

BEFORE THE
DEPARTMENT OF REHABILITATION
STATE OF CALIFORNIA

In the Matter of the Appeal of:

BILL SHEETS,

Appellant.

OAH No. 2013080048

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on October 14, 2013, in Sacramento, California.

Elizabeth K. Colegrove, Attorney I, represented the Business Enterprises Program for the Blind (BEP), Department of Rehabilitation (Department), State of California.

Appellant Bill Sheets appeared at hearing with his authorized representative Christina Rose.

Evidence was received, the record was closed, and the matter was submitted for decision on October 14, 2013.

SUMMARY

Appellant appeals the Department's denial of his Vending Facility Application. The evidence established that he is not eligible to apply for a vending facility because he has not operated such a facility for more than two years prior to the date of his application, and he has not enrolled in and completed the BEP Vendor Training Program or successfully challenged the requirement that he complete that Program since he last operated a vending facility. Therefore, appellant's Application should be denied.

FACTUAL FINDINGS

Procedural Background

1. Appellant completed the BEP Vendor Training Program in May 2010. Shortly thereafter, he was issued a Vending Facility License (License) by the Department.

While appellant has operated at least one vending facility¹ since receiving his License, the parties stipulated that he has not operated any such facility since April 29, 2011.²

2. Sometime between April 30, 2013, and May 28, 2013, appellant submitted to the BEP a Vending Facility Application (Application) seeking to operate a vending facility.

3. On May 28, 2013, Zachary Mundy, an employee with the BEP, contacted appellant by telephone and told him that he was not eligible to apply for a vending facility since he last operated such a facility more than two years ago. Therefore, Mr. Mundy denied appellant's Application.

¹ “‘Vending Facility’ means a business operated by a vendor, which is a single entity under one facility number issued by the BEP, excluding interim vending facilities. A vending facility may consist of one site, or two or more sites combined or consolidated into a vending facility, one of which is a primary site defined in subsection (a)(36) herein, and others that are satellite sites defined in subsection (a)(38) herein. Vending facilities may consist exclusively, or in combination, of the same or different types of facilities including but not limited to, vendor-operated cafeteria, dry/wet facility, food concession vehicle or cart service, snack-bar [*sic*] facility, or vending machine facility, as defined herein, which may sell newspapers, periodicals, confections, tobacco products, foods, beverages, lottery tickets, and other articles or services that are dispensed automatically or manually and prepared on or off the premises.” (Cal. Code Regs., tit. 9, § 7211, subd. (a)(54).)

² The parties' stipulation constitutes a judicial admission. (See, *Gonzales v. Pacific Greyhound Lines* (1950) 34 Cal.2d 749, 754-758.) “A judicial admission is a party's unequivocal concession of the truth of the matter, and removes the matter as an issue in the case.” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48.)

4. On June 24, 2013, appellant filed a written appeal of the denial of his Application.

Evidence at Hearing

5. Mr. Mundy is the BEP employee responsible for reviewing all vending facility applications submitted, verifying the applicants' eligibility, and granting or denying the applications. At hearing, he explained that he was confused when he received appellant's Application because he received at the same time notice that appellant was withdrawing his Application. Therefore, Mr. Mundy contacted appellant by telephone to seek clarification of his intent.

6. Mr. Mundy learned during his telephone conversation with appellant that appellant had not operated a vending facility since April 30, 2011. Therefore, Mr. Mundy explained to appellant that the Department's regulations require him to either enroll in and complete the BEP Vendor Training Program or "challenge" such requirement by taking and scoring at least 70 percent on an exam that is comparable to the midterm test offered as part of the BEP Vendor Training Program in order to be eligible to apply for a vending facility. (See, Legal Conclusion 5.)

7. Debra Meyer, the manager of the BEP and Mr. Mundy's supervisor, testified at hearing consistently with Mr. Mundy.

8. Appellant did not challenge the factual basis for the Department's conclusion that he was ineligible to apply for a vending facility. Instead, he argued that the Department's regulation specifying the eligibility requirements should not apply to him because that regulation was changed in 2009 and he never received notice of that change.

9. Appellant's argument was not persuasive. Appellant's Exhibit X was a July 30, 2010 letter Ms. Meyer sent to all vendors and licensees of the BEP. She wrote, in pertinent part:

The BEP is providing a complete copy of the regulations for all vendors to review the entire regulations [sic] before the BEP/Training conference in October 2010. The regulations [sic] effective date will be September 15, 2010, [sic] this [sic] provides all vendors and licensees with at least 45 days notice of the new regulations

consistent with current regulation Section 7210(a) (1) and (3) [sic].

