BEFORE THE
DIRECTOR OF THE
DEPARTMENT OF REHABILITATION
STATE OF CALIFORNIA

In the Matter of:	OAH No. 2013070700
MICHAEL FIELDS,	
Appellant.	

PROPOSED DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on November 18, 2013, in Los Angeles, California. Appellant Michael Fields appeared and was represented by Mary Tanagho Ross and Cindy Panuco, with Hadsell, Stormer, Richardson & Renick, LLP. Respondent, Department of Rehabilitation, was represented by Matthew W. Kruse, Attorney I with the Department of Rehabilitation.

Oral and documentary evidence was received, and argument was heard. The record was initially left open until December 2, 2013, to allow the parties to file and serve simultaneous closing briefs. On November 20, 2013, the parties filed a "Joint Post-Hearing Stipulation Continuing the Filing of the Closing Briefs." The Joint Stipulation was marked and admitted as Appellant's Exhibit 42. The Joint Stipulation contained the stipulation: "The Parties hereby request and stipulate to the continuance of the filing of the Closing Briefs until December 6, 2013." The Administrative Law Judge granted the request for continuance of the filing of the closing briefs until December 6, 2013.

On December 6, 2013, Appellant submitted his "Post-Administrative Hearing Closing Brief," which was marked as Appellant's Exhibit 43, and lodged. Appellant also submitted a "Notice of Lodging CD-R in Support of Post-Administrative Hearing Closing Brief," which was marked collectively with the CD-R as Appellant's Exhibit 44, and lodged. On December 6, 2013, Respondent Department of Rehabilitation submitted its "Closing Brief," which was marked as Respondent's Exhibit R-10, and lodged.[1] The record was closed and the matter was submitted for decision on December 6, 2013.

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[1] Prior to the hearing, Appellant submitted his "Administrative Hearing Brief," which was subsequently marked and lodged as Appellant's Exhibit 45. Also prior to the hearing, Respondent submitted its "Opening Brief," which was marked and lodged as Respondent's Exhibit R-11.

ISSUE ON APPEAL

The issue presented in this appeal is whether Appellant should be allowed to remain indefinitely (i.e. to be reinstated) as an interim vendor at the Stanley Mosk Courthouse pending a favorable resolution with the contracting agency of his primary facility or to be given alternate interim facility.

FACTUAL FINDINGS

Background

1. The Randolph-Sheppard Act, 20 U.S.C. §§ 107 et seq. (Randolph-Sheppard Act or Act), establishes a federal and state program providing remunerative employment and economic opportunities for blind persons. The Act grants priority to blind persons licensed by state licensing agencies to operate vending facilities on federal property. (20 U.S.C. § 107b.) The Act requires state licensing agencies, in part, to negotiate with federal agencies for the operation of vending facilities on federal sites (20 U.S.C. § 107a(c)) and to issue licenses to blind persons to operate vending facilities on federal property (20 U.S.C. § 107a(b)).

2. As a state licensing agency, the California Department of Rehabilitation (DOR or Department) implements the Randolph-Sheppard Act program through the Business Enterprise Program for the Blind (BEP).[2] The BEP provides self-employment opportunities for blind persons to become vendors operating vending facilities on federal, state, or other properties. The BEP issues licenses to qualified blind persons to operate the vending facilities. The BEP also applies for and obtains permits to operate the vending facilities located on federal property over which federal agencies have custody or control.

3. There are three types of vending facilities under the BEP program: primary site, satellite site, and interim vending facility. A "Primary Site" is "designated by the BEP as the main site of a vending facility that is comprised of two or more sites that have been combined or consolidated into a vending facility." (Cal. Code Regs., tit. 9, section 7211(a)(35).) A "Satellite Site" means "the secondary site or sites . . . that have been combined or consolidated [with a primary site] into a vending facility." (*Id.* at subd. (a)(37).) An "Interim Vending Facility" is defined as "a vending facility that is operated on a temporary basis by a vendor, not to exceed six months, except if renewed for a period of time specified in writing by the BEP Manager." (*Id.* at subd. (a)(28).)

