to enforce an arbitration panel's award of retroactive damages in federal court." *Id.* The Eighth Circuit has done the same. *McNabb v. U. S. Dep't of Educ.*, 862 F.2d 681 (8th Cir. 1988) (holding that sovereign immunity barred retroactive damages in RSA case).

The OCB acknowledges the Ninth Circuit's decision in *Premo*, but argues that intervening Supreme

Court cases have called into question its continued validity. Specifically, the OCB cites *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) [hereinafter *FMC*] and *Sossamon v. Texas*, 563 U.S. 277 (2011).

In *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (*en banc*), the Ninth Circuit clarified the law on "the sometimes very difficult question of when [the court] may reexamine normally controlling precedent in the face of an intervening United States Supreme Court decision." *Id.* at 892. "It is not enough for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to 'cast doubt' on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (citations omitted). Rather, "[t]he intervening higher precedent must be 'clearly inconsistent' with the prior circuit precedent." *Id.* (citation omitted). This is a "high standard." *Id.* Both the circuit and Supreme Court cases must be "closely on point." *Miller*, 335 F.3d at 899 (citations and quotation marks omitted). The issues "need not be identical in order to be controlling." *Id.* at 900. "Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.*

In *FMC*, the Supreme Court considered whether sovereign immunity precluded a private cruise ship company from seeking action against a state-run port, which refused to allow the company to use its port facilities because the company vessels' primary purpose was gambling. 535 U.S. at 747. The Supreme Court held that sovereign immunity applies not only to

judicial proceedings but also to arbitration proceedings. The Court recognized that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Id.* at 760. "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Id.* (quoting *Alden v. Maine,* 527 U.S. 706, 748 (1999)). "The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court. In both instances, a State is required to defend itself in an adversarial proceeding a private party before an impartial federal officer." *Id.* at 760-61.

FMC is not "closely on point" with *Premo*. *Miller*, 335 F.3d at 899. *FMC* does not discuss waiver of sovereign immunity where a state opts into a federal statutory scheme, *i.e.*, the central issue that the Ninth Circuit decided in *Premo*. *FMC* does not "undercut the theory or reasoning underlying" *Premo* "in such a way that the cases are clearly irreconcilable." *Id.*

The OCB also cites *Sossamon*, in which the Court held that, by accepting federal funds, states do not consent to waive their sovereign immunity to suits for money damages under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). 563 U.S. at 280. The Court recognized that the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.* at 284 (quoting *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999)).

"Waiver may not be implied." *Id* (quoting *Coll. Savs. Bank*, 527 U.S. at 682). Rather, a state's "consent to suit must be 'unequivocally expressed' in the text of the relevant statute." *Id.* (quoting *Pennhurst State Sch. and Hosp. v. Halderman,* 465 U.S. 89, 99 (1984)) (remaining citation omitted). "Only by requiring this 'clear declaration' by the State can we be 'certain that the State in fact consents to suit.'" *Id.* (quoting *Coll. Savs. Bank*, 527 U.S. at 680).

Sossamon analyzed the RLUIPA, not the RSA. Moreover, the central holding in *Sossamon*—that states may waive their sovereign immunity—is not new. The decision in *Premo* rests on that same principle, and the Ninth Circuit found "the evidence that Congress conditioned state participation in the Randolph-Sheppard program on consent to federal judicial enforcement of compensatory awards is overwhelming." 119 F.3d at 770 (emphasis added).

Some courts have recognized that in light of these cases, there is "some uncertainty as to whether the Eleventh Amendment permits RSA awards of retrospective money damages against state licensing agencies." *Jones v. DeNotaris*, 80 F.Supp.3d 588, 596 (E.D. Pa. 2015); *see also New Hampshire v. Ramsey*, 366 F.3d 1, 21-22 (1st Cir. 2004) ("At best there is disagreement as to whether the [RSA] arbitration panels can award damages, with reasoned arguments made on both sides . . . Differing conclusions can be drawn about the state's immunity in [the RSA's] statutory scheme").[13] However, it is not enough for an

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[13] One court has gone so far as to say that *Premo* is "no longer good law." *Wis. Dep't of Workforce Dev., Div. of Vocational Rehab. v. U.S. Dep't of Educ.*, 667 F.Supp.2d 1007, 1013 (W.D. Wis. 2009).

intervening Supreme Court case to "cast doubt" on Ninth Circuit precedent. *Lair*, 697 F.3d at 1207.

Because the "high standard" articulated in *Miller* has not been met, Ninth Circuit precedent on this issue must be followed. *See O.D. Jennings & Co. v. Maestri*, 22 F.Supp. 980, 983 (E.D. La. 1938), *decree aff'd*, 97 F.2d 679 (5th Cir. 1938) ("The obligation of a district court to follow the decision of its own Circuit Court of Appeals is of course too fundamental to require other than mere statement.").

B. Monetary Damages

Bird is entitled to retrospective compensatory relief. The Third Circuit expressly addressed this issue in *Del. Dept. of Health*, finding that "retrospective compensatory relief" was awarded as a "matter of course" under the FAA and that, under the RSA, the relationship between the blind vendor and the state was "contractual":

> When Congress in 1974 provided that states desiring to gain access to blind vendor locations in federal facilities must agree to submit to arbitration their disputes with blind vendors, the term arbitration had a well-recognized meaning. Congress was surely aware that arbitrators proceeding under the authority of the Federal Arbitration Act or under the authority of the Uniform Arbitration Act, as a matter of course awarded retrospective compensatory relief in appropriate cases. . . .

> The Randolph-Sheppard Act has specified, since 1936, the terms upon which participating states may contract with blind vendors. The contractual relationship is both analogous to and different from the relationship resulting from a collective bargaining agreement or a single person employment contract. It is analogous because the participating state, like a typical employer, maintains a large degree of control over the activities of the vendor. It is different because the vendor is compensated only out of the revenues which are generated at the site to which he is assigned. Nevertheless the relationship between the blind vendor and the state, like conventional employment relationships, is essentially contractual.

772 F.2d at 1136. The court also held that attorney fees are allowed as an "appropriate means" toward making "blind vendors whole for state breaches of contract." *Id.* at 1139. Similarly, in *Premo*, the Ninth Circuit affirmed the arbitration panel's award of $379,025.05 in lost income and $70,898.65 in attorney's fees and costs and the panel's order to reinstate the plaintiff's license and pay her $5,731.94 per month until she was restored at a comparable vending facility. 119 F.3d at 767.

Bird seeks monetary damages in the amount of $54,000 "plus reasonable attorney fees, and costs together with pre-and post-order interest on the award at the federal statutory rate, and $2,000.00 per month thereafter until such time as the OCB regains the Chemeketa vending facilities and restores them to

Mr. Bird or finds suitable alternative vending opportunities for same." ECF #44, at 35. The OCB does not address the issue of damages, other than to say that they are not allowed under the doctrine of sovereign immunity. Otherwise stated, the OCB does not contest the amount of damages requested by Bird.[14] The amount requested by Bird is supported by the record.[15] Accordingly, the requested amount should be awarded, along with reasonable attorney fees.

RECOMMENDATION

The Oregon Commission for the Blind's Motion for Summary Judgment (ECF #50) should be DENIED, and the March 17, 2014, Order of the Arbitration Panel (Case No. R-S/11-05) should be vacated. Bird should be awarded damages in the amount of $54,000 plus reasonable attorney fees and costs, together with pre and post order interest on the award at the federal statutory rate, and $2,000.00 per month thereafter until such time as the OCB regains the CCC vending facilities and restores them to Bird or finds suitable alternative vending opportunities for same.

SCHEDULING ORDER

These Findings and Recommendation will be referred to a district judge. Objections, if any, are due

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[14] Bird concedes that the dissenting panelist made a "persuasive argument for an alternative calculation." ECF #44, at 40; AR 2129. However, the OCB does not address those figures either.

[15] Bird testified at the arbitration hearing that he stopped providing vending services at CCC in September 2011 and his net proceeds between 2009 and 2011 were between $1,500 and $2,000 per month. AR 1681.

by Friday, March 10, 2017. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

DATED February 24, 2017.

/s/ Youlee Yim You
United States Magistrate Judge

RANDOLPH-SHEPPARD ACT
DISPUTE ORDER
(MARCH 17, 2014)

UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION

In the Matter of the Arbitration Between:

BIRD, ET AL.,

Complainant,

v.

OREGON COMMISSION FOR THE BLIND,

Respondent.

Case No. R-S/11-05

This matter came on for hearing before the Arbitration Panel (the "Panel") on September 24 and 25, 2013, at Portland, Oregon. Complainants were represented by Ronald Heard and Roger Harris with Harris Berne Christensen LLP. Respondent was represented by Lynn Rosik and Serena Hewitt of the Oregon Attorney General's Office. Testimony and documentary evidence were received. Post hearing briefs were received by the Panel on December 12, 2013 and December 20, 2013.

Based on the applicable law and regulations, the evidence, the arguments of the parties, the Panel hereby AWARDS AND ORDERS:

Jurisdiction

The Panel has jurisdiction of this matter under 20 U.S.C. § 107d-2, 34 C.F.R. § 395.37 and the September 21, 2012 appointment letter from Dr. Edward Anthony, Deputy Commissioner of the United States Department of Education, pursuant to a request filed by Jerry Bird, Randy Houth, Miranda Lewanda and Art Stevenson. Mr. Stevenson subsequently requested that he be removed as a party to the arbitration.

Procedural History

This dispute concerns actions of the Oregon Commission for the Blind ("Commission") with respect to vending services at Chemeketa Community College ("Chemeketa"), a political subdivision of the State of Oregon.

Complainants are blind · vendors licensed by the Commission to operate the vending facilities on federal, state and other property in the Stene of Oregon. Complainants requested that the arbitration panel require the Commission to take legal and other action against Chemeketa sufficient to protect the blind vending facility program and the blind vendor previously assigned to Chemeketa, including a demand that any compensation, commissions, or benefits accruing to competing vending facilities at Chenieketa be paid to Jerry Bird, the previously assigned blind vendor at Chemeketa, and a demand that Chemeketa take such other actions as are necessary to bring it into conformity with Oregon law.

THE ISSUES

The four issues agreed to by the parties were as follows:

1. Whether Chemeketa is subject to the preference guaranteed by Oregon law, and to ORS 346.220, and whether the Commission's actions failed to protect the preference in violation of state law or the Randolph-Sheppard Act.

2. Whether the burden is on Chemeketa as a public agency to show that it is not subject to the blind vending facility preference imposed by Oregon law, and whether the Commission refused to insist that Chemeketa adhere to the law in violation of Oregon and federal law.

3. Whether the Elected Committee of Blind Vendors in Oregon ("BECC") was allowed by the Commission to actively participate in a major program decision involving strategy on the Chemeketa controversy, in violation of the Randolph-Sheppard Act.

4. Whether the Commission was obligated to object to, and prevent, Chemeketa's contracts with both NWI, Inc. and Courtesy Vending, and was the Commission's failure to stop these contracts a violation of state law and the Randolph-Sheppard Act.

The Facts

The Commission entered into an intergovernmental agreement (IGA) with Chemeketa Community

College in 2007. The IGA had a five year term, and allowed for the operation of certain vending machines on the main Salem campus and various satellite campuses. The Chemeketa vending was assigned to licensed blind vendor Jerry Bird in accordance with a previous arbitration decision. In November 2008, Chemeketa entered into a contract with Northwest Innovations, Inc. ("NWI") to provide food services on Chemeketa campuses. At the same time, NWI entered into a Sponsorship Agreement with Pepsi Bottling for "pouring rights" for carbonated beverages on the college properties.

When the Commission became aware of the NWI contract, it concluded that Chemeketa had not given the Commission notice and an opportunity to bid on these vending and food service opportunities as required under Oregon law. The director of the Business Enterprise program, Walt Reyes, worked with the Commission's legal counsel, Senior Assistant Attorney General Joe McKeever, to negotiate an IGA that addressed the additional vending and provided financial benefit to the assigned vendor, Mr. Bird. Tentative agreements were reached, but negotiations broke down because Mr. Bird and the BECC did not agree to the payment of any commissions to Chemeketa, and Mr. Bird demanded that he be awarded all of the vending machines.

The Commission decided to follow a BECC recommendation to pursue litigation against Chemeketa based on its failure to notify the Commission of the vending opportunities and provide the Commission with the opportunity to bid. Chemeketa settled the lawsuit by agreeing to amend its NWI contract to remove all of the vending machines from the contract

and announced that the vending machines would be put out to bid. Chemeketa also informed the Commission that it was terminating the IGA so that all of the vending machines could be put out to bid at once.

Chemeketa put the vending machines out to bid with an RFP. The Commission and two private vending companies responded to the RFP. On August 15, 2011, Chemeketa announced it would award the vending contract to Courtesy Vending. Chemeketa provided written notice of the reasons for the award and described why Courtesy Vending's bid was better than the Commission's bid. The reasons given by Chemeketa included, but were not limited to, payment of commissions. The BECC recommended that the bid award be protested, but the Commission received legal advice from the Oregon office of Attorney General that there was no valid basis for a protest, so no protest was filed.

