BEFORE THE
DEPARTMENT OF REHABILITATION
STATE OF CALIFORNIA

In the matter of the Appeal of: **Tristen Kelley** Appellant.	OAH No. 2013070960

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Director of the Department of Rehabilitation as his Decision in the above-entitled matter.

A vendor who is dissatisfied with a decision rendered as a result of hearing may file a complaint with the United States Secretary of Education to convene an arbitration. The complaint must include a statement of the decision which was rendered and the reasons therefore. The complaint must be accompanied by all available supporting documents. A copy of the recording of the hearing may be purchased from the Department of General Services, Office of Administrative Hearings for inclusion with any complaint to the Secretary. The complaint must also be accompanied by the vendor's consent for release of any information necessary for the hearing. The arbitration is public and decisions are published. (Title 34, Code of Federal Regulations, section 395.13.) You may contact your representative of the California Vendors Policy Committee for assistance.

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This Decision shall become effective on September 4, 2013.

IT IS SO ORDERED September 3, 2013.

ANTHONY "TONY" P. SAUER, EMMDS
Director
Department of Rehabilitation

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BEFORE THE
DEPARTMENT OF REHABILITATION
STATE OF CALIFORNIA

In the Matter of the Appeal of: Tristen Kelley, Appellant.	OAH No. 2013070960

PROPOSED DECISION

This matter was heard before Administrative Law Judge Ruth S. Astle, Office of Administrative Hearings, State of California, on August 21, 2013, in Oakland, California.

Elizabeth K. Colegrove, Staff Attorney, represented the Department of Rehabilitation (Department).

Appellant Tristen Kelley was present and represented himself.

The matter was submitted on August 21, 2013.

ISSUE

The primary issue is whether the Department may require appellant to pay utility costs, in connection with his operation of vending machines at Boron Safety Roadside Rest Area (SRRA).

FACTUAL FINDINGS

Background

1. The Department administers the Business Enterprises Program for the Blind (BEP). The Legislature established this program for blind individuals to operate vending facilities in California for "the purpose 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...". (Welf. & Inst. Code, § 19625.) Welfare and Institutions Code section 19625, subdivision (a) provides: "With respect to vending facilities on state property, priority shall be given to blind persons, including the assignment of vending machine income as provided in this article. As used in

this article, 'state property' means all real property, or part thereof, owned, leased, rented, or otherwise controlled or occupied by any department or other agency or body of this state."

2. With regard to BEP program standards, the California Legislature expressed its intention that the Randolph-Sheppard Act (20 U.S.C. § 107 et seq.) and the federal regulations for its administration "shall serve as minimum standards for the operation of the Business Enterprises Program for the Blind." (Welf. & Inst. Code, § 19625.)

3. The Department enters into operating agreements with blind vendors who are qualified to operate vending facilities. Some sites are located within government owned and/or operated buildings. BEP vendors located on such state owned/operated buildings do not pay utilities. In contrast, BEP vendors operating at SRRAs have a mixed history of being required, and then not being required to pay utilities, the primary utility cost being electricity. From 2008 to 2012, SRRA vendors were not required to pay utility costs.

4. Appellant is a blind vendor who participates in the BEP. He operates SRRA vending facilities.

5. The Department and the California Department of Transportation (Caltrans) have entered into interagency agreements that have authorized the Department to provide vending services at SRRA sites. This particular blind vendor arrangement dates back to the late 1970s. SRRA sites are Caltrans property, or state property under the control of Caltrans, located within Caltrans' right of way and designed for the safety of the public. A single SRRA unit may serve either a single direction, or both directions of traffic. At the inception of the BEP program at SRRA sites, Caltrans provided electricity to the SRRA vending facilities, and obtained reimbursement from the Department. The Department, in turn, obtained reimbursement from the blind vendors for electrical utility service on a flat rate basis. Since approximately 1995 until 2008, the BEP vendors' monthly utility reimbursement rate was $200.

6. In 2008, the interagency agreement (IA) between the Department and Caltrans expired. At that time, the Department determined that blind vendors would no longer be required to pay the $200 electrical utility operating costs associated with the SRRA vending facilities.

7. Effective September 2012, the Department and Caltrans entered into an interim six-month IA for the period September 1, 2012, through February 28, 2013. Under this new IA, the blind vendors were required to: 1) resume reimbursing the Department for monthly utility services at a flat rate of $200, 2) pay a refundable deposit in the amount of $600 per facility, and 3) if/when a meter is installed at the SRRA site, BEP vendors were to begin paying the utility company directly.

By letter dated October 26, 2012, the Department advised appellant of these changes and appellant was provided an amended operating agreements which added language

incorporating the new conditions. The October 26, 2012 letter explained the Department's position as follows:

> For the past four years, Caltrans has not recovered the costs associated with the vending operations. However, as we have been discussing for over a year, the continued operation of every Safety Roadside Rest Area (SRRA) is dependent upon vendors paying the fair share as Caltrans cannot use federal highway funds for the purpose of paying a vendor's share of the costs which is to be paid from the proceeds of the vending machines. (California Streets and Highways Code section 220.5) In July, we urged you to pay Caltrans directly as the Department had not agreed to assume the obligation of collecting fees as determined by Caltrans.
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> In order to protect your interests in continued operation at the SRRAs, the Department entered into a six month agreement with Caltrans, which provides a short period of time to see if Caltrans' conditions of continued operation ensure that it is reimbursed for vendors' share of costs. The terms amended into your Operating Agreement are consistent with the terms in the draft agreements which we provided to you by email on August 20, 2012, and discussed with you the same day. The Permit that Caltrans has issued (the interagency agreement), allowing continued operation under the new terms and conditions, is valid for only six months, beginning on September 1, 2012. Should DOR not agree to collect the fees from Caltrans after February 2013, it is our understanding that Caltrans will not issue another Permit.

8. On September 14, 2012, appellant resigned as the licensed vendor for Post 139, Highway 58, Boron, California (Boron facility) because he was awarded a license for an new location at 813 S (as set forth on the resignation document) on September 6, 2012. The Department sent appellant a new contract to begin October 2, 2012 to cover the Boron location. Appellant never signed the new contract. On March 22, 2013, appellant was sent an invoice for $1,400 to cover utility costs for September through the first half of December 2012.

Department's Position

9. The Department treats the electrical utility costs as an operating expense of the SRRA vending facilities. It had billed all blind vendors operating such facilities for utility costs up to 2008, in order to reimburse Caltrans.

10. The Department relies upon Streets and Highway Code section 220.5 in requiring that Caltrans be reimbursed for the cost of utilities. References in section 220.5 to "department" are to Caltrans. Section 220.5 provides as follows:

> (a) The department shall authorize the placement of vending machines in safety roadside rests, unless prohibited by federal laws, rules, or regulations.
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> (b) The department, pursuant to provisions contained in paragraph (5) of subsection (a) of Section 2 of the Act of June 20, 1936, commonly known as the Randolph-Sheppard Act, as amended (20 U.S.C. Sec. 107a(a)(5)), shall give preference for the placement of vending machines in safety roadside rest areas along state highways to vendors operating under the Business Enterprises Program for the Blind in accordance with Article 5 (commencing with Section 19625) of Chapter 6 of Part 2 of Division 10 of the Welfare and Institutions Code.
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> (c) The department may determine which safety roadside rest areas are suitable for inclusion in the vending machine program and the appropriate location within each roadside rest area for the placement of the machines and the department shall approve the design and construction of any shelter or structure that may be required for the machines.
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> (d) The department shall determine the costs for any maintenance, operations, design review, or other activities related to the vending machines and shall be reimbursed for those costs from the revenues derived from the operation of the machines.
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> (e) Any money received by the department for authorizing the placement of, or from the income from, the vending machines shall be transferred to the State Highway Account.

11. The Department relies upon the language in Streets and Highway Code section 220.5 subdivision (d) requiring Caltrans to be reimbursed for "the costs for any maintenance, operations, design, review, or other activities related to the vending machines..." The Department characterizes the electricity used by each vending machine as a cost of operations.

12. The Department further points to its own regulation relating to the operation of a vending facility, which provides as follows: "The vendor shall be solely responsible for the payment of all rent and utility charges in accordance with the terms and conditions of the vendor operating agreement or permit or contract." (Cal. Code. Regs., tit.

9, § 7220, subd. (p).) The previously executed operating agreement signed by appellant incorporates the following language: "The Vendor shall pay all debts arising from the operation of the vending facility."

Appellants' Position

12. Appellant contends because he resigned from the Boron facility as of September 30, 2012, he should not be responsible for paying any utilities. He never agreed to pay utilities in any contract.

13. The usual process after resignation is for the Department to find a new vendor for the facility. The Department requests that the existing vendor continue to operate the facility until a new vendor is found. Appellant established that this should take about 35 days. In the case of the Boron facility it took until December 12, 2012, to get a new vendor to take over the location.

14. Appellant did not want to continue to operate the facility after the end of September. It was not a profitable facility. It was a hardship for him to continue to maintain the facility. However, he was told by two employees of the Department that if he did not continue to operate the facility until a new vendor is found he could lose his license. Neither of the two employees who told appellant this testified at the hearing. The appellant produced a witness who testified that he overheard the conversations in which appellant was told that he would be in jeopardy of losing his license if he did not continue to operate the Boron facility. While the Department employees that did testify at hearing stated that the Department cannot take a vendor's license for not continuing to operate a facility until a new vendor is found, neither of them were directly involved with appellant in the resignation process for the Boron facility. Appellant and his witness were credible concerning the statements that were made concerning continuing to operate the Boron facility.

Discussion

The Department is not prohibited from requiring a vendor to sign a new operating agreement when new responsibilities arise for different duties or activities that were not covered in the original vending operating agreement. In this case, a new interagency agreement between the Department and Caltrans required that the operating agreements with the SRRA vendors be updated. Updating operating agreements has been an established Department practice when a change in the terms and conditions or permit occurs. It is a means by which the vendor is placed on notice of new terms and conditions governing the operation of a vending facility. However, in this case, appellant had already resigned from the Boron facility and would have no reason to sign a new contract concerning that facility. Appellant, under these unique facts, cannot be required to pay for utilities at the Boron facility.

LEGAL CONCLUSIONS

1. Under California Code of Regulations, title 9, section 7227.2, subdivision (a), licensees/vendors who are dissatisfied with an action of the Department arising out of administration of the BEP Program may request a full evidentiary hearing.

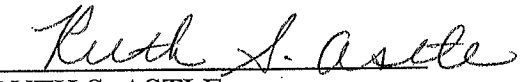
2. The Department's attempt to amend the operating agreement with appellant to include payment of utilities was not proper in this case. The existing contract states "The Vendor shall pay all debts arising from the operation of the vending facility." This can only refer to debts that appellant expected to incur under the contract at the time it was signed. Appellant had already resigned at the time the new contract was given to him.

3. Department regulations further provide that BEP vendors "shall be fully responsible for the payment of all rents and utility charges in accordance with the terms and conditions of the vendor operating agreement or permit or contract." (Cal. Code Regs., tit. 9, § 7220, subd. (p).) The terms and conditions of the vendor's operating agreement, in this case, did not include utilities. The Department argues that this section refers to the permit between CalTrans and the Department. That was not part of the operating agreement, permit or contract at the time appellant entered into the contract with the Department for the Boron facility.

ORDER

The appeal of Tristen Kelley is GRANTED. Appellant is not required to pay the cost of utilities for the Boron facility for September, October, November, and part of December.

DATED: August 23, 2013



RUTH S. ASTLE
Administrative Law Judge
Office of Administrative Hearings