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[2] The BEP was created under Welfare and Institutions Code section 19625 et seq. to provide blind persons with remunerative employment, enlarge their economic opportunities, and stimulate the blind to greater efforts in striving to make themselves self-supporting.

4. Prior to establishing vending facilities on any federal or state properties, the BEP must determine that the vending facility will produce "adequate net income" of $3,300 per month.[3] (Cal. Code Regs., tit. 9, § 7216, subd. (c)(5).)

5(a). The BEP may place a vending facility (comprised of one or more sites) into "interim operation" when it is "in the best interests of the BEP." (*Id.* at § 7215, subd. (a).) A facility is placed into interim operation generally due to unexpected vendor vacancies and in order to continue providing vending services. The BEP may renew an interim vending facility several times, but "only for as long as it takes for BEP to fill an unexpected vacancy." (*Id.* at subd. (b).) During the time of interim operation, the BEP must: decide whether the facility is to be combined or consolidated with any other site(s); announce its availability for operation as a permanent site; and select a vendor. (*Id.*)

5(b). Delays in announcing the availability of an interim facility as a permanent site are often encountered due to the time involved in negotiating new operating permits, BEP staffing issues, lack of resources, and other general bureaucratic problems. The BEP must analyze the average earning of facilities over time to determine if the facilities' average incomes are sufficient to announce them as a permanent site individually or in combination. Consolidation of sites is allowed when the BEP has determined that such a combination of sites is likely to produce, within a reasonable period of time, an adequate net income.

6(a). When a location for a vending facility becomes available, the BEP announces the availability of the location and takes applications from eligible vendors. (Cal. Code Regs., tit. 9, §§ 7214, 7214.1 and 7215.1.) Interviews are conducted by a Selection Committee for Vending Facilities, comprised of three representatives of the contracting agency,[4] unless the contracting agency waives this composition of the committee and allows the BEP to recruit other qualified committee members. (Cal. Code Regs., tit. 9, § 7214.1.)

6(b). For purposes of selecting a vendor to operate an interim vending facility, the BEP must conduct an assessment of the qualifications of vendor applicants as specified by regulation. (Cal. Code Regs., tit. 9, §7215.1, subd. (c).) If the contracting agency does not wish to participate in the selection process, the BEP Manager must select the interim vendor based on the assessment specified by regulation. (*Id.* at subd. (e).)

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[3] "Adequate Net Income" means "minimum projected net income of $3,300 per month to place a licensee or vendor in a newly established or previously established vending facility or in a vending facility formed by combining or consolidating two or more sites. The Department shall annually review this minimum income level and make adjustments based upon the changes in the California Necessities Index. (Cal. Code Regs., tit. 9, § 7211, subd. (a)(2).)

[4] "'Contracting Agency' means the [entity which] owns, leases, rents, or otherwise controls or occupies a federal, state, or other property, with the authority to sign a Permit . . . [to operate] the vending facility." (Cal. Code Regs., tit. 9, § 7211, subd. (a)(12).)

7. The selected vendor is provided with an operating agreement, which includes the vending facility permit. (Cal. Code Regs., tit. 9, § 7214.1, subd. (m); *Id.* at § 7220, subd. (b) .)

Jurisdiction

8. Under federal and state law, any licensed blind vendor who is dissatisfied with any action arising from the operation or administration of a vending facility program may request a full evidentiary hearing. (20 U.S.C. §107d(1); Welf. & Inst. Code section 19635; Cal. Code Regs., tit. 9, section 7227.2, subd. (a).) A request for a full evidentiary hearing must be made in writing and include the reason for the request and the action that the licensed vendor wishes to have taken. (Cal. Code Regs., § 7227.2, subd. (a).)

9. On June 6, 2013, Appellant Michael Fields (Appellant) submitted a written request for a full evidentiary hearing on the issue set forth above, and this hearing ensued.

Procedural Background

10. Appellant is a blind person. Since 1996, he has been a licensed vendor under the BEP.

11. Since February 4, 2002, Appellant has been the licensed BEP vendor at the New Federal Building, 300 North Los Angeles Street, Los Angeles, California 90013 (primary vending facility or primary site), a federal property under the control and custody of the United States General Services Administration (GSA). From 2002 until September 2009, Appellant operated the primary vending facility which was comprised of several service areas including a coffee cart and related carts and storage equipment/areas in the first floor lobby in front of an historic mural and on the third floor.

12. On July 28, 2009, GSA raised the issue with DOR that the primary facility's lobby cart had expanded beyond the scope of the permit without authorization. On September 1, 2009, the GSA informed DOR the issues involved with the lobby coffee cart included impact to the emergency egress due to the cart size and location and damage to the historic mural. The GSA also informed the DOR that:

> GSA plans to [require] the downsizing of [Appellant's] coffee cart to a maximum overall length of six feet, with no tables, display cases or other peripheral equipment. The cart will be relocated to another location in the lobby, and its offerings will be strictly limited to coffee and prepackaged pastries.
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> (Exhibit 24, p. 10.)

13. On September 23, 2009, over the DOR's objections, GSA relocated the coffee cart to a less visible portion of the lobby and removed several of the carts and display/storage

cases from the lobby and placed them on a different floor. This resulted in the reduction of the primary facility's size and available product offerings.

14. Immediately thereafter, Appellant requested that DOR file a complaint for arbitration with the United States Secretary of Education, asserting that the GSA had violated the Randolph-Sheppard Act by relocating and down-sizing his vending facility in the New Federal Building without his and the BEP's authorization, agreement, or participation.

15. Preferring to resolve the matter informally, the Department continued to discuss the issue with GSA through February 2010. However, in January 2010, after the Department failed to file a complaint for arbitration as requested, Appellant requested a full evidentiary hearing under California Code of Regulations, title 9, section 7227.2 seeking an order that DOR file for arbitration of his dispute with GSA before the United States Secretary of Education. That evidentiary hearing took place before an Administrative Law Judge with the Office of Administrative Hearings on May 24 and November 22, 2010 (2010 evidentiary hearing).

16. Prior to commencement of the 2010 evidentiary hearing, the BEP allowed Appellant to begin operating an interim facility, consisting of a small snack cart on the first floor of the Stanley Mosk Courthouse, 111 Hill Street, in Los Angeles (interim facility). Appellant was not required to submit any application or go through a formal selection process. Instead, BEP employee Jerry Faustinos asked Appellant if he would be interested in operating the interim facility and informed Appellant that his operation of the interim facility would supplement the financial losses he was incurring at his primary facility. Appellant invested time and money to begin operating the interim facility and to ensure that it would operate at "peak performance." He informed Faustinos about the money he was investing, and Faustinos told Appellant he would be at the interim facility longer than six months and that it was worth investing his money to build sales. It was Appellant's belief from his conversations with Faustinos that he would be allowed to run the interim facility until the BEP was successful in having his primary facility restored by GSA.

17. Following the 2010 evidentiary hearing, the Administrative Law Judge issued a proposed decision in January 2011, which was adopted by the DOR (Prior Decision). That Prior Decision determined that the GSA had violated the Randolph-Sheppard Act and that the DOR must file a complaint for arbitration with the Secretary of Education to resolve appellant's dispute with the GSA.

18(a). The DOR thereafter filed a complaint for arbitration with the Secretary of Education to resolve appellant's dispute with the GSA.

18(b). The Arbitration hearing took place on January 7 and 8, 2012. Following the arbitration hearing, the arbitration panel issued an Arbitration Decision.

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18(c). In the Arbitration Decision, the panel found that GSA violated the Randolph-Sheppard Act as follows:

(1). The arbitration panel found that "GSA violated the [Randolph-Sheppard Act] and its implementing regulations by not providing a total of 935 square feet for the lobby coffee cart and the third floor snack shop." (Exhibit 24, p. 13.)

(2). The arbitration panel also found that:

> GSA was required to get DOR's agreement prior to any relocation of the vending facilities as it related to the lobby coffee cart and GSA simply failed to get DOR's approval for the relocation of the lobby coffee cart. Accordingly, the panel finds that GSA violated the [Randolph-Sheppard Act] and its implementing regulations when it relocated the lobby coffee cart in September 2009 to its current location.
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> (Exhibit 24, p. 14.)