Discussion

1. Whether Chemeketa Is Subject to the Preference Guaranteed by Oregon Law, and to ORS 346.220, and Whether the Commission's Actions Failed to Protect the Preference in Violation of State Law or the Randolph-Sheppard Act.

The parties do not disagree as to whether Chemeketa is subject to the preference for blind vendors under Oregon law. The parties disagree about the nature and extent of that preference. Complainants maintain the Commission had the right of first refusal on all Chemeketa vending contracts if the Commission submitted a reasonable bid for those contracts.

The Commission maintains Chemeketa has the discretion to pick the bid which is satisfactory to it. ORS 346.520 provides:

> For the purposes of providing persons who are blind with remunerative employment, enlarging the economic opportunities of those persons and stimulating them to greater efforts to make themselves self-supporting with independent livelihoods, persons who are blind are who are licensed under the provisions of ORS 346.510 to 346.570 by the Commission for the Blind as set forth in ORS 346.510 to 346.570, shall operate vending facilities in or on any public buildings or properties where, in the discretion of the head of the department or agency in charge of the maintenance of such buildings or properties, such vending facilities may properly and satisfactory operate.

This language is somewhat ambiguous because on the one band it states that licensed blind managers "shall" operate vending facilities in public buildings, but on the other hand it modifies that "shall" with the phrase "where, in the discretion of the head of the department or agency in charge of the maintenance of such buildings or properties, such vending facility may properly and satisfactory operate." Complainants argue a reasonable interpretation of this language is that the only discretion a department head has is to determine whether there will be vending facilities on the property or not. Once that decision is made, the Commission automatically gets those vending facilities if it submits a reasonable bid. The Commission argues a reasonable interpretation of the statute is that the

head of the department or agency has the discretion to not only determine whether any vending facilities shall operate, but also the discretion to define what the proper and satisfactory operation of those vending facilities should be. In other words, the head of the department or agency can ask for bids, and use the best bid as that which is necessary to properly and satisfactorily operate the facility.

If ORS 346.520 stood alone, Complainant's argument would be more persuasive. However, ORS 346.530(2) states:

> If the Commission for the Blind makes an offer to operate a vending facility under the provisions of this section and the offer is not accepted for reasons other than a decision to have no vending facility on the premises, such head of the department or agency shall notify the Commission in writing of the reasons for refusing its offer, including but not limited to the terms and conditions of the offer which was accepted, if any.

This provision expresses the intent of the legislature that the head of the department or agency may decline the offer of the Commission to operate a vending facility for reasons other than a decision to have no vending facility on the premises. If the head of the department or agency does this, then that head shall notify the Commission of the reasons for refusing the Commission's offer. The head of an agency can decide that vending is appropriate, but that in his discretion, the Commission's bid is not satisfactory because another bid is much better. Adhering to the maxim that we should strive to not render any provision of the Oregon law null and void, then we

cannot accept Complainants' position that the head of an agency cannot decline an offer for reasons other than a decision to have no vending facility on the premises. Further, the Attorney General's Opinion in 37 OP Atty. Gen. 392 (1975) construed the statutes to allow an agency the discretion to refuse the Commission's offer if an agency chooses to accept a better offer. It is notable that the 1975 opinion was available when the Oregon legislature deliberated on amendments added to ORS 346.530. The legislature chose not to revise the language to prevent an agency from the acceptance of a better offer.

We find that Chemeketa had the discretion under Oregon law to determine which bid was satisfactory to Chemeketa, and no violation of the law occurred when the Commission did not challenge Chemeketa's discretion to select Courtesy Vending.

2. Whether the Burden Is on Chemeketa as a Public Agency to Show That It Is Not Subject to the Blind Vending Facility Preference Imposed by Oregon Laws and Whether the Commission Refused to Insist That Chemeketa Adhere to the Law, in Violation of Oregon and Federal Law.

At the hearing this issue evolved into whether the Randolph-Sheppard Act requires every entity which allows a licensed vendor to operate on its property to also execute a permit with the Commission for an indefinite period of time. Both parties agree that Chemeketa is not federal property. Both parties agree that Chemeketa is "other property" under the Randolph-Sheppard Act. The question is must the

managers of Other Property enter into permits with the Commission for an indefinite period of time.

34 CFR § 395.34 provides:

> Applications for permits for the operation of vending facilities other than cafeterias shall be made in writing on the appropriate form, and submitted for the review and approval of the head of the Federal property managing department, agency, or instrumentality.

This provision implies that permits are required when dealing with the head of the federal property agency. Nothing requires permits when dealing with Other Properties as defined by the Randolph-Sheppard Act. Therefore, the provisions of Section 395.35 addressing terms of permits would only apply when dealing with federal property. This interpretation is bolstered by the terms of Section 395.35 itself. For instance, Section 395.35(c)(2) talks about certain costs not being the responsibility of the "department, agency or instrumentality responsible for the maintenance of the federal property." 395.35(c)(3) talk about the articles which can be sold "in consultation with the onsite officials responsible for the federal property."

No case stands for the proposition that permits issued on Other Property must be for an indefinite period of time. The *Delaware Department of Health and Social Services v. United States Department of Education*, 772 F.2d 1123, 1126-27 (3' Cir. 1985) case cited in the Brief of Complainants merely holds that vendors on Other Property have certain rights under the Act as stated in 20 U.S.C. § 107(b). None of those rights have anything to do with securing permits for an indefinite period of time on Other Property.

The Panel finds the law does not require that these contracts for vending services on Other Property be for an indefinite period of time.

3. Whether the Elected Committee of Blind Vendors in Oregon (the "BECC"), Was Allowed by the Commission to Actively Participate in a Major Program Decision Involving Strategy on the Chemeketa Controversy, in Violation of the Randolph-Sheppard Act.

We must first examine whether the issues surrounding Mr. Bird's permit with Chemeketa were a major program decision., and if they were, did the Commission allow active participation of the BECC with regard to those issues.

The Commission's rules and regulations define active participation as "major administrative decisions and policy and program decisions affecting the overall administration of the program." *See* OAR 585-010-0015. This regulation gives examples of these major administrative decisions affecting the overall administration of the program. None of those examples include negotiating a particular contract for a particular vendor or even litigating an issue for a particular vendor. The examples are of issues which affect the overall administration of the program such as policies which govern duties, supervision, transfer, promotion and final participation of all of the managers, not just one.

The evidence at the hearing was clear that although another definition of active participation was discussed, no other definition of active participation was ever formally adopted by the Commission and

approved by the Rehabilitation Services Administration as is required for it to become effective.

We find that active participation by the BECC was not required. This is not to say that the issues involved in Mr. Bird's concern would not have been of interest to many managers. However, that is not the definition of a major administrative decision affecting the overall administration of the program. If the Commission is dealing with one manager's contract with a state agency, that is not a major administrative decision affecting the overall administration of the program.

4. Whether Respondent Was Obligated to Object to, and Prevent, Chemeketa's Contracts with Both NWI, Inc. and Courtesy Vending, and Was Its Failure to Stop Those Contracts a Violation of State Law and the Randolph-Sheppard Act.

We have previously held that the Commission did not have the right of first refusal on Chemeketa vending contracts if it submitted a reasonable proposal for that vending. Because Chemeketa had the discretion to award vending contracts to vendors presenting superior bids for those contracts, the Commission was not obligated by state or federal law to try to stop or to prevent those vending contracts.

CONCLUSION

Because the Panel majority has found in favor of the Commission on all four issues, there are no grounds for an award of damages or attorneys' fees.

/s Thomas F. Levak
Dated March 24, 2014

Assent

/s/ Peter A. Nolan
Dated March 19, 2014

Dissent

/s/ Susan Rockwood Gashel
Dated March 19, 2014

The following summary is submitted as appropriate for publication in the FEDERAL REGISTER:

USA, DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, *OREGON COMMISSION FOR THE BLIND (Complainant)/US DEPARTMENT OF VA (Respondent),* Randolph-Sheppard Act Dispute, Case No. R-S/11-05 Before the Arbitration Panel: Thomas Levak, Peter Nolan & Susan Gashel.

Summary of Award & Order

This matter proceeded under 20 U.S.C. § 107d-1 (a), § 107d-2, the implementing regulations at 34 C.F.R. § 395.13 and a September 21, 2013, appointment letter from Deputy Commissioner Edward Anthony. At issue were Complainants' contentions that Respondent Oregon Commission for the Blind violated state law and the Randolph-Sheppard Act by failing to assert the Commission's priority for vending at Chemeketa Community College, a public community college located in Salem, Oregon, and by failing to allow the elected

committee of licensed blind vendors to actively participate in a major program decision involving strategy on the Chemeketa Community College controversy.

The complainants sought a determination that the Commission had violated both state law and the Randolph-Sheppard Act and further sought the award of damages and attorney fees.

The complainants raised four issues that were addressed in the Panel majority's opinion. First, was Chemeketa Community College subject to a preference guaranteed by Oregon law, and did respondent violate state law and the Randolph-Sheppard Act by failing to protect the preference? The Panel majority determined that Oregon's vending statutes, ORS 346.510 to 346.570, did not require Chemeketa Community College to provide the vending to Respondent if it chose to have vending on its campuses, but that Chemeketa Community College had discretion to determine which bid was satisfactory to Chemeketa Community College.

Second, Complainants contended that the burden was on Chemeketa Community College to show that it was not subject to the blind vending facility preference imposed by Oregon law, and that Respondent abandoned its obligation to the licensed blind vendors in Oregon by failing to insist that Chemeketa Community College adhere to the law, thus violating state law and the Randolph-Sheppard Act. The Panel majority concluded that requiring every entity which allows a licensed vendor to operate on its property to execute a permit with respondent for an indefinite period of time is inconsistent with the federal requirements for permits issued on other property.

Third, Complainants contended that the elected committee of blind vendors was not allowed by Respondent to actively participate in a major program decision involving strategy on the Chemeketa Community College controversy, in violation of the Randolph-Sheppard Act. The Panel majority determined that the Chemeketa Community College matter was not a major administrative decision affecting the overall administration of the program as defined in Respondent's rules and regulations.

Fourth, complainants contended that Respondent was obligated to object to, and prevent, Chemeketa Community College's contracts with private vending companies and that its failure to do so was a violation of state law and the Randolph-Sheppard Act. The Panel majority determined that because Chemeketa had the discretion to award vending contracts to vendors presenting superior bids for those contracts, the Commission was not obligated by state or federal law to try to stop or to prevent those vending contracts.

In sum, the Panel majority found in favor of Respondent on all four issues, finding that Respondent did not violate Oregon law or the Randolph-Sheppard Act in any respect. Complainants did not prevail on any of their contentions and they were not entitled to an award of damages or attorney fees.

The panel majority's 11-page Order is accompanied by Panel member Gashel's 7-page dissent.

PANEL MEMBER GASHEL'S DISSENT
(MARCH 17, 2014)

UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION

In the Matter of the Arbitration Between:

JERRY BIRD, RANDY HAUTH, and
LEWANDA MIRANDA,

Complainants,

v.

OREGON COMMISSION FOR THE BLIND,

Respondent.

Case No. R-S/11-05

The majority decision of the arbitration panel has the effect of nullifying Oregon blind vending law, a law with the explicit purpose of improving the employment prospects of blind individuals. That law provides that individuals licensed by the Oregon Commission for the Blind (Commission or OCB) "shall operate vending facilities" on public property where "in the discretion" the state agency charged with maintenance of the public property such vending facilities may "properly and satisfactorily operate." ORS § 346.510(a). Neither the Commission nor a blind licensee can be required to pay for rent or utilities incurred in the operation

of the vending facility. ORS § 346.410(b). Contracts entered into by agencies in contravention of ORS §§ 346.220, 346.510 to 346.570 "shall be null and void." ORS § 346.530(3).

The majority's decision in this case involving Chemeketa Community College (CCC or Chemeketa) is that a state agency can accept a "better offer" from a non-blind operated concern. There is no language in the statute that authorizes a "better offer" to overcome the blind's statutory preference. This means that CCC or other host agencies can circumvent the blind vendor law. The "better offer" interpretation ensures that a commercial concern will be awarded all but the least profitable facilities, thwarting both the letter and the spirit of ORS § 346.510. Under Oregon law, the statutory interpretation advocated by the Commission and acceded to by the majority is not tolerable. As stated in *Int'l Broth. of Elec. Workers Local No. 48 v. Oregon Steel Mills, Inc.*, 168 Or. App. 101, 106, 5 P.3d 1122, 1125 (2000), a statute cannot be interpreted to render it a nullity; [s]ettled principles of statutory construction counsel against that interpretation."

In effect, a state agency can put a vending facility out to bid, and award it to a non-blind operated concern. This interpretation puts the blind vending preference on the same footing as any other bidder for a concession to operate a blind vending facility on state property. The "better offer" interpretation nullifies, indeed eviscerates, the blind vending preference. For all practical purposes, there is no preference. The "better offer' interpretation effectively ensures that Oregon will not carry out the purposes of the law. It will not "provide persons who are blind with remunerative employment." It will not "enlarge

the economic opportunities of the blind." It will not stimulate the blind to "greater efforts to become self-supporting individuals with independent livelihoods." Indeed, the desirable and profitable employment and economic opportunities will go to non-blind operated concerns.

DISCUSSION

Issue One: The Majority Erred When It Concluded That CCC Had Discretion to Choose the "Better Offer" and When It Concluded That the Commission Was Not Required to Declare the CCC Contracts with Non-Blind Operators Null and Void

A. Principles of Statutory Construction

As explained by the United States Supreme Court, in *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542, (1940):

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute[.]

Yet this is precisely what the Majority has done, in its acceptance of the "best offer" interpretation of Oregon's blind vending law. *See, also*, *State ex rel. Cox v. Wilson*, 277 O.R. 747, 562 P.2d 172, 173 (1977): [t]he

best standard for statutory construction applicable to the problems of this case is the often quoted statement in *U.S. v. Amer. Trucking Ass'ns*."

The Majority has inserted language into the statute that the legislature omitted. Under Oregon law, this statutory construction is impermissible:

> When we construe the language of a statute,
>
> "we are to effectuate the intentions of the legislature, 'if possible.' ORS 174.020. To ascertain the intentions of the legislature, we examine the text, its context and, if necessary, the legislative history. In all events, however, we are constrained by the reasonable construction of the language that the legislature actually enacted. We are forbidden, both by statutory command and by constitutional principles, to insert language that the legislature, whether by design or by default, has omitted."

Tee v. Albertson's, Inc., 148 Or. App. 384, 389, 939 P.2d 668, 670 (1997) (citations omitted).

B. The "Better Offer" Interpretation Does Not Accord with Well-Settled Principles of Statutory Construction

The majority sees the requirement at ORS § 346.430(2) that state agencies notify the Commission of the reasons for refusing the Commission's offer, as an exception to the law, stating that the Commission's bid can be rejected because "another bid is much better." This reasoning ignores Oregon's comprehensive scheme to ensure that blind licensees are given the

opportunity for remunerative employment. Briefly summarized, that law provides:

346.520(a)

> Blind persons shall operate vending facilities on public property where agency heads, in their discretion, determine that the facilities may properly and satisfactorily operate.

346.520(b)

> The state agency cannot charge the Commission or the blind licensee for rent or utility costs.

346.530(1)

> Agency heads shall notify the Commission (a) of sites where vending facilities might properly and satisfactorily operate; (b) of intention to issue a permit 30 days prior to issuance; (c) of any locations where vending facilities are planned or might properly and satisfactorily operate at least 30 days prior to permit issuance.

346.530(2)

> If the Commission's offer is not accepted, the agency head shall notify the Commission of the reasons for not accepting the offer, and the terms and conditions of the offer that was accepted.

346.530(3)

> Any contract in violation of ORS §§ 346.220 and 346.510 to 346.570 shall be null and void.

Moreover, the Majority has misstated Complainant's position. Complainant's position is that the head of an agency can decline an offer when no licensee can provide the services meeting requisite standards (other

than of course, the payment of rent, utilities, commissions, and the like—*i.e.*, the "better offer").

Contrary to the Majority's view, ORS §§ 346.520 and 346.530, when read together, provide support for Complainant's position that an agency can decline to issue a permit to the Commission when (a) no vending facility is desired by the state agency, or (b) no blind licensee can provide the requisite services sought by the agency at the vending facility. Indeed, the requirement that the agency notify the Commission of the terms accepted gives the Commission an opportunity to see if it can meet those terms.

Furthermore, the Majority has misinterpreted the legislative history, stating:

> It is notable that the 1975 opinion was available when the Oregon legislature deliberated on amendments added to ORS 346.530. The legislature chose not to revise the language to prevent an agency from the acceptance of a better offer.

This is the actual sequence of events: on February 28, 1975, the Oregon Attorney General issued an opinion on the issue of whether blind licensees are granted a preference to operate vending stands on public property. The opinion stated, in part:

> the agency head must consider the commission's offer. While it may be rejected, we believe there must be sufficient cause for such rejection which perhaps might be a better offer.

On April 23, 1975, the Oregon House Committee on Human Resources held a public hearing on HB

2437, which added the provision declaring "null and void" contracts which do not comply with the blind licensee preference. The testimony was that the "null and void" language was inserted to ensure that the preference is recognized. Rep. Bunn stated that the purpose of the "null and void" language was to ensure that "blind persons would, in fact, have first opportunities at those contracts."

Thus, the Majority's statement that the Legislature did not revise the language is incorrect. In fact, the Legislature did amend the act to declare such "better offer" contracts "null and void."

Thus, the Majority erred when it concluded that CCC had the "discretion" to accept the "better offer." The Majority also erred when it concluded "no violation of the law occurred when the Commission did not challenge Chemeketa's discretion to select Courtesy Vending." The Commission is charged with the duty of establishing vending facilities in those locations which the Commission deems suitable, and with entering into leases or licensing agreements therefor, with the consent of the state agencies. ORS § 346.540(b). The Commission failed to do ensure that a blind licensee could operate the vending facility at CCC, contrary to its statutory duty. It failed to take steps to ensure that the contract between CCC and Courtesy Vending be "null and void."

Issue Two: The Panel Erred When It Concluded That Permits for Vending Facilities on State Property Are Not Required to Be Indefinite

As stated above, Oregon law requires that state agencies enter into leases or licensing agreements with the Commission for vending facilities to be

operated by blind licensees (akin to permits). Blind vendors receive licenses for an indefinite period. 34 C.F.R. § 395.3(a)(11)(1). The Randolph-Sheppard Act (R-S Act) "establishes a cooperative federal-state program that provides employment opportunities for the blind." *Premo v. Martin*, 119 F.3d 764, 766 (9th Cir. 1997). Each state has a state licensing agency (SLA) that issues "licenses to blind individuals to operate vending facilities on Federal and other property. 34 C.F.R. § 395.1(v) (emphasis added). The blind vending program "means all the activities of the licensing agency under this part related to vending facilities on Federal and other property. 34 C.F.R. § 395.1(p) (emphasis added). The Majority states that permits issued for "other property" need not be for an indefinite period of time. This reasoning ignores the fact that licensees are granted a license for an indefinite period of time. If the license is indefinite and the agreement (whether it is termed permit, lease, or licensing agreement) is not for an indefinite period of time, then the vendor does not have the right to operate that particular facility for an indefinite period of time (note that cafeteria contracts may be time limited under the R-S Act). The majority ignores the fact that termination of a permit is limited by the R-S Act regulations: 34 C.F.R. § 395.7(b) only authorizes revocation of a license if a vending facility is not being operated in accordance with the SLA's rules and regulations, the permit's terms and conditions, and the terms and conditions of the SLA's agreement with the vendor. A finite permit effectively limits a licensee's indefinite permit; the end result is that the R-S Act's purposes and those of the Oregon blind vending law are thwarted. The blind licensee's ability to engage in remunerative employment is limited by a finite permit.

Issue Three: The Panel Erred When It Ruled That the Oregon Elected Committee of Blind Vendors Was Not Required to Be Involved in Strategy in the CCC Controversy.

The Majority's characterization of the issue as "negotiating a particular contract for a particular vendor or even litigating an issue for a particular vendor" trivializes the importance of the issues in this case to Oregon's blind licensees. The CCC contract was the first time vendors in Oregon were faced with the SLA agreeing to two contract terms: the payment of commissions and a "termination without cause" provision. There can be no doubt that these provisions weaken the blind vendor preference, and that the Oregon SLA was starting down a slippery slope that would weaken the economic prospects of Oregon's blind licensees.

The Commission is required to establish a blind vendors committee (Business Enterprise Consumer Committee or BECC.) 20 U.S.C. 107b-1. The BECC's role is, inter alia, to actively participate in major administration decisions and policy and program development. *Id.* The Commission, as the SLA, is required to establish "[t]he methods to be used to ensure the continuing and active participation of the State Committee of Blind Vendors in matters affecting policy and program development and administration. 34 C.F.R. § 395.3(a)(4) (emphasis added).

It is noteworthy that in a previous arbitration brought by Mr. Bird, R-S107-2, the panel found that "OCB's rules and regulations require it to consult with the BECC about decisions regarding opportunities the magnitude of the CCC vending." Thus, the issue was *res judicata,* as there was no appeal of the arbitration

award. The evidence in the record makes it clear that the Commission's refusal to actively participate on this issue along with its acceptance of the legally flawed "better offer" interpretation have had the dismal result of lessening the number of blind people who are able to secure employment through the Commission. In fact, Oregon has only 17 blind licensees, down from 25 in 2008.

Issue Four: The Panel Erred When It Held That the Commission Was Not Required to Object to and Prevent CCC's Contracts with Both NWI, Inc. and Courtesy Vending

Oregon's blind vendors cannot be required to pay utilities or rent. ORS § 346.520(2). This sets up a scenario where state agencies will seek to improve the state agency's fiscal condition by acceptance of a non-blind offer. After all, the non-blind vending facility operator can be required to pay utilities, rents, commissions, and the like. The "better offer" interpretation ensures that a commercial concern will prevail over the statute at ORS § 346.520(1), that blind licensees "shall" operate vending facilities.

ORS § 346.530 provides that contracts that do not comply with ORS §§ 220 and 346.510 to 346.570 "shall be null and void." While the law is not clear what action must be taken by the Commission to nullify and void the contracts, the facts are clear that the SLA did nothing to void the contracts. In fact, the SLA did nothing to enlarge the economic opportunities of the blind in this case, and failed in its essential mission.

CONCLUSION

The Panel erred when it failed to order the following prospective relief:

1. A ruling that OCB has failed in its obligations as a state licensing agency when it (a) agreed to the payment of commissions to Chemeketa; and (b) failed to take actions to obtain a declaration that the contract between Chemeketa and non-blind operated concerns were null and void;

2. An order that OCB be required to ensure that BECC participate in major administrative decisions such as the Chemeketa decision.

3. An order requiring OCB to take actions to ensure that the Chemeketa contract be declared "null and void" and that Mr. Bird be awarded the CCC contract.

The Panel erred when it failed to award damages. In this circuit, *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997) is the controlling authority. *Premo* involved an arbitration panel that ruled in favor of the blind licensee, awarding her damages and attorney fees. There, the Ninth Circuit concluded that arbitration panels convened under the Act have the authority to award compensatory relief. *Premo* at 769.

Mr. Bird's damages can best be calculated by means of reference to a March 23, 2010 email from the Oregon Department of Justice to OCB, which sets out the amount of income received from May 2007 through August 2009. This amount is deemed to be reliable as it is a public record. The total amount for

the 27 month period comes to $23,890, which comes to $884 per month.

Accordingly, Mr. Bird should be awarded $884 per month from September 2011 through the present, less set aside payable to the State of Oregon, plus post and pre-judgment interest payable at the federal statutory rate. In addition, Mr. Bird should be awarded $884 (less set-aside charges) per month until OCB locates a suitable vending opportunity to place his net earnings at $884.00 per month. Mr. Bird should also be awarded his reasonable attorneys' fees and costs incurred in this action.

Dated: March 17, 2014.

/s/ Susan Rockwood Gashel

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING (MARCH 21, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY BIRD,

Petitioner-Appellee,

v.

OREGON COMMISSION FOR THE BLIND,
an Agency of the State of Oregon,

Respondent-Appellant.

v.

U.S. DEPARTMENT OF EDUCATION,
Rehabilitation Services Administration,

Respondent-Appellee.

No. 20-36066

D.C. No. 3:18-cv-01856-YY
District of Oregon, Portland

Before: GRABER and CHRISTEN, Circuit Judges, and R. COLLINS,* District Judge.

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* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

The panel judges have voted to deny Petitioner-Appellee's petition for panel rehearing. Judge Christen has voted to deny the petition for rehearing en banc, and Judges Graber and Collins have so recommended.

The full court has been advised of Petitioner-Appellee's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Petitioner-Appellee's petition for panel rehearing and rehearing en banc, Docket No. 46, is DENIED.

FEDERAL CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

FEDERAL STATUTORY PROVISIONS

20 U.S.C.A. § 107
§ 107. Operation of vending facilities

(a) Authorization

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

(b) Preferences regulations; justification for limitation on operation in authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies,

or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that–

(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and

(2) 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. Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

20 U.S.C. § 107a
§ 107a. Federal and State responsibilities

(a) . . .

(b) Duty of State licensing agencies to prefer blind

The State licensing agency shall, in issuing each such license for the operation of a vending facility, give preference to blind persons who are in need of employment. Each such license shall be issued for an indefinite period but may be terminated by the State licensing agency if it is satisfied that the facility is not being operated in accordance with the rules and regulations prescribed by such licensing agency. Such licenses shall be issued only to applicants who are blind within the meaning of section 107e of this title.

(c) Selection of location and type of facility

The State licensing agency designated by the Secretary is authorized, with the approval of the head of the department or agency in control of the maintenance, operation, and protection of the Federal property on which the facility is to be located but subject to regulations prescribed pursuant to section 107 of this title, to select a location for such facility and the type of facility to be provided.

20 U.S.C. § 107b

§ 107b. Application for designation as State licensing agency; cooperation with Secretary; furnishing initial stock

A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree–

(1) to cooperate with the Secretary in carrying out the purpose of this chapter;

(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary: Provided, however, That such equipment and stock may be owned by the licensing agency for use of the blind, or by the blind individual to whom the license is issued: And provided further, That if ownership of such equipment is vested in the blind licensee, (A) the State licensing agency shall retain a first option to repurchase such equipment and (B) in the event such individual dies or for any other reason ceases to be a licensee or transfers to another vending facility, ownership of such equipment shall become vested in the State licensing agency (for transfer to a successor licensee) subject to an obligation on the part of the State licensing agency to pay to such individual (or to his estate) the fair value of his interest therein as later determined in accordance with regulations of the State licensing agency and after opportunity for a fair hearing;

(3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E)

retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, that funds under this paragraph shall be set aside for such purposes: Provided, however, That in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary;

* * *

(6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

20 U.S.C. § 107d-1
§ 107d-1. Grievances of blind licensees

(a) Hearing and arbitration

Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this

title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

(b) Noncompliance by Federal departments and agencies; complaints by State licensing agencies; arbitration

Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility as described in section 107(b) of this title and the Secretary's determination thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

20 U.S.C. § 107d-2
§ 107d-2. Arbitration

(a) Notice and hearing

Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall convene an ad hoc arbitration panel as provided in subsection (b). Such panel shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.

(b) Composition of panel; designation of chairman; termination of violations

(1) The arbitration panel convened by the Secretary to hear grievances of blind licensees shall be composed of three members appointed as follows:

(A) one individual designated by the State licensing agency;

(B) one individual designated by the blind licensee; and

(C) one individual, not employed by the State licensing agency or, where appropriate, its parent agency, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A) and (B).

If any party fails to designate a member under subparagraph (1)(A), (B), or (C), the

Secretary shall designate such member on behalf of such party.

(2) The arbitration panel convened by the Secretary to hear complaints filed by a State licensing agency shall be composed of three members appointed as follows:

(A) one individual, designated by the State licensing agency;

(B) one individual, designated by the head of the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose; and

(C) one individual, not employed by the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A) and (B).

If any party fails to designate a member under subparagraph (2)(A), (B), or (C), the Secretary shall designate such member on behalf of such party. If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

20 U.S.C. § 107d-3
§ 107d-3. Vending machine income

(a) Accrual to blind licensee and alternatively to State agency; ceiling on amount for individual licensee

In accordance with the provisions of subsection (b) of this section, vending machine income obtained from the operation of vending machines on Federal property shall accrue (1) to the blind licensee operating a vending facility on such property, or (2) in the event there is no blind licensee operating such facility on such property, to the State agency in whose State the Federal property is located, for the uses designated in subsection (c) of this section, except that with respect to income which accrues under clause (1) of this subsection, the Commissioner may prescribe regulations imposing a ceiling on income from such vending machines for an individual blind licensee. In the event such a ceiling is imposed, no blind licensee shall receive less vending machine income under such ceiling than he was receiving on January 1, 1974. No limitation shall be imposed on income from vending machines, combined to create a vending facility, which are maintained, serviced, or operated by a blind licensee. Any amounts received by a blind licensee that are in excess of the amount permitted to accrue to him under any ceiling imposed by the Commissioner shall be disbursed to the appropriate State agency under clause (2) of this subsection and shall be used by such agency in accordance with subsection (c) of this section.

(b) Direct competition between vending machine and vending facility; proportion of accrued income from such vending machines for individual licensee

(1) After January 1, 1975, 100 per centum of all vending machine income from vending machines on Federal property which are in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section. "Direct competition" as used in this section means the existence of any vending machines or facilities operated on the same premises as a blind vending facility except that vending machines or facilities operated in areas serving employees the majority of whom normally do not have direct access to the blind vending facility shall not be considered in direct competition with the blind vending facility. After January 1, 1975, 50 per centum of all vending machine income from vending machines on Federal property which are not in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section, except that with respect to Federal property at which at least 50 per centum of the total hours worked on the premises occurs during periods other than normal working hours, 30 per centum of such income shall so accrue.

* * *

(c) Disposal of accrued vending machine income by State licensing agency

All vending machine income which accrues to a State licensing agency pursuant to subsection (a)

of this section shall be used to establish retirement or pension plans, for health insurance contributions, and for provision of paid sick leave and vacation time for blind licensees in such State, subject to a vote of blind licensees as provided under section 107b(3)(E) of this title. Any vending machine income remaining after application of the first sentence of this subsection shall be used for the purposes specified in sections 107b(3)(A), (B), (C), and (D) of this title, and any assessment charged to blind licensees by a State licensing agency shall be reduced pro rata in an amount equal to the total of such remaining vending machine income.

20 U.S.C. § 107e
§ 107e. Definitions

As used in this chapter–

(1) "blind person" means a person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than twenty degrees. In determining whether an individual is blind, there shall be an examination by a physician skilled in diseases of the eye, or by an optometrist, whichever the individual shall select;

(2) "Commissioner" means the Commissioner of the Rehabilitation Services Administration;

(3) "Federal property" means 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;

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

(5) "State" means a State, territory, possession, Puerto Rico, or the District of Columbia;

(6) "United States" includes the several States, territories, and possessions of the United States, Puerto Rico, and the District of Columbia;

(7) "vending facility" means automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment as the Secretary may by regulation prescribe as being necessary for the sale of the articles or services described in section 107a(a)(5) of this title and which may be operated by blind licensees; and

(8) "vending machine income" means receipts (other than those of a blind licensee) from vending machine operations on Federal property, after cost of goods sold (including reasonable service and maintenance costs), where the machines are operated, serviced, or maintained by, or with the approval of, a department, agency, or instrumentality of the

United States, or commissions paid (other than to a blind licensee) by a commercial vending concern which operates, services, and maintains vending machines on Federal property for, or with the approval of, a department, agency, or instrumentality of the United States.

REGULATORY PROVISIONS

Chapter 34 C.F.R.
Part 395-Vending Facility Program for the Blind On Federal and Other Property

Subpart A-Definitions

34 C.F.R. § 395.1 Terms.

Unless otherwise indicated in this part, the terms below are defined as follows:

(a) Act means the Randolph-Sheppard Vending Stand Act (Pub. L. 74-732), as amended by Pub. L. 83-565 and Pub. L. 93-516, 20 U.S.C., ch. 6A, Sec 107.

(b) Blind licensee means a blind person licensed by the State licensing agency to operate a vending facility on Federal or other property.

(c) Blind person means a person who, after examination by a physician skilled in diseases of the eye or by an optometrist, whichever such person shall select, has been determined to have

(1) Not more than 20/200 central visual acuity in the better eye with correcting lenses, or

(2) An equally disabling loss of the visual field as evidenced by a limitation to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than 20.

* * *

(g) Federal property means 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 U.S. 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.

(h) Individual location installation or facility means 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 working days.

(i) License means a written instrument issued by the State licensing agency to a blind person, authorizing such person to operate a vending facility on Federal or other property.

(j) Management services means supervision, inspection, quality control, consultation, accounting, regulating, in-service training, and other related services provided on a systematic basis to support and improve vending facilities operated by blind vendors. Management services does not include those services or costs which pertain to the on-going operation of an individual facility after the initial establishment period.

(k) Net proceeds means the amount remaining from the sale of articles or services of vending facilities, and any vending machine or other income accruing to blind vendors after deducting the cost of such sale and other expenses (excluding set-aside charges required to be paid by such blind vendors).

* * *

(o) Permit means the official approval given a State licensing agency by a department, agency or instrumentality in control of the maintenance, operation, and protection of Federal property, or person in control of other property, whereby the State licensing agency is authorized to establish a vending facility.

(p) Program means all the activities of the licensing agency under this part related to vending facilities on Federal and other property.

* * *

(v) State licensing agency means the State agency designated by the Secretary under this part to issue licenses to blind persons for the operation of vending facilities on Federal and other property.

(w) United States includes the several States, territories, and possessions of the United States, Puerto Rico, and the District of Columbia.

(x) Vending facility means automatic vending machines, cafeterias, snack bars, cart service, shelters, counters, and such other appropriate auxiliary equipment which may be operated by blind licensees and which is necessary for the sale of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, and including the vending or exchange of changes for any lottery authorized by State law and conducted by an agency of a State within such State.

(y) Vending machine, for the purpose of assigning vending machine income under this part, means a coin or currency operated machine which dispenses articles or services, except that those machines operated by the United States Postal Service for the sale of postage stamps or other postal products and services, machines providing services of a recreational nature, and telephones shall not be considered to be vending machines.

(z) Vending machine income means receipts (other than those of a blind vendor) from vending machine operations on Federal property, after deducting the cost of goods sold (including reasonable service and maintenance costs in accordance with customary business practices of commercial vending concerns, where the machines are operated, serviced, or maintained by, or with the approval of, a department, agency, or instrumentality of the United States, or commissions paid (other than to a blind vendor) by a commercial vending concern which operates, services, and maintains vending machines on Federal property for, or with the approval of, a department, agency, or instrumentality of the United States.

(aa) Vendor means a blind licensee who is operating a vending facility on Federal or other property.

* * *

Subpart B-The State Licensing Agency
34 C.F.R. § 395.2 Application for designation as a State licensing agency; general.

(a) An application for designation as a State licensing agency may be submitted only by the State vocational rehabilitation agency providing vocational rehabilitation services to the blind under an approved State plan for vocational rehabilitation services under part 1361 of this chapter.

(b) Such application shall be:

(1) Submitted in writing to the Secretary;

(2) Approved by the chief executive of the State; and

(3) Transmitted over the signature of the administrator of the State agency making application.

34 C.F.R. § 395.3 Application for designation as State licensing agency; content.

(a) An application for designation as a State licensing agency under § 395.2 shall indicate:

(1) The State licensing agency's legal authority to administer the program, including its authority to promulgate rules and regulations to govern the program;

(2) The State licensing agency's organization for carrying out the program, including a description of the methods for coordinating the State's vending facility program and the State's vocational rehabilitation program, with special reference to the provision of such post-employment services necessary to assure that the maximum vocational potential of each blind vendor is achieved;

(3) The policies and standards to be employed in the selection of suitable locations

* * *

(11) The assurances of the State licensing agency that it will:

(i) Cooperate with the Secretary in applying the requirements of the Act in a uniform manner;

* * *

(vi) Furnish each vendor a copy of its rules and regulations and a description of the arrangements for providing services, and take adequate steps to assure that each vendor understands the provisions of the permit and any agreement under which he operates, as evidenced by his signed statements:

(vii) Submit to an arbitration panel those grievances of any vendor unresolved after a full evidentiary hearing;

(viii) Adopt accounting procedures and maintain financial records in a manner necessary to provide for each vending facility and for the State's vending facility program a classification of financial transactions in such detail as is sufficient to enable evaluation of performance; and

* * *

34 C.F.R. § 395.4 State rules and regulations.

(a) The State licensing agency shall promulgate rules and regulations which have been approved by the Secretary and which shall be adequate to assure the effective conduct of the State's vending facility program (including State licensing agency procedures covering the conduct of full evidentiary hearings) and the operation of each vending facility in accordance with this part and with

the requirements and conditions of each department, agency, and instrumentality in control of the maintenance, operation, and protection of Federal property, including the conditions contained in permits, as well as in all applicable Federal and State laws, local ordinances and regulations.

(b) Such rules and regulations and amendments thereto shall be filed or published in accordance with State law.

* * *

34 C.F.R. § 395.7 The issuance and conditions of licenses.

(a) The State licensing agency shall establish in writing and maintain objective criteria for licensing qualified applicants, including a provision for giving preference to blind persons who are in need of employment. Such criteria shall also include provisions to assure that licenses will be issued only to persons who are determined by the State licensing agency to be:

(1) Blind;

(2) Citizens of the United States; and

(3) Certified by the State vocational rehabilitation agency as qualified to operate a vending facility.

* * *

34 C.F.R. § 395.8 Distribution and use of income from vending machines on Federal property.

(a) Vending machine income from vending machines on Federal property which has been disbursed to the State licensing agency by a property managing department, agency, or instrumentality of the United States under § 395.32 shall accrue to each blind vendor operating a vending facility on such Federal property in each State in an amount not to exceed the average net income of the total number of blind vendors within such State, as determined each fiscal year on the basis of each prior year's operation, except that vending machine income shall not accrue to any blind vendor in any amount exceeding the average net income of the total number of blind vendors in the United States. No blind vendor shall receive less vending machine income than he was receiving during the calendar year prior to January 1, 1974, as a direct result of any limitation imposed on such income under this paragraph. No limitation shall be imposed on income from vending machines, combined to create a vending facility, when such facility is maintained, serviced, or operated by a blind vendor. Vending machine income disbursed by a property managing department, agency or instrumentality of the United States to a State licensing agency in excess of the amounts eligible to accrue to blind vendors in accordance with this paragraph shall be

retained by the appropriate State licensing agency.

(b) The State licensing agency shall disburse vending machine income to blind vendors within the State on at least a quarterly basis.

(c) Vending machine income which is retained under paragraph (a) of this section by a State licensing agency shall be used by such agency for the establishment and maintenance of retirement or pension plans, for health insurance contributions, and for the provision of paid sick leave and vacation time for blind vendors in such State, if it is so determined by a majority vote of blind vendors licensed by the State licensing agency, after such agency has provided to each such vendor information on all matters relevant to such purposes. Any vending machine income not necessary for such purposes shall be used by the State licensing agency for the maintenance and replacement of equipment, the purchase of new equipment, management services, and assuring a fair minimum return to vendors. Any assessment charged to blind vendors by a State licensing agency shall be reduced pro rata in an amount equal to the total of such remaining vending machine income.

34 C.F.R. § 395.9 The setting aside of funds by the State licensing agency.

(a) The State licensing agency shall establish in writing the extent to which funds are to be set aside or caused to be set aside from the

net proceeds of the operation of the vending facilities and, to the extent applicable, from vending machine income under § 395.8(c) in an amount determined by the Secretary to be reasonable.

(b) Funds may be set aside under paragraph (a) of this section only for the purposes of:

(1) Maintenance and replacement of equipment;

(2) The purchase of new equipment;

(3) Management services;

(4) Assuring a fair minimum of return to vendors; or

(5) The establishment and maintenance of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is so determined by a majority vote of blind vendors licensed by the State licensing agency, after such agency provides to each such vendor information on all matters relevant to such proposed purposes.

(c) The State licensing agency shall further set out the method of determining the charge for each of the above purposes listed in paragraph (b) of this section, which will be determined with the active participation of the State Committee of Blind Vendors and which will be designed to prevent, so far as is practicable, a greater charge for any purpose than is reasonably required for that purpose.

The State licensing agency shall maintain adequate records to support the reasonableness of the charges for each of the purposes listed in this section, including any reserves necessary to assure that such purposes can be achieved on a consistent basis.

* * *

34 C.F.R. § 395.13 Evidentiary hearings and arbitration of vendor complaints.

(a) The State licensing agency shall specify in writing and maintain procedures whereby such agency affords an opportunity for a full evidentiary hearing to each blind vendor (which procedures shall also apply to cases under § 395.6(e)) dissatisfied with any State licensing agency action arising from the operation or administration of the vending facility program. When such blind vendor is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary. Such complaint shall be accompanied by all available supporting documents, including a statement of the decision which was rendered and the reasons in support thereof.

(b) The filing of a complaint under paragraph (a) of this section with either the State licensing agency or the Secretary shall indicate consent by the blind vendor for the release of such information as is necessary for the conduct of a full evidentiary hearing or the hearing of an ad hoc arbitration panel.

(c) Upon receipt of a complaint filed by a blind vendor which meets the requirements established by the Secretary, the Secretary shall convene an ad hoc arbitration panel which shall, in accordance with the provisions of 5 U.S.C. chapter 5, subchapter II, give notice, conduct a hearing, and render its decision which shall be final and binding on the parties except that such decision shall be subject to appeal and review as a final agency action for purposes of the provisions of 5 U.S.C. chapter 7.

(d) The arbitration panel convened by the Secretary to hear the grievances of blind vendors shall be composed of three members appointed as follows:

(1) One individual designated by the State licensing agency;

(2) One individual designated by the blind vendor; and

(3) One individual not employed by the State licensing agency or, where appropriate, its parent agency, who shall be jointly designated by the other members of the panel and who shall serve as chairman of the panel.

(e) If either the State licensing agency or the blind vendor fails to designate a member of an arbitration panel, the Secretary shall designate such member on behalf of such party.

(f) The decisions of an arbitration panel convened by the Secretary under this section shall be matters of public record and shall be published in the Federal Register.

(g) The Secretary shall pay all reasonable costs of arbitration under this section in accordance with a schedule of fees and expenses which shall be published in the Federal Register.

(h) The provisions of this section shall not require the participation of grantors of permits for the operation of vending facilities on property other than Federal property.

* * *

§ 395.32 Collection and distribution of vending machine income from vending machines on Federal property.

(a) . .

(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 accure to the State licensing agency which shall disburse such income to such blind vendor operating such vending facility on such property provided 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).

(c) Effective January 2, 1975, 50 per centum of all vending machine income from vending machines on Federal property which are not in direct competition with a vending facility operated by a blind vendor shall accrue to the State licensing agency which shall disburse such income to the blind vendor operating such vending facility on such property. In the event that there is no blind vendor, such income shall accrue to the State licensing agency, except as indicated under paragraph (d) of this section. The total amount of such income disbursed to such blind vendor shall 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 accrue 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).

(d) Effective January 2, 1975, 30 per centum of all vending machine income from vending machines, which are not in direct competition with a vending facility operated by a blind vendor and which are on Federal property at which at least 50 per centum of the total hours worked on the premises occurs during a period other than normal working hours, shall accrue to the State licensing agency which shall disburse such income to the

blind vendor operating a vending facility on such property. In the event that there is no blind vendor on such property, such income shall accrue to the State licensing agency. The total amount of such income disbursed to such blind vendor shall 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).

* * *

§ 395.37 Arbitration of State licensing agency complaints.

(a) Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States which has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of the Act or of this part and all informal attempts to resolve the issues have been unsuccessful, such licensing agency may file a complaint with the Secretary.

(b) Upon receipt of a complaint filed under paragraph (a) of this section, the Secretary shall convene an ad hoc arbitration panel which shall, in accordance with the provisions of 5 U.S.C. ch. 5, subchapter II, give notice, conduct a hearing and render its decision which shall

be final and binding on the parties except that such decision shall be subject to appeal and review as a final agency action for purposes of the provisions of 5 U.S.C. ch. 7. The arbitration panel convened by the Secretary to hear complaints filed by a State licensing agency shall be composed of three members appointed as follows:

(1) One individual designated by the State licensing agency;

(2) One individual designated by the head of the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose; and

(3) One individual, not employed by the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose, who shall be jointly designated by the other members of the panel and who shall serve as chairman of the panel.

(c) If either the State licensing agency or the head of the Federal department, agency, or instrumentality fails to designate a member of an arbitration panel, the Secretary shall designate such member on behalf of such party.

(d) If the panel finds that the acts or practices of any department, agency, or instrumentality are in violation of the Act or of this part, the head of any such department, agency, or instrumentality (subject to any appeal under

paragraph (b) of this section) shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

(e) The decisions of an arbitration panel convened by the Secretary under this section shall be matters of public record and shall be published in the Federal Register.

(f) The Secretary shall pay all reasonable costs of arbitration under this section in accordance with a schedule of fees and expenses which shall be published in the Federal Register.

OREGON STATUTORY AND REGULATORY PROVISIONS INVOLVED

OREGON STATUTORY PROVISIONS

ORS 346.510. Definitions

As used in ORS 346.510 to 346.570:

(1) "Cafeteria" means a food-dispensing facility:

(a) That can provide a variety of prepared foods and beverages;

(b) Where a patron may move through a self-service line;

(c) That may employ some servers to wait on patrons; and

(d) That provides seating suitable for patrons to consume meals.

(2) "Healthy vending item" and "local vending item" have the meanings given those terms by rules adopted by the Commission for the Blind in consultation with the Public Health Director and the business enterprise consumer committee.

(3) "Person who is blind" means a person who has not more than 20 /200 visual acuity in the better eye with best correction or whose visual acuity, if better than 20 /200, is accompanied by a limit to the field of vision to such a degree that its widest diameter subtends an angle of no greater than 20 degrees and whose blindness is certified by a

licensed physician who specializes in diseases of the eye.

(4) "Political subdivision" means a local government as defined in ORS 174.116, a municipality, town or village of this state.

(5) "Public building" or "property" means a building, land or other real property, or a portion of a building, land or other real property, that is occupied by a department or an agency of the State of Oregon or by a political subdivision, except for a public elementary school, a secondary school, a public university listed in ORS 352.002 or a public corporation created pursuant to ORS 353.020.

(6) "Vending facility" means:

(a) Shelters, counters, shelving, display and wall cases, refrigerating apparatus and other appropriate auxiliary equipment that are necessary or customarily used for the vending of articles, including an established mix of healthy vending items approved by the Commission for the Blind and the agency, department or political subdivision charged with maintaining the public building or property where the vending facility is located;

(b) Vending machines; or

(c) Cafeterias or snack bars for the dispensing of foodstuffs and beverages.

(7) "Vending facility manager" means a person who is:

(a) Blind;

(b) Responsible for the day-to-day conduct of the vending facility operation; and

(c) Licensed under ORS 346.510 to 346.570.

(8) "Vending machine" means a manual or coin-operated machine or a similar device used for vending articles, including machines or devices that accept electronic payment.

* * *

ORS 346.520. Operation of vending facilities in public buildings or on public property

(1) For purposes of providing persons who are blind with remunerative employment, enlarging the economic opportunities of persons who are blind and stimulating persons who are blind to greater efforts to make themselves self-supporting with independent livelihoods, persons who are blind and who are licensed under ORS 346.510 to 346.570 by the Commission for the Blind have the priorities and preferences described in ORS 346.510 to 346.570 when, in the discretion of the agency, department or political subdivision in charge of the maintenance of the public buildings or properties, vending facilities may properly and satisfactorily operate.

(2) Notwithstanding ORS 276.385, the agency, department or political subdivision charged with maintaining a public building or property where a vending facility is operated under ORS 346.525 (1) may not:

(a) Charge the commission or persons who are blind and who are licensed under the provisions of ORS 346.510 to 346.570 any amount for:

(A) Rental of the space where the vending facility is operated;

(B) Utility costs incurred in the operation of the vending facility; or

(C) The priority, right, permit, license or lease to operate a vending facility in or on the public building or property.

(b) Require that the commission or the vending facility manager pay to the agency, department or political subdivision any portion of a commission, gratuity or revenue earned by the vending facility manager from the operation of the vending facility.

(3) Subsection (2) of this section does not apply to charges imposed by the Department of Transportation or the Travel Information Council. Subject to the availability of funds, the department and the council may refrain from charging any amount for rental of space or utility costs described in subsection (2) of this section.

ORS 346.525. Preference given to the blind in establishing and operating vending facilities in public buildings; compliance

(1) The state shall grant to persons who are blind a priority to:

(a) Operate vending facilities in public buildings in this state, unless the vending facilities are:

(A) Cafeterias; or

(B) Located at a community college or at a visitor venue.

(b) Operate vending machines located at visitor venues.

(2) The state shall grant to persons who are blind a preference to:

(a) Operate cafeterias in public buildings in this state, except for cafeterias located at visitor venues.

(b) Operate vending facilities located at community colleges.

(3) If a state agency, department or political subdivision constructs a new public building or facility, modifies an existing public building or facility, enters into or modifies a contract for, or otherwise seeks to procure, products or services that are customarily provided by the business enterprise program of the Commission for the Blind, including the operation of vending facilities, the agency, department or political subdivision complies with:

(a) Subsection (1) of this section if the agency, department or political subdivision:

(A) Notifies the commission of the intended action and allows the commission to determine whether a vending facility manager licensed under ORS 346.510 to

346.570 is able to provide the product or service;

(B) Offers to the commission a right of first refusal;

(C) Does not charge the commission or vending facility manager any amount prohibited under ORS 346.520 (2); and

(D) Procures the vending service from the commission if the service:

(i) Is offered by the commission or by persons with visual impairments under the direction and supervision of the commission; and

(ii) Meets the requirements of the agency, department or political subdivision for quality and quantity of foodstuffs and beverages available through the vending facility.

(b) Subsection (2) of this section if the agency, department or political subdivision:

(A) Notifies the commission of the intended action and allows the commission to determine whether a vending facility manager licensed under ORS 346.510 to 346.570 is able to provide the product or service; and

(B) Procures the vending service from the commission if the service:

(i) Is offered by the commission or by persons with visual impairments

under the direction and supervision of the commission;

(ii) Meets the requirements of the agency, department or political subdivision for quality and quantity of foodstuffs and beverages available through the vending facility; and

(iii) Is offered in a bid that is equal to any other bids submitted.

ORS 346.530. Notice of vending facilities locations; reason for refusal of commission offer to operate a vending facility

(1) Each agency, department or political subdivision charged with maintaining public buildings or properties shall:

(a) Annually notify the Commission for the Blind in writing of any and all existing locations where vending facilities are in operation or where vending facilities might properly and satisfactorily be operated.

(b) Not less than 30 days prior to the reactivation, leasing, re-leasing, licensing or issuance of a permit for operation of any vending facility, inform the commission of the pending action.

(c) Inform the commission of any locations where vending facilities are planned or might properly and satisfactorily be operated in or about other public buildings or properties that are or may be under the jurisdiction of the agency, department or political subdivision for maintenance.

(2) If the commission offers to operate a vending facility under this section and the offer is not accepted for reasons other than the decision not to have a vending facility on the premises, the agency, department or political subdivision shall notify the commission in writing of the reasons for refusing the commission's offer. The agency, department or political subdivision shall offer the commission an opportunity to resolve the concerns raised in the written notice.

(3) Any contract or agreement between the commission and an agency, department or political subdivision relating to the operation of a vending facility entered into subsequent to July 1, 1975, that is not in compliance with or that is in violation of ORS 346.510 to 346.570, is null and void.

ORS 346.540. Operation of vending facilities; duties of commission

(1) The Commission for the Blind shall:

(a) As the commission determines is necessary, survey public buildings or properties to determine the suitability of the public buildings or properties as locations for vending facilities to be operated by persons who are blind and advise the agencies, departments or political subdivisions charged with maintaining the public buildings or properties of the commission's findings.

(b) With the consent of the agency, department or political subdivision charged with maintaining the buildings or properties, establish vending facilities in those locations that the

commission determines are suitable and enter into agreements to operate the vending facilities.

(c) Recruit, select, train, license and install qualified persons who are blind as managers of vending facilities in public buildings or properties.

(d) Adopt rules as necessary to ensure the proper and satisfactory operation of vending facilities and for the benefit of vending facility managers.

(e) Provide for the continued operation of established vending facilities if a qualified person who is blind is not available until a qualified person who is blind is available for assignment as manager.

* * *

OREGON ADMINISTRATIVE RULES

Chapter 585
Division 15
BUSINESS ENTERPRISE PROGRAM RULES

OAR 585-015-0000

Introduction

These rules govern the Business Enterprise Program of the Oregon Commission for the Blind. They are intended to supplement the governing law of the Randolph-Sheppard Act, 20 USC sections 107 to 107f and ORS 346.510 to 346.570.

OAR 585-015-0005

Definitions

(1) . . .

(2) BLIND PERSON means a person who qualifies as a blind person under 34 CFR 395.1(c);

(3) BUSINESS ENTERPRISE PROGRAM means the Program administered by the Commission that is responsible for providing self-employment opportunities to persons who are legally blind pursuant to the Randolph-Sheppard Act;

* * *

(8) COMMISSION means the Oregon Commission for the Blind which is the agency of the state of Oregon which provides rehabilitation services for legally blind persons within the

state. It is also the licensing agency assigned to administer the Act;

(9) DIRECTOR means the Director of the Business Enterprise Program;

(10) DIRECT COMPETITION VENDING has the meaning provided in 34 § CFR 395.1(f);

* * *

(15) LICENSE has the meaning provided in 34 CFR 395.1(i);

(16) LICENSEE has the meaning provided in 34 CFR 395.1(b);

* * *

(18) NET PROCEEDS is as defined in CFR 395.1(k);

(19) OPERATING AGREEMENT means the agreement between the vending facility manager and the Commission stating specific terms of operation for a vending facility;

* * *

(30) VENDING FACILITY AGREEMENT, for facilities located on State property or in other public buildings, means an agreement between the appropriate officials with a public property or federal property and the Commission that defines the terms and conditions for the establishment and operation of a vending facility;

(31) VENDING FACILITY MANAGER means a person who is:

(a) Blind;

(b) Responsible for the day-to-day conduct of the vending facility operation; and

(c) Licensed under ORS 346.510 to 346.570;

(32) VENDING MACHINE is as defined in 34 CFR 395.1(y);

(33) VENDING MACHINE INCOME is as defined in 34 CFR 395.1(z);

(34) VENDING ROUTE is compilation of vending machines combined to establish a vending facility.

OAR 585-015-0010

Licensing

(1) TRAINEE SELECTION–To become a trainee in the Business Enterprise program, an applicant must meet the following qualifications:

(a) Be a citizen of the United States;

(b) Be present in the State of Oregon;

(c) Be a blind person;

(d) Be a client of the Commission's vocational rehabilitation program;

(e) Be certified by the Commission's vocational rehabilitation program as capable and qualified to operate a vending facility;

(f) Complete and submit an application form to the Director;

(g) Complete the Business Enterprise program testing requirements.

(h) The Director must also determine that there is reasonable expectation that the client will successfully complete the required training.

* * *

OAR 585-015-0020

Set-Aside Funds

(1) ASSESSMENT-The standard set aside charge is eleven percent (11%) of a vending facility's monthly net proceeds.

(2) SET-ASIDE INCENTIVES-The Commission shall reduce the percentage of set aside collected from a vending facility manager, by the following amounts:

(a) Four percentage points, if the vending facility offers exclusively healthy vending items or local vending items.

(b) Three percentage points if at least 75 percent but less than 100 percent of the offerings at the vending facility are healthy vending items or local vending items.

(c) Two percentage points if at least 50 percent but less than 75 percent of the offerings at the vending facility are healthy vending items or local vending items.

(d) Two percentage points if the vending facility employs at least one person who is blind, in addition to the vending facility manager;

(e) One percentage point for each person who is blind and is employed by the vending facility

in addition to the persons described in section 4;

(f) One percentage point if the vending facility employs at least one person with a disability, as defined in ORS 174.107, or who is a veteran, as defined in ORS 408.225, in addition to the vending facility manager; and

(g) One-half of one percentage point for each person with a disability or veteran employed by the vending facility in addition to the persons described in section

(h) References-The following link provides the criteria for healthy vending items: https://www.cdc.gov/obesity/downloads/guidelines_for_federal_concessions_and_vending_operations.pdf.

(i) Set-aside reductions are not cumulative. Vending facility managers who meet the requirements of (2)(a) above will receive a 4 percentage point reduction but no more. Vending facility managers who do not meet the requirements of (2)(a) above will earn reductions of no more than 3 percentage points.

(j) Vending facility managers shall provide proof annually for the incentives for which they qualify.

(k) Proof for vending machines shall consist of one of the following, to be submitted to and verified by the Business Enterprise Program:

(A) A planogram schematic of each vending machine and photos of the machine each time it is stocked; or

(B) Monthly inventory records of items installed in each machine

(l) Proof for cafeterias and snack bars shall consist of the following, to be submitted to and verified by the Business Enterprise Program:

(A) Either of the options listed above for vending machines, and

(B) Weekly copies of menus and lists of items for sale, and

(C) Recipes for all menu items made on-site

(3) DEDUCTIONS-When determining net proceeds, the vending facility manager may deduct vending facility operating costs or operating expenses paid during the reported calendar month.

(a) The allowable deduction is the actual dollar amount paid, as further limited below:

(A) Cost of food and products, this would include raw food and ingredients, prepared food, vending products, and other supplies and materials for resale;

(B) Direct vending facility rent and utilities, this includes off-site storage, power, phone, and internet services;

(C) Wages paid to employees, including any spouse, domestic partner or relative by blood or marriage, not to exceed two times the State of Oregon's minimum

wage, provided the vendor is compliant with IRS reporting;

(D) Benefits paid to employees, including any spouse, domestic partner, or to a relative by blood or marriage;

(E) Payroll taxes;

(F) Business taxes, licenses and health permits necessary to operate the vending facility;

(G) Liability, fire, property damage and workers' compensation insurance;

(H) Business consultant services with prior written approval from Agency;

(I) Legal fees, directly related to the operation of the vending facility with prior written approval from Agency;

(J) Accounting and banking expenses, this includes business tax preparation, credit card processing and bank fees;

(K) Vending facility janitorial services;

(L) Payments for equipment owned or leased by the vending facility manager with prior written approval of the Commission;

(M) Repairs to vending facility equipment;

(N) Office supplies directly related to operating the vending facility;

(O) Automobile expenses, the allowable expense is either the documented business-related mileage driven, multiplied by the current Internal Revenue

Service standard mileage rate (www.IRS.gov), or the total itemized automobile expenses for that month;

(P) Travel expenses, for business related travel;

(Q) Training expenses, for business related training;

(R) Miscellaneous business expenses, each expense shall be itemized, allowable expenses include laundry and uniform expenses, advertising and promotional expenses, printing expenses, pest control expenses, and business-related Interest expenses, the allowable amounts are the actual amount paid for all miscellaneous expenses.

(b) The following deductions are not allowed:

(A) Cost of food and products purchased for personal use;

(B) Personal rent and utilities;

(C) Benefits paid to non-employees, (other than to any spouse, domestic partner, or to a relative by blood or marriage) including health insurance, life insurance, long term care insurance and retirement benefit costs;

(D) Personal tax obligations;

(E) Personal insurance, including liability, home owners and automobile insurance;

(F) Personal legal costs;

(G) Personal accounting and banking expenses;

(H) Personal travel expenses, for non-business-related travel;

* * *

OAR 585-015-0035

Dispute Resolution

(1) Dispute Resolution Process – The dispute resolution process is a formal complaint process that should be utilized when a vending facility manager, or licensee, is unable to informally resolve their concerns. Multi-party complaints are prohibited. The Director will attempt to resolve vending facility manager, or licensee, concerns at the lowest possible level. Complaints filed by a VFM, or licensee, must be concerning any Business Enterprise Program action arising from the operation or administration of the program.

(a) Step 1, filing of a complaint: Except for the actions described in Paragraph (3)(a)(B) below (intent to remove licensure), any vending facility manager or licensee filling a complaint must file their complaint in writing, using the Commission approved form;

(b) Step 2, documenting the complaint: The complainant shall provide sufficient detail to fully explain the concerns regarding actions arising from the operation or administration of the Business Enterprise Program. The complainant shall file the complaint no later

than 60 days after the action giving rise to the complaint or within 60 days of the date the complainant knew or should reasonably have known of the action;

(c) Step 3, choice of process: The complainant may choose one of two options for how their complaint will be addressed;

(A) Option 1, the complainant may request an informal administrative review, as outlined in the Administrative Review Process section or;

(B) Option 2, the complainant may request a full evidentiary hearing. If the complainant selects this option, the agency will send a hearing request, the completed complaint form and any other evidence presented to the Oregon Office of Administrative Hearings (OAH), within 45 days. OAH will conduct the full evidentiary hearing.

(d) Step 4, submitting the complaint: The complainant must submit their complaint to the Director and indicate their choice of process.

(2) Administrative Review Process

(a) The Executive Director shall schedule the administrative review in consultation with the complainant and notify the complainant in writing of the date, time and location for the administrative review;

(b) The Executive Director shall hold the administrative review within a reasonable time of the complainant's request, taking into

consideration the length and complexity of the complaint;

(c) The administrative review is informal and is conducted at the direction of the Executive Director or the Executive Director's designee. The complainant will have an opportunity to ask questions and discuss the details of the complaint;

(d) The complainant shall advise the Executive Director if they intend to have advocates or legal counsel attend with them;

(e) The Executive Director shall issue a written decision on the complaint within 60 days of completing the administrative review;

(f) The complainant may request a full evidentiary hearing if the complainant is dissatisfied with the administrative review decision by filing a written request for a hearing with the Executive Director within 30 (thirty) days after issuance of the administrative review decision.

(3) Full Evidentiary Hearing

(a) A Complainant may request a full evidentiary hearing in response to:

(A) Any Business Enterprise Program actions arising from the operation or administration of the program;

(B) A notice of intent to terminate the licensee's or vending facility manager's license; or

(C) An administrative review decision.

(b) Requests for full evidentiary hearings shall:

(A) Be submitted in writing to the Executive Director within 30 (thirty) days after the date the Executive Director issues an administrative review decision, if that is the chosen process;

(B) Be submitted in writing to the Executive Director within 60 (sixty) days for vending facility managers from another state who have received a notice denying licensure;

(C) The complainant shall file the complaint and request for an OAH full and fair evidentiary hearing no later than 60 days after the action giving rise to the complaint or within 60 days of the date the complainant knew or should reasonably have known of the action.

(c) The Executive Director shall refer a request for a full evidentiary hearing and the grievance as presented by the complainant to the OAH, within 45 days.

(d) A full evidentiary hearing is conducted as a contested case hearing before an independent administrative law judge under the procedures set forth in ORS 183.411 to 183.497.

(e) The administrative law judge issues a proposed final order in all Commission matters, except when a licensee has withdrawn their complaint, or failed to show up for the scheduled hearing. If the licensee

defaults, the administrative law judge may issue a final order.

(f) If the licensee is dissatisfied with the results of the hearing, they may request the convening of an arbitration panel as provided for in 34 CFR 395.13.

(4) Arbitration-A complainant may file a request for arbitration with the Secretary of Education as authorized by Section 107 (d)1 of the Randolph-Sheppard Act, and 34 CFR 395.13 of the regulations issued pursuant to the Act.

OAR 585-015-0040

Vending Machine Income from Federal Property

(1) Vending machine income from federal property which is retained by a State Licensing Agency shall be used by such agency for the establishment and maintenance of retirement or pension plans, for health insurance contributions, and for the provision of paid sick leave and vacation time for blind vendors in such State, if it is so determined by a majority vote of blind vendors licensed by the State licensing agency, after such agency has provided to each such vendor information on all matters relevant to such purposes. Any vending machine income not necessary for such purposes shall be used by the State licensing agency for the maintenance and replacement of equipment, the purchase of new equipment, management services, and assuring a fair minimum return to vendors. Any assessment charged to blind vendors by

a State licensing agency shall be reduced pro rata in an amount equal to the total of such remaining vending machine income.

(2) In the event the Agency receives income from vending machines on federal property which may or may not be in direct competition with a licensed manager, the Agency will be guided by 34 CFR § 395.32 in distributing any such funds to a licensed manager. Any funds not distributed to a licensed manager shall be used by the Agency in accordance with 34 CFR § 395.8 to pay for the managers' benefits package.

(3) VENDING MACHINE INCOME FROM STATE AND OTHER PROPERTY-In the event the Commission collects and retains vending machine income from state and other properties that is not in direct competition with a vending facility manager, the funds shall be expended as described in OAR 346.

OCB-BIRD OPERATING AGREEMENT (JANUARY 2012)

This Agreement is between the Oregon Commission for the Blind (OCB) and its Business Enterprise Program and Jerry Bird's Vending (the Manager).

1. Agreement Period

This agreement shall be effective on the date of execution by all parties and shall continue in effect for one year.

2. Purpose and Scope

This agreement describes the rights and responsibilities of the parties in connection with the operation of a vending machine route by the Manager in the Salem area as a licensed blind vendor under the Business Enterprise Program (BEP). Attached and incorporated into this agreement as Exhibit "A" is a list of sites that the Manager is currently serving in his vending machine route.

In carrying out this agreement, the parties shall comply with all applicable provisions of the Business Enterprises Rules and Regulations (adopted February 2, 2001), ORS 346.510 to 346.570 and the Randolph-Sheppard Act, 20 USC § 107 ff.

3. OCB Responsibility

OCB Shall:

A. Purchase, repair and replace all BEP-owned equipment connected with the vending machine route. OCB may charge the first $70 of any repairs to the Manager.

B. Send a quarterly report to the Manager and all other licensed vendors.

C. Send an invoice each month to the Manager, listing required payments for health insurance, liability insurance and set-aside payments.

D. Provide to the Manager a copy of the current Rules and Regulations.

E. Publish a vacancy announcement whenever a vending unit becomes available and publish information on actual sales, gross profits and net proceeds for the unit over the previous three years.

F. Oversee all requirements of the permit or contract applicable to each vending site and monitor the Operator's performance.

G. Work with the Operator and the permit/contract agency to attempt to resolve any complaints or disputes concerning the Operator's performance.

H. If requested by the permit/contract agency, OCB may terminate this Agreement and install a temporary manager until a vacancy can be filled through the required selection process.

I. Provide to the manager a copy of any permit or vending facility contract that applies to the manager's operating agreement.

4. Manager's Responsibility

The Manager shall:

A. Manage the servicing, stocking, maintenance and repair of vending machines according to the requirements and specifications of the permit/contract agency.

B. Comply with all performance standards under the permit or contract between OCB and the permit /contract agency,

C. Work with OCB and the permit/contract agency to attempt to resolve any complaints or disputes concerning performance under this Agreement or the agreement between OCB and the agency.

D. Maintain liability insurance coverage with coverage to include OCB, the Manager and, if deemed necessary by OCB, the permit/contract agency.

E. Submit a monthly profit and loss statement to OCB by the 15th day of each month.

F. Make set-aside payments to the OCB by the 15th day of the month following receipt of an invoice from OCB.

G. Maintain health insurance through OCB, unless otherwise excused from this requirement by OCB.

H. Refer questions concerning policy to the BEP program.

I. Obtain written permission from BEP before purchasing any equipment.

5. Removal of Manager From a Vending Site

Upon receiving written request from a permit agency or contract agency, OCB may remove the Operator from an assigned vending site and assign another manager to the site. OCB will first make effort to resolve any problems or disputes between the Manager and the agency; but if the issues cannot be resolved, OCB may comply with the agency's request to assign another manager.

6. Termination

Manager may terminate this agreement upon providing 30 days prior written notice to OCB. In such event, the Manager will cooperate with OCB in taking an inventory of equipment and stock.

OCB may terminate this agreement if the Manager fails to comply with any material term of the agreement. In such event, OCB shall provide 30 days prior written notice of the termination, and the notice shall contain a statement of OCB 's reasons for terminating the agreement. In such event, the Manager will cooperate with OCB in taking an inventory of equipment and stock.

/s/ Linda Mock
Signature/Date Administrator,
Commission for the Blind
Date: 1/13/2012

Jerry Bird
Signature
Date Vendor: 12/3/2011

/s/ Walt Reyes
Signature/Date Director, BEP,
Commission for the Blind
Date Vendor: 1/12/12

OCB-BIRD OPERATING AGREEMENT (JANUARY 2010)

Exhibit A

List of Vending Sites (Jerry Bird) Unit 2447

1. Oregon State Hospital (Salem & Portland)
2. Baldock Rest Area (North & South)
3. Santiam Corrections
4. Divisions of Lands Building (First Floor)
5. Economic Development (Second Floor)"
6. Hillcrest Training
7. Agricultural Building
8. State Archive
9. Dome Building
10. Chemeketa Community College
11. Marion County Jail Inmate Area
12. Post office substations in Wilsonville, Woodburn and Silverton do not currently have vending machines installed. If vending facilities are installed on these sites, Mr. Bird will be assigned the manager to these sites.

13 OTI 27500 SW. Parkway Wilsonville Oregon

14 Development Service 150 Beavercreek RD. Oregon City Oregon

15 Immigration Naturalization 511 NW. Broadway Portland Oregon

16 Marion County Health 3180 Center ST. NE. Salem Oregon

17 Salem Social Security 1750 Mcgilchrist Salem Oregon

18 DHS Locations #1-Oregon City #2-North Portland #3-Irving Street #4-Clackamas

OPERATING AGREEMENT

This Agreement is between the Oregon Commission for the Blind (OCB) and its Business Enterprise Program and Jerry Bird, dba Jerry Bird's Vending (the Manager).

1. Agreement Period

This agreement shall be effective on the date of execution by all parties and shall continue in effect for one year.

2. Purpose and Scope

This agreement describes the rights and responsibilities of the parties in connection with the operation of a vending machine route by the Manager in the Salem area as a licensed blind vendor under the Business Enterprise Program (BEP). Attached and incorporated into this agreement as Exhibit "A" is a list of sites that the Manager is currently serving in his vending machine route.

In carrying out this agreement, the parties shall comply with all applicable provisions of the Business Enterprises Rules and Regulations (adopted February 2, 2001), ORS 346.510 to 346.570 and the Randolph-Sheppard Act, 20 USC § 107 ff.

3. OCB Responsibility

OCB shall:

A. Purchase, repair and replace all BEP-owned equipment connected with the vending machine route. OCB may charge the first $70 of any repairs to the Manager.

B. Send a quarterly report to the Manager and all other licensed vendors.

C. Send an invoice each month to the Manager, listing required payments for health insurance, liability insurance and set-aside payments.

D. Provide to the Manager a copy of the current Rules and Regulations.

E. Publish a vacancy announcement whenever a vending unit becomes available and publish information on actual sales, gross profits and net proceeds for the unit over the previous three years.

F. Oversee all requirements of the permit or contract applicable to each vending site and monitor the Operator's performance.

G. Work with the Operator and the permit/contract agency to attempt to resolve any complaints or disputes concerning the Operator's performance.

H. If requested by the permit/contract agency, OCB may terminate this Agreement and install a temporary manager until a vacancy can be filled through the required selection process.

I. Provide to the manager a copy of any permit or vending facility contract that applies to the manager's operating agreement.

4. Manager's Responsibility

The Manager shall:

A. Manage the servicing, stocking, maintenance and repair of vending machines according to the requirements and specifications of the permit/contract agency.

B. Comply with all performance standards under the permit or contract between OCB and the permit/contract agency, including the requirement to pay the $100 fee to Chemeketa Community College under Paragraph 8 of the Intergovernmental Agreement between OCB and Chemeketa Community College.

C. Work with OCB and the permit/contract agency to attempt to resolve any complaints or disputes concerning performance under this Agreement or the agreement between OCB and the agency.

D. Maintain liability insurance coverage with coverage to include OCB, the Manager and, if deemed necessary by OCB, the permit/contract agency.

E. Submit a monthly profit and loss statement to OCB by the 15th day of each month.

F. Make set-aside payments to the OCB by the 15th day of the month following receipt of an invoice from OCB.

G. Maintain health insurance through OCB, unless otherwise excused from this requirement by OCB.

H. Refer questions concerning policy to the BEP program.

I. Obtain written permission from BEP before purchasing any equipment

5. Removal of Manager From a Vending Site

Upon receiving written request from a permit agency or contract agency, OCB may remove the Operator from an assigned vending site and assign another manager to the site. OCB will first make effort to resolve any problems or disputes between the Manager and the agency; but if the issues cannot be resolved, OCB may comply with the agency's request to assign another manager.

6. Termination

Manager may terminate this agreement upon providing 30 days prior written notice to OCB. In such event, the Manager will cooperate with OCB in taking an inventory of equipment and stock.

OCB may terminate this agreement if the Manager fails to comply with any material term of the agreement. In such event, OCB shall provide 30 days prior written notice of the termination, and the notice shall contain a statement of OCB 's reasons for terminating the agreement. In such event, the Manager will cooperate with OCB in taking an inventory of equipment and stock.

/s/ Linda Mock
Administrator,
Date: 4/30/2010

Jerry Bird
Manager
Date Vendor: 4/21/2010

/s/ Walt Reyes
BEP Director
Date Vendor: 04/26/2010

EXHIBIT A
List of Vending Sites
(Jerry Bird)

1. Oregon State Hospital (Salem & Portland)
2. Baldock Rest Area (North & South)
3. Santiam Corrections
4. Divisions of Lands Building (First Floor)
5. Economic Development (Second Floor)
6. Hillcrest Training
7. Agricultural Building
8. State Archive
9. Dome Building
10. Chemeketa Community College
11. Post office substations in Wilsonville, Woodburn and Silverton do not currently have vending machines installed. If vending facilities are installed on these sites, Mr. Bird will be considered for assignment as to these sites.

BUSINESS ENTERPRISE PROGRAMS, RULES AND REGULATIONS, RELEVANT EXCERPTS (FEBRUARY 2, 2001)

BUSINESS ENTERPRISE PROGRAM

RULES AND REGULATIONS

February 2, 2001

[. . .]

I. Definitions

A. "THE ACT" means the Randolph-Sheppard Vending Stand Act (Public Law 74-732), as amended by Public Law 83-565 and 93-516, 20 U.S.C. Chapter 6A, Section 107.

B. "BLIND PERSON" means a person having not more than 20/200 visual acuity in the better eye with best correction or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision to such a degree that its widest diameter subtends an angle of no greater than 20 degrees. Such blindness shall be certified by a licensed physician who specializes in diseases of the eye.

C. "BUSINESS ENTERPRISE PROGRAM" (BEP) means the program administered by the Commission which provides self-employment opportunities for blind persons to operate its vending facilities. It is established under the provisions of ORS 346.510 to 346.570.

D. "COMMISSION" means the Oregon Commission for the Blind which is the agency of the state of Oregon which provides rehabilitation services for

legally blind persons within the state. It is also the licensing agency assigned to administer the Act.

E. "DIRECTOR" means the director of the Oregon Business Enterprise Program.

F. "FEDERAL PROPERTY" means any building, land or other real property owned, leased or occupied within the state by any department, agency or instrumentality of the United States or other instrumentality wholly owned by the United States.

G. "LICENSE" means a written instrument issued by the Commission authorizing a qualified blind person to operate a vending facility.

H. "LICENSEE" means a person who has been issued a license and is eligible to apply for any vending facility.

I. "MANAGER" means a person currently assigned to a vending facility and working under an operating agreement.

J. "MANAGERS' COMMITTEE: BUSINESS ENTERPRISE CONSUMER COMMITTEE" (BECC) means a group of managers that work with the Commission to help determine policies for the administration of the BEP.

K. "NET PROCEEDS" means the amount remaining from the sale of articles or services of vending facilities, and vending machine or other income accruing to blind vendors after deducting the cost of such sale and other expenses (excluding set-aside charges).

L. "NET PROFIT" means Net Proceeds minus set-aside payment.

M. "OPERATING CONTRACT" means the agreement between the manager and the Commission stating specific terms of operation for a particular vending facility.

N. "PERMIT" means the agreement between the Commission and the agency, person or entity having care, control or custody of the property authorizing the establishment of a vending facility.

O. "SET-ASIDE FUNDS" means those funds paid by managers to the Commission from the net proceeds of the operation of a vending facility.

P. "STATE PROPERTY" means any building, land or other real property, owned, leased, or occupied by any state department or agency, or any of its political subdivisions except public elementary and secondary schools.

Q. "TEMPORARY MANAGER" means a person assigned to a vending facility for up to 90 days, while operating under temporary agreement.

R. "VENDING FACILITY means a manager-operated cafeteria, snack bar or dry/wet facility, or vending machine route which may sell newspapers, confections, tobacco products, foods, beverages and other articles or services dispensed from automatic vending machines or manually.

1. "CAFETERIA" means a food dispensing facility providing a broad variety of foods and beverages prepared on the premises, including hot meals.

2. "SNACK BARS" means a facility selling limited lines of refreshments and some prepared foods.

3. "DRY/WET FACILITY" means a manual dispensing facility selling prepackaged refreshments.

4. "VENDING MACHINE ROUTE" means a series of vending machines in various locations directly operated by a manager. A manager may put a part of the vending route on full service with the director's approval.

II. Issuance and Conditions of Licenses

A. Eligibility Requirements

1. A blind person will be accepted into the BEP training program if there is a reasonable expectation that such person will complete the program and meets all of the following criteria:

a. Is a citizen of the United States

b. Is a blind person as defined in I.B of these Rules and Regulations

c. Is certified by the Commission's Rehabilitation program as qualified to operate a vending facility.

B. Training Program

1. An evaluation will be conducted at an existing BEP unit, in order to assess the trainee's strengths and weaknesses relative to working in a vending facility.

2. Each trainee will complete a training committee (BECC)

[* * *]

c. Up to two management persons from the building where the facility is located

2. Personal interviews will be conducted at the facility site. The committee will grade all applicants in four areas:

a. Past record as a manager

b. Education/training

c. Other experience

d. Interpersonal skills

3. Personal interviews will be limited to five (5) applicants. If more than five persons apply for that facility, the director will select the top five candidates for an interview, using the above four criteria.

4. If only one applicant applies, the director may make the selection without going through the formal selection process.

5. It should be noted that this transfer and promotion process was developed with the active participation of the BECC.

VII. Vending Machine Income On Federal Property

A. Direct Competition Machines:

1. Direct Competition Machines are those machines located on the same property as the location of the vending facility

2. Income will be distributed to the manager operating such facility, not to exceed the average net income of all managers in Oregon (as determined each fiscal year on the basis of each prior year's operation),

or the average net income of the total number of vendors in the United States, whichever is less

3. The Commission will retain vending machine income disbursed by a property managing department, agency or instrumentality of the United States in excess of the amounts eligible to accrue to managers

B. Non-Direct Competition Machines:

1. Income collected by the Commission from vending on Federal property, which is not distributed to a manager, shall be used for the establishment and maintenance of a retirement plan, for health insurance contributions and for paid sick leave and vacation

2. The use of vending machine income will be determined by a majority vote of the managers, after the Commission has provided relevant information to all managers.

3. No limitation shall be imposed on income from vending machines, combined to create a vending facility, when such facility is maintained, serviced, or operated by a manager

4. The Commission will disburse vending machine income to managers on at least a quarterly basis

5. Any vending income not needed for these purposes shall be used by the Commission for set-aside purposes of the Business Enterprise Program. Any assessment charged to the managers shall be reduced pro rata in an amount equal to the total of such remaining vending machine income.

VIII. Evidentiary Hearings and Arbitration of Vendor Complaints

A. Administrative Review

1. Any licensee may file a written complaint with the director concerning any BEP staff member or the operation of the program, except when the director has given notice of intent to suspend or terminate the licensee's license. In that situation, the licensee may request a hearing as provided under Paragraph B.

2. If the director's response is not considered to be satisfactory, a request for an administrative review must be submitted to the Administrator of the Commission.

3. A time and place for a review will be assigned and the licensee will be notified in writing. A review will be conducted as soon as is practical.

4. The review will be informal and the licensee will have adequate opportunity to ask questions and discuss the problems, which gave rise to the complaint. The Administrator will mail a written decision within fifteen (15) days of the review.

5. A full evidentiary hearing may be requested if the informal review does not resolve the dispute.

B. Fair Hearing:

1. A licensee may request a hearing in response to a notice of intent to suspend or terminate the licensee's license or if the licensee is dissatisfied with the decision of the administrative review panel discussed under Paragraph A (5). A written request for a fair hearing must be submitted to the Administrator within fifteen (15) working days of

receiving the notice of intent to suspend or terminate the license or of the administrative review panel decision.

2. The hearing will be conducted as a contested case hearing under the procedures set forth in ORS 183.413 to 183.497.

In the event a licensee is dissatisfied with the results of the fair hearing, an arbitration panel may be requested by filing a complaint with the Secretary of Education as authorized by Section 107 (d)1 of the Randolph-Sheppard Act, and 34 CFR 395.13 (a) of the regulations issued pursuant to the Act.

IX. Access to Program and Financial Information

A. Reports

1. Each licensee shall be provided access to all program and financial . . .

[* * *]

OREGON RSA CONTRACT 1978

APPLICATION FOR DESIGNATION AS STATE LICENSING AGENCY

A. Application submittal

The Oregon Commission for the Blind (Name of State Agency) submits this application for designation as State licensing agency to administer the Randolph-Sheppard Vending Facility Program in accordance with the Randolph-Sheppard Act as amended by P.L. 93-516 and all applicable regulations, policies and procedures established by the Commissioner of the Rehabilitation Services Administration.

B. Legal basis

The Oregon Commission for the Blind (Name of State Agency) is the State vocational rehabilitation agency providing vocational rehabilitation services to the blind under an approved State plan under 45 CFR 1361.6 of the Federal regulations governing the administration of the State Vocational Rehabilitation Program.

Sec. 1369.2(a)

Applicable State laws and interpretations thereof are on file with the approved State Plan for providing rehabilitation services to the blind. This authority permits the State agency for the blind to be designated as State licensing agency for the Randolph-Sheppard Vending Facility Program and to administer the program, including the promulgation of governing rules and regulations.

Sec. 1369.3(a)(1)

C. Agency organization

The State licensing agency will provide as attachment B its organization for carrying out the program, including a statement of the methods for coordination of the vending facility program and the vocational rehabilitation program, with special reference to the provision of post-employment services necessary to assure that the maximum vocational potential of each blind vendor is achieved.

Sec. 1369.3(a)(2)

Staff in sufficient number and with appropriate qualifications is available to carry out all functions required under the Act.

D. Selection criteria-for the establishment of vending facilities

The following policies and standards will be employed by the State licensing agency in determining feasible locations for the establishment of vending facilities:

Sec. 1369.3(a)(3)

1. A formal survey of the potential location will be conducted by the State licensing agency. Such survey will be in accordance with a model survey form as shown in the Randolph-Sheppard Vending Facility Program Manual Chapter or a comparable form which will assist in determining the feasibility of establishing a vending facility.
2. The establishment of a vending facility at a particular location will contribute to the

maximum development of economic opportunities for the blind and provide for the most productive utilization of program assets.

The evaluation will take into consideration but will not be limited to such factors as building population and continued availability, traffic, space requirements, competition, realistic return upon investment, and other appropriate factors.

E. State Committee of Blind Vendors

The State licensing agency assures the continuing and active particition [*sic*] of the State Committee of Blind Vendors in matters affecting policy and program development and administration of its vending facility program by providing for:

Sec. 1369.3(a)(4)

1. The biennial election of a State Committee of Blind Vendors which to the extent possible, will be fully representative of all blind vendors in the State program on the basis of such factors as geography and vending facility type with a goal of providing for proportional representation of blind vendors on Federal property and blind vendors on other property. Participation by any blind vendor in any election will not be conditioned upon the payment of dues or any other fees.

Sec. 1369.14(a)

2. Active participation of the State Committee of Blind Vendors in major administrative decisions and policy and program development which decisions and development affect

the overall administration of the State's vending facility program.

Sec. 1369.14(b)(1)

3. The receipt by the State Committee of Blind Vendors of grievances of blind licensees, and at the request of such licensees, the transmittal of such grievances to the State agency and service as advocate in connection therewith.

Sec. 1369.14(b)(2)

4. Active participation of the State Committee of Blind Vendors in the development and administration of a system for the transfer and promotion of blind vendors.

Sec. 1369.14(b)(3)

5. Active participation of the State Committee of Blind Vendors in the development of training and retraining programs for blind vendors.

Sec. 1369.14(b)(4)

6. Sponsorship with the assistance of the State licensing agency of meetings and instructional conferences for blind vendors within the State; and

7. Active participation of the State Committee of Blind Vendors in setting out the method of determining the set-aside charge for each set-aside purpose that the State agency intends to utilize under section 1369.9(b).

Sec. 1369.9(c)

F. Provision of necessary equipment and initial stocks and supplies

The State licensing agency will assume full responsibility for providing each vendor under the program with suitable equipment and adequate initial stocks and supplies.

Sec. 1369.3(a)(5)

G. Sources of funds for administration of the program

The following sources of funding will be utilized by the State licensing agency for the administration and operation of the vending facility program:

Sec. 1369.3(a)(8)

- ☒ Set-aside (levied pursuant to section 1369.9 of the regulations)
- ☒ Set-aside (unassigned vending machine income distributed pursuant to section 1369.8(c) of the regulations)
- ☒ State appropriations
- ☒ Federal matching
- ☐ Other _____

H. State agency relationship to vendors

The licensing agency will set forth and maintain in the rules and regulations attached to this application, policies and standards governing the relationship of the agency to the vendors including their selection, duties, supervision, transfer, promotion, financial participation, rights to and procedures for a full evidentiary hearing concerning a State licensing agency action,

and, when necessary, rights for the submittal of complaints to the Secretary requesting the convening of an arbitration panel.

Sec. 1369.3(a)(7)

I. Training program for blind individuals

The State licensing agency assures that effective programs of vocational and other training services to prepare the individual for the operation of a vending facility, including personal and vocational adjustment, books, tools, and other training materials, shall be provided to blind individuals as vocational rehabilitation services under the Rehabilitation Act of 1973 (Pub.L. 93-112), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516). Such programs will also include on-the-job training in all aspects of vending facility operation for blind persons with the capacity to operate a vending facility, and upward mobility training (including further education and additional training or retraining for improved work opportunities) for all blind licensees. The State licensing agency further assures that post-employment services as necessary will be provided to blind vendors to that the maximum vocational potential of such vendors may be achieved and suitable employment is maintained within the State vending facility program.

Sec. 1369.3(a)(8)
Sec. 1369.11

J. Utilization of the services of a nominee

The State licensing agency will utilize the services of a nominee under Sec. 1369.15.

☒ No

☐ Yes

If the State licensing agency has checked "Yes" it shall forward the agreement as Attachment C with this application. (See Model Nominee Agreement)

Sec. 1369.3(a)(9)
Sec. 1369.15(a)

This written agreement shall provide as a minimum the following:

1. That the State licensing agency retains full responsibility for the administration and operation of all phases of the program;
2. The type and extent of the services to be provided under such agreement;
3. That no set-aside charges will be collected from blind vendors except as specified in such agreement;
4. That no nominee will be allowed to exercise any function with respect to funds for the purchase of new equipment or for assuring a fair minimum of return to vendors, except to collect and hold solely for disposition in accordance with the order of the State licensing agency any charges authorized for those purposes by the licensing agency; and
5. That only the State licensing agency shall have control with respect to selection, placement, transfer, financial participation and termination of the vendors, and the preservation, utilization, and disposition of program assets.

K. Title to the equipment and stock

If the State licensing agency, in accordance with the laws of the State, permits any right, title to, and interest in vending facility equipment or stock (including vending machines) used in the program to be held by an agency or organization other than a vendor, the arrangements shall be in writing and shall specify that all such right, title to, or interest is held by such agency or organization as the nominee of the State licensing agency for program purposes and subject to the paramount right of the State licensing agency to direct and control the use, transfer, and disposition of such vending facilities or stock.

Sec. 1369.3(a)(10)
Sec. 1369.15(b)

L. The State licensing agency assures that it will:

Sec. 1369.3(a)(11)

1. Cooperate with the Commissioner in applying the requirements of the Act in a uniform manner;

2. Take effective action, including the termination of licenses, to carry out full responsibility for the supervision and management of each vending facility in its program in accordance with its established rules and regulations, the regulations at 45 CFR Part 1369, and the terms and conditions governing the permit;

3. Submit promptly to the Commissioner for approval a description of any changes in the legal authority of the State licensing agency,

its rules and regulations, blind vendor agreements, schedules for the setting aside of funds, contractual arrangements for the furnishing of services by a nominee, arrangements for carrying general liability and product liability insurance, and any other matters which form a part of the application;

4. If it intends to set aside, or cause to be set aside, funds from the net proceeds of the operation of vending facilities, obtain a prior determination by the Commissioner that the amount of such funds to be set aside is reasonable;

5. Establish policies against discrimination of any blind vendor on the basis of sex, age, physical or mental impairment, creed, color, national origin, or political affiliation;

6. Furnish each vendor a copy of its rules and regulations and the operator agreement which describes its arrangements for providing services, and take adequate steps to assure that each vendor understands the provisions of the permit and any agreement under which he operates, as evidenced by his signed statements;

7. Submit to an arbitration panel (upon its being convened by the Secretary) those grievances of any vendor which the vendor believes to be unresolved after a full evidentiary hearing;

8. Adopt accounting procedures and maintain financial records in a manner necessary to

provide for each vending facility and for the State's vending facility program a classification of financial transactions in such detail as is sufficient to enable evaluation of performance; and

9. Maintain records and make reports in such form and containing such information as the Commissioner may require, make such records available for audit purposes, and comply with such provisions as the Commissioner may find necessary to assure the correctness and verification of such reports.

Transmitted by:

/s/ J. Terry Carney
Administrator

Date: 10-11-78

Approved by:

/s/ Robert Straub
Chief Executive of State

Date: 10-11-78