[¶]... [¶]

Some of the provisions which have been added or amended by the new regulations include, but are not limited to:

[¶]... [¶]

- • Requirements for a licensee to apply for a vending facility in Section 7213.5;

[¶]... [¶]

The BEP/Vendor Training conference that will be held October 8-10, 2010 [sic] in Sacramento will have a training of [sic] the regulations for all vendors. If you have any questions about the new regulations or would like an alternate format, please contact your Business Enterprises Consultant. The training day has been tentatively set for October 9th [sic], 2010.

Ms. Meyer testified that she provided training on recent changes to the Department's regulations at the October 2010 training conference. While she could not recall specifically what she said during that training, she was "confident" that she covered the recent changes to the regulations. Appellant admitted he attended that training, but said he did not "recall" receiving any training on the new regulations.

10. The evidence discussed above established appellant is currently ineligible to apply for a vending facility license. Specifically, he stipulated that he last operated a vending facility more than two years before he submitted his Application. He introduced no evidence that he enrolled in and completed the BEP Vendor Training Program or successfully challenged the requirement that he complete that program by taking and passing the applicable test since operating his last facility. Therefore, appellant's Application for Vending Facility should be denied.

LEGAL CONCLUSIONS

1. Generally speaking, the Randolph-Shepherd Act (20 USC, § 107 et seq.) requires that blind individuals be given preference for operating vending facilities on federal property. California has adopted a similar requirement with regard to state property and created the BEP, which is administered by the Department.

2. In California, "any individual who is 18 years or older, blind, ... a United States citizen, and eligible to receive vocational rehabilitation services from the Department, is eligible to apply for participation in the Business Enterprises Program for the Blind, hereafter BEP." (Cal. Code of Regs., tit. 9, § 7212, subd. (a).) The "readiness" of an eligible person to participate in the BEP Vendor Training Program is determined by: 1) an on the job pre-entry evaluation conducted by a vendor-trainer; and 2) a review and interview conducted by an Applicant Review Panel. (Cal. Code of Regs., tit. 9, § 7212, subd. (b).)

3. California Code of Regulations, title 9, section 7212.1 provides the following regarding the BEP Vendor Training Program:

[¶]...[¶]

(b) The Vendor Training Program shall include a training syllabus developed by the BEP that sets out the required courses and performance standards that Client-Trainees are expected to maintain. The training syllabus, schedule, curriculum, and vendor training evaluation process shall be made available to the CVPC or any vendor upon request.

(c) The training curriculum shall include, at a minimum:

(1) Classroom training including, but not limited to, subjects such as: federal law (20 USC section 107 et seq.); federal regulations (34 CFR Part 395); state law (Welfare and Institutions Code section 19625 et seq.); state regulations (California Code of Regulations (CCR), Title 9, Section 7210 et seq.); and applicable California Health and Safety Code requirements and certifications.

This training shall include homework, tests, and evaluations, as determined by the Training Instructor.

(2) On-the-Job Training at two or more BEP vending facilities.

(3) Additional training to enhance knowledge in specific subject areas, which may be provided through classroom and on-the-job training, if required by the Training Instructor.

(d) The training syllabus, performance standards, and methods of testing and scoring established by the BEP shall be reviewed every two years, at a minimum, by BEP management with the active participation of the CVPC.

(e) The duration of training specified in subsection (c) herein shall be determined by the BEP.

(f) To successfully pass the training specified in subsection (c) herein, Client-Trainees shall be required to average 70 percent on all required tests developed by the BEP. On a test for certification by a food service organization or association, a Client-Trainee shall be required to achieve the score established by the food service organization or association for certification. A midterm test shall be given to Client-Trainees following the basic classroom training component. Client-Trainees must have a minimum score of 70 percent to continue the training. Failure to achieve this score shall constitute sufficient cause to remove the Client-Trainee from the Vendor Training Program and refer the Client-Trainee back to his or her Rehabilitation Counselor for the Blind, who shall take one of the following actions:

(1) Work with the applicant to establish a plan, including classes, training, or business or work experience, which would increase the applicant's ability to successfully complete the Vendor Training Program; or

(2) Reevaluate the applicant's choice of an employment outcome as a BEP vendor.

(g) A Client-Trainee shall complete all of the training components at the performance levels specified in subsection (h) herein before he or she successfully completes the Vendor Training Program and may be certified by the Training Instructor and licensed by the Department to operate a vending facility. Performance levels are measured using the DR 445, Client-Trainee Training Evaluation (Rev. 07/07), incorporated by reference herein, using the DR 445A, Client-Trainee Training Evaluation Instructions (Rev. 07/07), incorporated by reference herein. The DR 445, Client-Trainee Training Evaluation (Rev. 07/07) measures 10 areas of performance, has a possible total score of 10 points, and is rated and scored as follows:

(1) Standard = Fully meets expected standards. Each standard rating is scored as one (1) point.