(3). The panel further found:

> While it appears that the dispute over certain offerings at the lobby coffee cart (i.e. nachos, hot dogs, chili, popcorn) were considered items that were prepared on the premises and therefore not allowed under the permit, GSA's September 1, 2009, correspondence has gone too far in limiting the offerings to only coffee and pre-packaged pastries. . . . In addition to violating the [Randolph-Sheppard Act] and its implementing regulations when the lobby coffee cart was relocated, the panel also finds that GSA violated [the Randolph –Sheppard Act] and its implementing regulations by limiting the offerings at the lobby coffee cart to coffee and pre-packaged pastries in its September 1, 2009 correspondence.
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> (Exhibit 24, p. 15.)

18(d). However, the arbitration panel determined that no violations were committed regarding the April 2011 relocation of third floor storage/office space to the sub-basement. The panel found:

> In July 2009, GSA informed DOR that because of the downsizing of the lobby coffee cart and tenant critical space needs on the third floor, the third floor storage/office space be3ing used by [Appellant][would need to be relocated to the sub-basement area. . . . Discussion regarding the relocation of the third floor storage/office space continued for a period of more than two years [until April 2011, when

> Appellant's supplies were moved from the third floor]. Since the permit is silent as to the usage of the third floor storage/office space, the panel cannot find that GSA violated the [Randolph-Sheppard Act] or its implementing regulations when the third floor storage/office space was relocated to the sub-basement in April 2011 because the permit is the authority in which DOR is allowed to occupy the space in a federally owned space. There was no evidence presented that the terms of the March 1996 permit were ever modified or changed by the parties. . . . GSA did not violate [the Randolph-Sheppard Act] or its implementing regulations when the third floor storage/office space was relocated to the sub-basement area because there is no evidence that DOR was ever entitled to occupy the third floor storage/office space in the first place.
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> (Exhibit 24, pp. 16-17.)

19. Following the issuance of the Arbitration Decision, DOR has engaged in negotiations with GSA regarding the placement of Appellant's equipment in the primary facility in an effort to enforce the Arbitration Decision. Those negotiations have been extensive and remain ongoing. To date, DOR has been unsuccessful in enforcing the Arbitration Decision (regarding the size, location and offerings of the primary facility).

Facts regarding Current Appeal

20. Following the 2010 evidentiary hearing, the BEP allowed Appellant to continue operating the interim facility.

21(a). However, in 2010, after Appellant began operating the interim facility, DOR adopted new regulations, approved by the United States Department of Education, which affected the selection of vendors for interim facilities. These new regulations included regulations addressing: the requirements for a licensee to apply for a vending facility set forth in California Code of Regulations, title 9, section 7213.5; announcement and application procedures for available vending facilities set forth in California Code of Regulations, title 9, sections 7214 and 7214.1; placement of a vending facility into interim operation and the announcement of an available interim vending facility set forth in California Code of Regulations, title 9, sections 7215 and 7215.1; and consolidation and combination of vending facilities set forth in California Code of Regulations, title 9, section 7216.1. (See also Findings 3 through 7, above.)

21(b). On July 30, 2010, DOR sent copies of the regulations to all vendors and informed them that the effective date of the regulations would be September 15, 2010.

22. At some point between September 15, 2010 and January 6, 2011, DOR informed Appellant that it intended to solicit vendors to apply to operate a primary site at the Stanley Mosk Courthouse which included Appellant's interim facility.

23(a). On January 25, 2011, Appellant's attorney sent a letter to DOR, stating:

> I am writing to request that the Department desist from its efforts to remove [Appellant] as the interim operator of [the facility] at the Stanley Mosk Courthouse, and instead renew the agreement to allow him to continue to operate the vending facility on an interim basis, pending the resolution of the Department's dispute with GSA . . .
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> As you know, [Appellant's] income derived solely from the operation of [his primary site] has been drastically reduced to levels below $3,300 in violation of California Welfare and Institutions Code section 7211. Per the Department's own financial records submitted during the Administrative Hearing in connection to [Appellant's] appeal, [the primary site] had an average monthly net income of $2,690 for the period September 2009 to September 2010. Conversely, prior to the unilateral downsizing and relocation of [the primary site], it averaged a monthly net income of $7,279 for the period from April 2008 to April 2009. The facility has gone from the point of providing a healthy income to the vendor, to now not even meeting the minimum net income requirement of $3,300 as set forth in the regulations. The operation of [the interim facility] has served to somewhat supplement the income derived from the now underperforming [primary site]; however, [Appellant's] income has not been restored to the levels at which it was before. . .
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> [Appellant] was permitted to operate [the interim] facility on an interim basis. While [Appellant] does not disputed that an "Interim Vending Facility" means a vending facility that is operated on a temporary basis for a period of six months, the Department is in no way required to limit his operation of this facility to six months. The regulations authorize the [BEP] Manager, in this case Debra Meyer, to renew the agreement and permit [Appellant] to continue to operate the vending facility for a longer time period. Cal. Admin. Code tit. 9, § 7211 (29) ("'Interim Vending Facility' means a vending facility that is operated on a temporary basis by a vendor, not to exceed six months, except if renewed for a period of time specified in writing by the BEP Manager) (emphasis added).
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> On January 6, 2011, [Appellant] wrote an email to the BEP Manager, Debra Meyer, invoking the provision of the regulations which allows his operation of the interim facility for a period exceeding six months. Ms. Meyer has ignored [Appellant's] request, and has provided him no legal authority, or legitimate reason to support a refusal to grant [Appellant's] request that he be permitted to continue to operate the [interim facility] until which time the Department

resolves the dispute with GSA, or his income is restored in some manner to the levels which the facility produced prior to its downsize.

[Appellant] asks that until such time as his income is restored, the Department desist from any efforts to reassign [the interim facility] to another blind licensee, and to instead renew the agreement allowing him to continue to operate the facility on an interim basis. Indeed, the Department is both authorized to renew and extend any agreements regarding the operation of interim vending facilities, and in this case, is compelled to do so under the circumstances. . . .

[¶] . . .[¶]

It is my understanding that the Department intends to remove [Appellant] as the operator of [the interim facility] by the end of January 2011. Given the short time frame, we request that the Department refrain from taking such actions until they have fully justified in writing, and [Appellant] has had an opportunity to appeal the Department's decision to remove him as the operating vendor of [the interim facility].

(Exhibit 14.)

23(b). Appellant's counsel did not receive a response to this letter.

24. Appellant continued to operate the interim facility after the January 25, 2011 letter was sent.

25(a). Just prior to April 5, 2012, Appellant was again informed that DOR intended to solicit vendors to apply to operate the interim facility as a permanent site. On April 5, 2012, Appellant's counsel sent another letter to DOR, again requesting that DOR desist from any efforts to remove Appellant as the operator of the interim facility. The language of the April 5, 2012 letter mirrored that of the January 25, 2011 letter.

25(b). Appellant's counsel did not receive a response to this letter.

26. Appellant continued to operate the interim facility after the April 5, 2012 letter was sent.

27(a). Just prior to April 29, 2013, Appellant was again informed that DOR intended to solicit vendors to apply to operate the interim facility as a permanent site. On April 29, 2013, Appellant's counsel sent another letter to DOR, again requesting that DOR desist from any efforts to remove Appellant as the operator of the interim facility. The language of the April 29, 2013 letter mirrored that of the January 25, 2011 and April 5, 2012 letters.

27(b). Appellant's counsel did not receive a response to this letter.

28. Appellant continued to operate the interim facility after the April 29, 2013 letter was sent.

29.(a). On May 2, 2013, DOR published a Vending Facility Announcement for the Stanley Mosk Courthouse as a permanent site which would include areas on the first and fourth floors. This announcement combined the area of Appellant's interim facility on the first floor with another interim facility being operated on the fourth floor. In determining to combine the two facilities for announcement as a permanent site, the BEP evaluated the performance of the interim facilities. The facilities were combined to meet the net adequate income requirements for a permanent site.

29(b). Appellant received an email with the attached announcement in May 2013. At that time, he was still operating the interim facility.

30. Appellant did not apply to operate the Stanley Mosk Courthouse as a primary site. A vendor is allowed to operate only one primary site, and Appellant's primary site was the New Federal Building. He reasoned that, if he applied and was chosen to operate the Stanley Mosk Courthouse as his primary site, he would have to give up his primary site at the New Federal Building, which he believed would be a much more profitable location on restoration to its original configuration.

31. On June 6, 2013, Appellant's counsel sent another letter to DOR, requesting that DOR allow Appellant to continue operating the interim facility. The letter noted:

> We first wrote the Department over two years ago in January 2011 regarding this same issue and made the same request. We asked the Department to formally decide that [Appellant] could remain as the operator of [the interim facility] on an interim basis, or formally refuse his request. We asked for a decision on this matter from the Department two more times . . . We have yet to receive a response to any of these three letters.
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> Instead, it appears the Department has moved forward with sending out an Announcement soliciting vendors to apply to run [the interim facility as a permanent site]. Once a vendor is selected, it will require [Appellant] to be removed as the vendor for that location, meanwhile the Department has yet to respond to his request that he be permitted to remain as the interim vendor while the issues surrounding [the permanent site] are resolved.
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> [W]e will take the Department's conduct, including announcing the facility and now, as we learned yesterday, moving forward with

> interviews, to indicate that it intends to remove [Appellant] as the operator of that facility. . . .
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> Accordingly, [Appellant] hereby formally demands that a full evidentiary hearing be scheduled and conducted . . .
>
> (Exhibit 21.)

32(a). Following the application and interview process, vendor Jose Santoyo was awarded the permanent facility at the Stanley Mosk Courthouse based on competitive criteria.

32(b). DOR did not permit Appellant to continue operating the interim facility pending resolution of his dispute with GSA at his primary site. Appellant was removed as the operator of the interim facility; his last day of operation there was August 31, 2013, when the new vendor took over operating it as a primary site. At that point, Appellant had operated the interim facility for three years, seven months.

33(a). Vendors are responsible for submitting Monthly Operating Reports (MORs) to BEP. According to Appellant's MORs for his interim site, his 12-month average for monthly net income during the months of April 2012 through April 2013 was $2,197.

33(b). According to Appellant's MORs for his primary site, his 12-month average for monthly net income during the months of October 2012 through September 2013 was $4,320. This amount is above the "Adequate Net Income" amount of a $3,300 per month.[5]

34. In November 2013, a new cafeteria opened on the second floor of the New Federal Building. Although DOR had asked Appellant if he wanted to apply to operate that restaurant, he was not interested. If BEP had submitted an application, it would have been given priority; instead, applications were accepted from the general public. The cafeteria has a cappuccino station which offers items identical to those Appellant offers at his cart in the lobby, but at a lower price. Appellant is concerned that the competition from the cafeteria will "be the end of his facility."

35. Appellant maintained that, as a result of the difficulties enforcing the arbitration decision and resolving his dispute with GSA, he continues to suffer economic loss at his primary site. Appellant asserted that the income from the interim facility had helped to supplement his income and that he still needs this additional income because the proceeds from his primary site are insufficient to meet his financial obligations.

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[5] This amount is also significantly higher than the primary site's 12-month average at the end of 2010, as noted in the Prior Decision: "As of November 2010, appellant's 12-month average net income from his vending facility at the New Federal Building was $2,690." (Exhibit 15, p. 16, para. 30(B).)

36. Appellant has applied to operate other facilities since he was removed from the Stanley Mosk Courthouse. He has not been selected to operate any other facilities.

LEGAL CONCLUSIONS

1. Cause does not exist to require the Department to reinstate Appellant indefinitely as an interim vendor at the Stanley Mosk Courthouse, or to provide him an alternate interim facility (without engaging in the competitive process outlined by regulation) pending a favorable resolution with GSA regarding his primary facility, as set forth in Factual Findings 1 through 36, and Legal Conclusions 2 through 6.

2. 34 C.F.R. § 395.33 provides:

> (a) Priority in the operation of cafeterias by blind vendors on Federal property shall be afforded when the Secretary determines, on an individual basis, and after consultation with the appropriate property managing department, agency, or instrumentality, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.
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> (b) In order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at comparable cost and of comparable high quality as that available from other providers of cafeteria services, the appropriate State licensing agency shall be invited to respond to solicitations for offers when a cafeteria contract is contemplated by the appropriate property managing department, agency, or instrumentality. Such solicitations for offers shall establish criteria under which all responses will be judged. Such criteria may include sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, budget and accounting practices. If the proposal received from the State licensing agency is judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section. If the State licensing agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary under the provisions of § 395.37.
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> (c) All contracts or other existing arrangements pertaining to the operation of cafeterias on Federal property not covered by contract

with, or by permits issued to, State licensing agencies shall be renegotiated subsequent to the effective date of this part on or before the expiration of such contracts or other arrangements pursuant to the provisions of this section.

(d) Notwithstanding the requirements of paragraphs (a) and (b) of this section, Federal property managing departments, agencies, and instrumentalities may afford priority in the operation of cafeterias by blind vendors on Federal property through direct negotiations with State licensing agencies whenever such department, agency, or instrumentality determines, on an individual basis, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees: Provided, however, That the provisions of paragraphs (a) and (b) of this section shall apply in the event that the negotiations authorized by this paragraph do not result in a contract.

3(a). California Code of Regulations, title 9, section 7211, subdivision (28), defines an "Interim Vending Facility" as "a vending facility that is operated on a temporary basis by a vendor, not to exceed six months, except if renewed for a period of time specified in writing by the BEP Manager."

3(b). California Code of Regulations, title 9, section 7215 describes the process for placing a vending facility into interim operation as follows:

(a) The Business Enterprises Program for the Blind (BEP) may place a vending facility, whether comprised of one site or two or more sites combined or consolidated, into interim operation under any circumstances in which it is determined by the BEP Manager to be in the best interests of the BEP.

(b) The BEP may renew an interim vending facility more than once. **An interim vending facility may be renewed only for as long as it takes for BEP to fill an unexpected vacancy**. During the period of time the vending facility is being operated on an interim basis, the BEP shall decide whether the facility is to be announced as a vending facility on one site, or a combined or consolidated vending facility, as defined in Section 7211(a)(11) of these regulations, and to announce the vending facility as available to be operated on a permanent basis, as provided in Article 5 of these regulations, and select a vendor. The BEP Manager shall provide the California Vendors Policy Committee with written notification of a renewal at least 30 calendar days prior to the renewal of an interim operating facility. (Emphasis added.)

3(c). As set forth above (See Findings 6(a) and 6(b)), when a location for a vending facility becomes available, the BEP must announce the availability of the location and take applications from eligible vendors. This includes primary and interim facilities. (Cal. Code Regs., tit. 9, §§ 7214, 7214.1 and 7215.1.) Interviews are conducted by a Selection Committee for Vending Facilities, comprised of three representatives of the contracting agency, unless the contracting agency waives this composition of the committee and allows the BEP to recruit other qualified committee members. (Cal. Code Regs., tit. 9, § 7214.1.) Currently, when selecting a vendor to operate an interim vending facility, the BEP must conduct an assessment of the qualifications of vendor applicants as specified by regulation, and if the contracting agency declines to participate in the selection process, the BEP Manager must select the interim vendor based on the assessment. (Cal. Code Regs., tit. 9, §7215.1, subd. (c) and (e).)

4(a). Appellant argued that DOR had the authority and discretion to permit Appellant to remain at the interim facility or to provide him with an alternate interim facility upon removing him. Appellant maintained that, although converting the interim facility into a permanent facility was the normal practice for the operation of interim facilities, this was overridden by Appellant's difficulties at his primary site. Appellant asserted:

> As a direct result of GSA and the Department's inability to enforce the Arbitration Panel's decision, [Appellant's] primary facility . . . remains severely compromised and he suffers continued economic harm. In order to comply with the law and provide maximum employment to the greatest extent possible, the Department is responsible for compensating [Appellant] until the Arbitration Panel's Decision is enforced. While the Department argued at the Hearing that [Appellant] earns the "adequate net income" according to the Regulations, this is entirely irrelevant to the issue at hand. . . . [T]he Department is obligated to provide [Appellant] with "maximum employment opportunities ... to the greatest extent possible." 34 CFR § 395.33 . . . Thus, the fact that [Appellant] allegedly earns more than the "adequate net income" is not sufficient to clear the Department of its obligations under the Randolph-Sheppard Act.
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> (Exhibit 43, pp. 7-8.)

4(b). Appellant's arguments are not persuasive.

5(a). The BEP followed regulatory requirements in announcing the interim facility as a permanent site. Pursuant to the California Code of Regulations, the BEP may extend a vendor's operation of an interim vending facility for longer than six months, but "only for as long as it takes for BEP to fill an unexpected vacancy" and to announce the facility's availability, either alone or combined with any other site(s), as a permanent site. (Cal. Code Regs., tit. 9, § 7215, subd. (b).)

5(b). It took much longer than six months for the BEP to prepare for and to announce the availability of the interim facility as a permanent site. During that time, DOR did not provide Appellant with any written renewal of his authorization to operate the interim facility. Instead, after Appellant had been operating the interim facility for almost a year, DOR informed Appellant that it was planning to announce the availability of the interim facility as a permanent site. Thereafter, the BEP repeatedly informed Appellant that it was working toward announcing the facility. The BEP never agreed to allow Appellant to operate the interim facility indefinitely or until his primary site was restored to its condition prior to GSA downsizing.

5(c). While the BEP was determining the configuration of the permanent site to announce its availability, Appellant was able to operate the interim facility for over three and one half years, to his benefit. However, regulations do not allow Appellant to keep an interim site indefinitely. Additionally, the fact that he was allowed to continue operating the interim facility while the BEP prepared to announce its availability as a permanent site did not create any right for Appellant to remain there indefinitely. Additionally, there is nothing in statute or regulation that would require or allow the BEP to withhold an interim facility from operation by other vendors seeking a permanent site. The current regulations do not contemplate that interim facilities will be operated indefinitely or that they will serve the purpose which Appellant asserts (i.e. to offer vendors monetary reparation until resolution of a disagreement with a contracting agency). Consequently, in compliance with regulation, another vendor was awarded the permanent facility at the Stanley Mosk Courthouse for which Appellant chose not to apply.

5(d). Appellant asserted that, in order to comply with the law, the Department is responsible for compensating Appellant until the Arbitration Panel's Decision is enforced, even if Appellant is earning an "adequate net income." This is incorrect. The Department's duty as the state licensing agency to "enlarge the economic opportunities of the blind" (20 U.S.C.S. § 107(a)) and to "provide maximum employment opportunities to blind vendors to the greatest extent possible" (34 C.F.R. § 395.33) is not a guarantee of income over the adequate net income for any individual. Rather, the Department must provide opportunities for vendors, including Appellant, to compete for and operate vending facilities under negotiated permits. Appellant has not established that the Department acted in contravention of this duty.

5(e). Lastly, the Department is not responsible for bringing an action against a federal agency which refuses to comply with an arbitration decision, nor does the Department's refraining from bringing an enforcement action make the Department liable for compensatory damages. (*Sauer v. U.S. Dept. of Education* (9th Cir. 2012) 668 F.3d 644.)

6. Given the foregoing, Appellant has not established that his rights were violated, and as such, his appeal should be denied.

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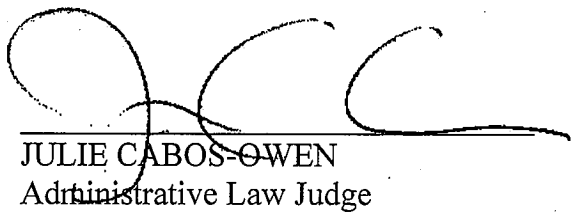
ORDER

The appeal of appellant Michael Fields is denied.

Dated: December 13, 2013



JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings