respondent, the Alabama Division of Rehabilitation Services (ADRS), pursuant to the Randolph-Sheppard Act. ADRS is the SLA responsible for the operation of the Alabama vending facility program for blind individuals. The purpose of the program is to establish and support blind vendors operating vending facilities on Federal property. Beginning in May of 1985, Mr. Waldie operated a vending facility located in the Lyster Army Hospital, Fort Rucker, Alabama (Lyster Facility). Mr. Waldie alleged in his complaint that there was a problem with excessively high temperatures in the Lyster Facility. He also raised two other issues regarding facility safety and the sale of tobacco products. In addition, sometime late in 1985 or early in 1986, Mr. Waldie expressed a desire to expand into three buildings that were located near the Lyster Army Hospital building.

Because these issues were not resolved by ADRS to Mr. Waldie's satisfaction, the complainant initiated administrative proceedings under ADRS regulations. On April 11, 1988, pursuant to ADRS rules and regulations, a fair hearing was conducted at Mr. Waldie's request. The decision rendered after the hearing was unfavorable to the complainant who subsequently requested a full evidentiary hearing, which was held on May 26, 1988. The State hearing officer upheld the administrative decision of ADRS in his opinion of August 2, 1988. The hearing officer stated that (1) the record did not indicate that Mr. Waldie had been denied the opportunity to expand his facility; (2) the determination of which product lines are to be sold at a vending facility is a decision to be made by the SLA and the Federal property manager; and (3) the ventilation and air circulation problems are the result of new product lines requiring machines that generate heat. Further, the hearing officer stated that the permit was not violated by the Federal agency, that ADRS had not violated its rules and regulations, and that evidence presented failed to establish a violation of any rule or regulation governing the Business Enterprise Program and did not prove any erroneous application of that program. The SLA's decision was affirmed.

Mr. Waldie requested that the Secretary of Education convene an arbitration panel to review the issues. The arbitration hearing was held on June 27, 1991 and January 28, 1992. Two of the issues, the facility security and sale of tobacco products, were resolved during pre-hearing negotiations.

Arbitration Panel Decision

The panel found that the main issue in this case concerned the question of whether the SLA had improperly dealt with the air circulation and ventilation at the Lyster Facility. After hearing testimony, the panel found that, in fact, the Lyster Facility did not provide proper ventilation. In determining whose responsibility it was to rectify the problem, the panel turned to the concept of satisfactory site as used in the Act and the regulations. Satisfactory site is defined in the Act in 20 U.S.C. 107a(d)(3) and in the regulations in 34 CFR 395.1(q).

The panel set out the two different circumstances under which a vending facility can be established. First, the panel considered 34 CFR 395.30(a), which requires that Federal property managers take all steps necessary to assure that, wherever feasible, one or more vending facilities for operation by blind licensees shall be located on all Federal property. The second circumstance in which the establishment of a vending facility is discussed is in 34 CFR 395.31, which requires that, when a Federal property owner acquires or substantially renovates a property, the Federal property owner is required to provide a satisfactory site for the operation of a vending facility by a blind vendor.

Because the Act and the regulations use the term ''satisfactory site'' only in the latter circumstance, the panel concluded that, if the Lyster Facility was established under the first circumstance, the definition of satisfactory site would not apply. While the panel found that no evidence was submitted at the hearing as to the circumstances under which the Lyster Facility was established, the panel reasoned that, even if the Lyster Facility was established under 34 CFR 395.30, the definition of satisfactory site found in the regulations would apply for two reasons. First, the parties have proceeded since the outset on the assumption that this language applies to the Lyster Facility. Second, the panel noted that both the SLA and the Federal property manager agreed, at the time the permit was issued, that the Lyster Facility constituted a satisfactory site.

The panel concluded that there is a general ongoing obligation on the part of the Federal property manager to provide a satisfactory site. The panel further determined that the Lyster Facility must be properly cooled in order to be considered a satisfactory site.

In recognizing that the Federal agency was not a party to the arbitration proceeding, the panel turned to the responsibilities of the ADRS in ensuring that the vending facility was a satisfactory site. The panel determined that, although the ADRS was not responsible for providing an air conditioning unit, it was obligated to urge the Federal agency to rectify the problem. Consequently, ADRS was directed to use vigorous means, including the use of arbitration under the Act, to compel the Federal property manager to provide sufficient cooling for the Lyster Facility.

In considering the action of ADRS in responding to Mr. Waldie's request for expansion, the panel determined that ADRS has the obligation to reasonably pursue expansion sites for blind vendors and to use reasonable judgment in distributing any of those locations among qualified blind vendors. The panel concluded that ADRS acted reasonably in response to Mr. Waldie's request even though no expansion occurred, notwithstanding the plans to move the vending facility at some future date. Consequently, the panel delayed remedy on the matter for a period of time to determine whether a move of the facility would rectify the situation.

Finally, the panel addressed the issue of retroactive damages and an award of attorney's fees raised by Mr. Waldie. The panel concluded, based on reasoning of the majority opinion in *McNabb* v. *U.S. Department of Education*, 862 F.2d 681 (8th Cir., 1988), that Mr. Waldie was not entitled to retroactive damages under the Act. The panel determined, as well, based on the decision in *Alyeska Pipeline Service* v. *Wilderness Society*, 421 U.S. 240 (1975), that an express provision in the Act was required to award attorney's fees to Mr. Waldie and that no such provision existed in the Randolph-Sheppard Act.

One panel member dissented from the opinion of the majority as to the temperature issue. A second panel member dissented with respect to the expansion issue and the issue of the right of the blind vendor to seek retroactive damages and attorney's fees.

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

Dated: June 8, 1995.

Judith E. Heumann,

Assistant Secretary, Office of Special Education and Rehabilitative Services.

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