(2) Below Standard = Fails to meet expected standards. Each below standard rating scores zero (0) points. Any rating of Below Standard must be fully explained by the Vendor Trainer on the DR 445, Client-Trainee Training Evaluation (Rev. 07/07), including specific examples to support the rating.

(h) To meet the requirements of (g) of this section, the Client-Trainee must achieve performance levels as follows:

(1) For the classroom component of training, a score 70 percent on Part II of the DR 445, Client-Trainee Training Evaluation (Rev 07/07).

(2) For the on-the-job component of training, a score of 70 percent on Part I of the DR 445, Client-Trainee Training Evaluation (Rev. 07/07).

(A) The Training Instructor shall take remedial action if a Client-Trainee scores four or more Below Standard ratings on any one DR 445, Client-Trainee Training Evaluation (Rev. 07/07). Remedial action may include placing the Client-Trainee on probation or removing the Client-Trainee from the Vendor Training Program.

(i) The Training Instructor shall complete a DR 454, Client-Trainee Final Appraisal (Rev. 07/07) to determine a Client-Trainee's final grade. The Client-Trainee must score at least 70 points on the DR 454, Client-Trainee Final Appraisal (Rev. 07/07) to be licensed. When a Client-Trainee scores at least 70 points on the DR 454, Client-Trainee Final Appraisal (Rev. 07/07), the Training Instructor also shall complete a DR 456, Certification of Eligibility for BEP License (Rev. 07/07), incorporated by reference herein; and a DR 468, Vending Facility License (Rev. 07/07), incorporated by reference herein, which shall be sent to the Client-Trainee within 30 working days of the completion of training.

(j) The BEP shall provide the Rehabilitation Counselor for the Blind with a copy of the forms specified in subsection (i) herein, for insertion into the Client-Trainee's vendor file.

(k) An applicant who has experience operating a blind vendor facility in another state, or who has prior experience in the food service business, may not challenge the requirement to complete the Vendor Training Program required by this section.

4. A person who successfully completes the BEP Vendor Training Program and has the ability to comply with all applicable laws and regulations is entitled to a Vending Facility License, which the Department must issue within 30 working days of the issuance of a Certification of Eligibility for BEP License pursuant to California Code of Regulations, title 9, section 7212.1, subdivision (i). (Cal. Code of Regs., tit. 9, section 7213, subd. (a).) The Vending Facility License remains valid as long as the licensee is eligible to hold such license pursuant to California Code of Regulations, title 9, section 7213, subdivision (a), unless the

license is suspended or terminated as provided by law. (Cal. Code of Regs., tit. 9, § 7213, subd. (b).)

5. California Code of Regulations, title 9, section 7213.5 provides the following eligibility requirements for applying for a BEP vending facility:

(a) To be eligible to apply for a Business Enterprises Program for the Blind (BEP) vending facility, including an interim vending facility, a licensee shall comply with the following requirements to ensure that he or she maintains the qualifications to operate a BEP vending facility:

(1) If the licensee has not operated a BEP vending facility, including an interim vending facility, from two to four years from the date of licensure or from the last day the licensee operated a vending facility, whichever is most recent in the previous, the licensee must either:

(A) Enroll in and complete the BEP Vendor Training Program described in Section 7212.1 of these regulations, except that an individual who was a former vendor will not be required to complete the on-the-job training specified in Section 7212.1(c)(2) of these regulations; or

(B) Challenge the requirement to take the BEP Vendor Training Program by taking and scoring 70 percent or higher on an examination given by the BEP Training Instructor, comparable to the midterm test specified in Section 7212.1(f) of these regulations.

(2) If the licensee has not operated a BEP vending facility, including an interim vending facility, for more than four years from the date of licensure or from the last day the licensee operated a vending facility as a vendor, whichever is most recent, the licensee must complete all components of the Vendor Training Program described in Section 7212.1 of these regulations.

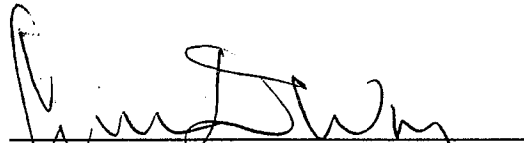
(b) A licensee who fails to take the appropriate action specified herein shall not be eligible to apply for a BEP vending facility, including an interim vending facility.

6. For the reasons discussed in Factual Finding 10, appellant is ineligible to apply for a vending facility pursuant to California Code of Regulations, title 9, section 7213.5, subdivision (a). Therefore, his Vending Facility Application should be denied.

ORDER

Appellant Bill Sheet's Vending Facility Application is DENIED.

DATED: October 18, 2013


COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings