

# STATE OF ALASKA

## Department of Labor and Workforce Development DIVISION OF VOCATIONAL REHABILITATION

**Sean Parnell, Governor**

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February 16, 2012

The Honorable Bettye Davis  
State Capitol, Room 30  
Juneau, Alaska 99801

Dear Senator Davis:

Thank you for the opportunity to respond to questions submitted by Mr. Obermeyer in your office regarding Senate Bill 51.

1. Please indicate desired changes in specific bill language and why. You might give us a little background as to management of the program, i.e., certification of licensees, how and when, funding, etc either in writing or testimony on Jan. 20.

Remove new language inserted and restore original language in Section 1, AS 23.15.100 (6) – lines 11 – 12.

- The use of term “contract” suggests that the only purpose of a “contract” is for the temporary operation of the facility until a blind vendor can be licensed indefinitely to the facility. The Division of Vocational Rehabilitation (DVR) Business Enterprise Program (BEP) uses temporary “contracts” for a variety of purposes necessary to effectively manage the BEP. Requiring “first priority” for blind persons for contracts may impede DVR’s ability to do such things as utilize a facility as a training site or to assess the economic viability of a site prior to making it available to vendors and certified managers.

Remove new language inserted in Section 2, AS 23.15.133(a) 2 – lines 9 – 10.

- Justification provided in response above regarding use of the term “contracts”.

Remove Section 3. AS 23.15.133 (d) and (e). – lines 18 - 27

- (d) DVR is not aware of the existence of any private organization in the State of Alaska that specializes in the employment of blind persons. Furthermore, use of a private organization is unnecessary to provide notification of BEP vacancies since only those certified, currently licensed, or previously licensed can be considered for the placement at a vacant BEP facility. DVR certifies and licenses all BEP managers/vendors and works with the Committee of Blind Vendors to notify all certified vending facility managers, and current/former licensees.
- (e) This new language will allow blind individuals who are currently licensed to a facility to operate additional facilities indefinitely. This is the equivalent of having two or more full-time permanent positions (jobs) in different locations with the same work hours. Allowing a blind licensee to operate multiple facilities could limit further

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employment opportunities for certified vending facilities managers who are not yet assigned to facilities. It could also limit promotion and transfer opportunities for currently licensed vendors. Theoretically, the single most qualified blind vendor would be able to obtain all of the sites available. This specific issue was addressed and DVR's position affirmed in the Decision and Order issued by Administrative Law Judge, Rebecca L. Pauli from the Office of Administrative Hearing (OAH) No. 07-0188-Voc (see attached). The Decision and Order also provides legislative and programmatic background that you may find useful.

2. Please find the citation in federal Randolph-Sheppard Act of language indicating "indefinite" duration of blind vendor site awards.

34 CFR 395.7

(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.

(b) The State licensing agency shall provide for the issuance of licenses for an indefinite period but subject to suspension or termination if, after affording the vendor an opportunity for a full evidentiary hearing, the State licensing agency finds that the vending facility is not being operated in accordance with its rules and regulations, the terms and conditions of the permit, and the terms and conditions of the agreement with the vendor.

(c) The State licensing agency shall further establish in writing and maintain policies which have been developed with the active participation of the State Committee of Blind Vendors and which govern the duties, supervision, transfer, promotion, and financial participation of the vendors. The State licensing agency shall also establish procedures to assure that such policies have been explained to each blind vendor.

3. Please define what "indefinite" means.

Neither federal nor state laws define the term "indefinite."

4. Could it "indefinite" duration refer to a license/permit, not a contract until a new vendor is found?

Correct, the term "indefinite" refers to a license/permit.

There are no provisions which allow the removal of a "vendor" from a facility merely to provide an opportunity to another blind licensee, or certified BEP manager. 34 CFR 395.1(aa) defines "Vendor" as meaning a blind licensee who is operating a vending facility on Federal or other property. 34 CFR 394.7(b) requires DVR to afford the "vendor" an opportunity for a full evidentiary hearing prior to suspension or termination, if DVR finds that the vending facility is not being operated in accordance with its rules and regulations, the terms and conditions of the permit, and the terms and conditions of the agreement.

5. Why do you object to the language of "contract" if this only adds certainty and more fairness to the process, particularly as to duration?

The use of the term "contract" suggests that the only purpose of a "contract" is for the temporary operation of the facility until a blind vendor can be licensed indefinitely to the facility. The DVR BEP uses temporary "contracts" for a variety of purposes necessary to effectively manage the BEP. Requiring "first priority" for blind persons for contracts may impede DVR's ability to do such things as utilize a facility as a training site or to assess the economic viability of a site prior to making it available to vendors and certified managers.

6. Do all licensees have signed contracts as well? For what period of time – or are they "indefinite", i.e., not defined.

Yes, all licensees have signed operating agreements/contracts. These operating agreements/contracts are for an "indefinite" period of time.

7. How can DBV/BEP have separate federal Randolph-Sheppard Act program from State and use same personnel but not comingle funds?

Federal regulations 34 CFR 361.49 "Scope of vocational rehabilitation services for groups of individuals with disabilities." Section (i) includes management services and supervision.

8. I understand no federal funding is available for state BEP because "severely disabled" are included in our program. So would not removing disabled from the blind program allow federal funding?

Yes.

9. Are there not other employment programs in DVR for the disabled, including federal VA benefits for returning soldiers?

Yes, DVR offers other employment opportunities for individuals with disabilities, including blindness through the Client Services program. The U.S. Department of Veterans Affairs Vocational Rehabilitation and Education program is separate from DVR.

10. I understand from other sources that the 5% gross proceeds from vendors monthly was only inserted in language to assure monthly income statements would be provided by vendors for management purposes – not to cover the cost of the BEP program, including state health insurance for vendors, etc.

DVR does not have background information available to state why the 5% set aside from the net proceeds of the operation of the vending facilities language was inserted. Information regarding facility income is necessary for DVR to comply with Federal reporting requirements.

11. You object to multiple sites for the blind but I understand you allowed a sighted (dyslexic) person to have multiple sites, including Ft. Rich – when blind vendors

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were available. The practice seems inconsistent unless as you suggest, multiple sites are allowed only until another vendor is found.

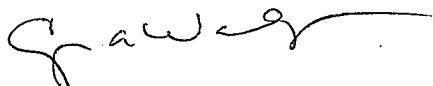
Licensees each have one primary site, but may operate additional sites under a temporary period, typically under a one year contract. It is important to note that historically there has been very little interest among the blind vendors to enter into contracts to temporarily operate a facility. Ensuring the profitability of their primary facility is their number one priority.

**12. Where does current law or regulation prohibit multiple sites?**

8 AAC 98.340 (b) A license does not authorize the holder to operate a vending facility at a location other than that described in the license.

I hope these responses answer Mr. Obermeyer's questions. If you have any other questions or concerns, please contact me at (907)465-6927.

Sincerely,



Cheryl A. Walsh

Director, Division of Vocational Rehabilitation

Enclosure

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
REFERRAL FROM THE COMMISSIONER OF THE DEPARTMENT OF  
LABOR AND WORKFORCE DEVELOPMENT**

James Swartz )  
v. )  
Division of Vocational Rehabilitation ) OAH No. 07-0188-VOC  
 ) Agency Case No. 3559

## DECISION AND ORDER

## I. Introduction

James Swartz (Swartz), a blind vendor, challenges the Division of Vocational Rehabilitation's (division) selection of Rick Renaud,<sup>1</sup> a non-blind severely disabled person, to run a food concession facility on State property, the Nesbett Courthouse, in Anchorage, Alaska.<sup>2</sup> Both are certified vending facility managers under the State's Business Enterprise Program (BEP or vending program).<sup>3</sup>

Assistant Attorney General Larry McKinistry represented the Division of Vocational Rehabilitation (division). Jerry Reichlin represented Mr. Swartz.

The parties have presented a matter of first impression. Although this decision contains extensive discussions about federal and state laws, legislative history, and statutory interpretation, the dispute between the parties is, at its core, a dispute regarding how the division applies regulatory priorities when it has a blind person and a person with severe disabilities competing to operate a vending facility. To resolve this dispute it is necessary to first determine what the legislature intended when it gave the blind a “first priority for the operation of the vending facilities;” in AS 23.15.100(a)(6) and second whether the division’s regulations, as applied, are reasonable and implement the legislative intent. The parties have provided extensive briefing and oral testimony resulting in the following conclusions:

<sup>1</sup> Mr. Renaud has not participated in this proceeding.

<sup>2</sup> Throughout this decision there will be reference to vendors, blind vendors, and severely disabled vendors. For purposes of this decision, those terms refer to persons licensed to operate a vending facility on public property under AS 23.15.133.

3 8 AAC 98.330.

1. the Nesbett Courthouse is not “other property” under the Federal Randolph Sheppard Act (RSA);<sup>4</sup>
2. the State’s Chance Act<sup>5</sup> (CA), grants blind persons<sup>6</sup> and persons with severe disabilities<sup>7</sup> a priority when seeking a license to operate vending facilities on certain properties, but it gives blind persons a first priority or prior right over a non-blind disabled person to license to operate a vending facility on public property;
3. the division’s interpretation of its regulations that a license is site specific and a qualified vendor may only have one license is reasonable; and
4. the division was correct when it granted Mr. Renaud a license to operate the courthouse vending facility as a primary site when there was no blind person seeking to operate the facility as a licensed site.

## II. Background

The division operates its BEP to provide employment opportunities to individuals who are blind or severely disabled.<sup>8</sup> Through its BEP the division licenses:

blind persons and persons with severe disabilities in accordance with AS 23.15.133 for the operation of vending facilities on public property, with blind persons having first priority for operation of the vending facilities....<sup>[9]</sup>

When the division has more than one certified vending facility manager competing for a site the division applies the priorities listed at 8 AAC 98.340. This regulation is silent on the priority assigned to a blind vendor.

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<sup>4</sup> *Randolph-Sheppard Act*; P.L. 74-732, as amended by P.L. 83-565 and P.L. 93-516; 20 U.S.C. 107 *et seq.*

<sup>5</sup> AS 23.15.132, *et. seq.*

<sup>6</sup> “‘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 not greater than 20 degrees; an examination by an ophthalmologist or by an optometrist is necessary before a person is found to be blind;....” AS 23.15.210(3).

<sup>7</sup> A person with a severe disability means “a person who has one or more physical or mental disabilities that seriously limit the person’s functional capacities in terms of regular employment and whose vocational rehabilitation requires multiple vocational rehabilitation services over an extended period of time;....” AS 23.15.210(8). In this decision “persons with severe disabilities” are also referred to as severely disabled persons.

<sup>8</sup> AS 23.15.100 – AS 23.15.136; Deposition of Russell Cusack at 37.

<sup>9</sup> AS 23.15.100(a)(6). Prior to May 10, 2006, the statute AS 23.15.100(a)(6) read “license blind persons and severely handicapped persons....” am §6 ch 25 SLA 2006.

This is the first time the division has had a blind person compete with a severely disabled person for a BEP vending site. Thus, it is the first time the division has applied the statutory priority at AS 23.15.100(a)(6) and regulatory priorities set forth at 8 AAC 98.340(c) as between a blind and non-blind vendor.

To better understand issues raised by the parties a brief history of the applicable statutes and regulations will be presented, followed by an explanation of how the vending program is run and its accounting process, and finally a discussion of the vacancy announcement and award of the Nesbett vending facility.

*A. Legislative Background: The Randolph Sheppard Act and the Chance Act*

1. The Randolph Sheppard Act

The RSA was enacted in 1936 to provide employment opportunities for the blind, and to encourage the economic self sufficiency of blind individuals by authorizing blind vendors to operate "vending facilities on any Federal property."<sup>10</sup> The definition of "Federal property" contained in the RSA is limited in scope to buildings, land, or real property of or interest therein of the United States.<sup>11</sup>

The RSA is a partnership program between the Federal government and those states that choose to participate. It is not mandatory that a state participate in the RSA blind vendor program; if a state chooses to participate, the responsibilities for operating the program are split between the state and federal agencies. The Secretary of Education is responsible for interpreting and enforcing the RSA's provisions, particularly the designation of state licensing agencies (SLA).<sup>12</sup> An SLA is "the state agency designated by the Secretary ...to issue licenses to blind persons for the operation of vending facilities on Federal and *other property*."<sup>13</sup> "Other property" is defined as:

[p]roperty which is not Federal property and on which vending facilities are established or operated by the use of any funds

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<sup>10</sup> 20 USC § 107(a).

<sup>11</sup> "(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;...." 20 USC § 107e. The same definition is contained in the RSA's regulations. 34 CFR §395.1(g).

<sup>12</sup> 20 USC §§ 107a(a)(5); 107b; 34 CFR §§395.5, 395.8.

<sup>13</sup> 34 CFR §395.1(v) (emphasis added).

derived in whole or in part, directly or indirectly, from the operation of vending facilities on any Federal property.<sup>[14]</sup>

The SLA and the Secretary agree on appropriate locations on federal and other property for an RSA vending facility.<sup>15</sup> The division is Alaska's designated SLA. The SLA trains, certifies and ultimately licenses blind vendors to operate RSA vending facilities as sole proprietors.

Though well intentioned, the RSA was not meeting Congress' goals for employment of the blind and the RSA was amended in 1974 to ensure that in the operation of vending facilities on Federal property "priority shall be given to blind persons licensed by a State agency."<sup>16</sup> Before 1974, the RSA provided a "preference" rather than a "priority" to bind vendors.<sup>17</sup> The post 1974, "priority" language in the RSA has been interpreted to mean that the SLA must assure that blind vendors have a prior right to negotiate or to do business.<sup>18</sup>

## 2. The Chance Act

In response to the 1974 changes to the RSA, in 1975, the Alaska legislature considered SB 272, "An Act Relating to the Operation of Food Vending Facilities and Vending Machines by a Blind or Handicapped Person" also known as the Chance Act. SB 272 added several new statutory provisions to AS 23.15 *et seq.* including a new paragraph AS 23.15.100(b)(5) granting the division the authority to:

License blind and severely handicapped persons for the operation of vending facilities on federal property and in public buildings, with blind persons having first priority for operation of the vending facilities...<sup>[19]</sup>

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<sup>14</sup> 34 CFR §395.1(n).

<sup>15</sup> 20 USC § 107(b).

<sup>16</sup> Randolph Sheppard Act Amendments of 1974, Pub.L. No. 93-516, §§ 201(1), 201(3), (1974); 20 USC § 107(b).

<sup>17</sup> "In authorizing the operation of vending stands on Federal property, *preference* shall be given, so far as feasible, to blind persons licensed by a State agency...." 20 U.S.C. § 107 (1970) (repealed 1974) (emphasis added).

<sup>18</sup> *New Hampshire v. Ramsey*, 366 F.3d 1 (1<sup>st</sup> Cir. 2004).

<sup>19</sup> FCCS HCSSB 272 1976 Chpt. 75 Sec. 1 amending AS 23.15.100(b) by adding "(5) license blind and severely handicapped persons for the operation of vending facilities on federal property and in public buildings, with blind persons having first priority for operation of the vending facilities;...."

The CA defines "public building" as any building owned or leased by the State.<sup>20</sup>

Although records of committee discussion on SB 272 are scarce, the minutes of the March 23, 1976, House Finance Committee reveal there was a question regarding the definition of the term "licensee".<sup>21</sup> It was explained by the director of the division at that time, Michael Morgan, "that should there not be enough blind persons to fill licensee rolls, that within the states' program, [the division] could select other severely handicapped persons."<sup>22</sup> The CA was signed into law on May 20, 1976.

The CA remained undisturbed for the next 6 years until, in 1982, SB 778 was introduced. In its original form, SB 778 sought to limit the vending program to the blind and give the Committee of Blind Vendors a much more active role in the administration and policy development of the blind vending program.<sup>23</sup> The Committee of Blind Vendors is required under the RSA and the CA and consists of all blind persons in the State's vending facility program.<sup>24</sup> Because the program would be limited to the blind, the language giving blind persons first priority for operation of the vending facilities was not necessary and was not included in SB 778 as introduced.<sup>25</sup>

The division opposed SB 778 as introduced because there were more vending facilities available than certified blind vendors, and it believed the bill would deny disabled persons other than the blind from participating in the vending program;<sup>26</sup> the division also objected that the bill would require the administration of two programs, one for the severely disabled and one for the blind, rather than the current combined

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<sup>20</sup> FCCS HCSSB 272 1976 Chpt. 75 Sec. 2 amending AS 23.15.210 by adding "(11) 'public building' means any building owned by the state or an agency of the state, or any space leased by the state or any agency of the state, and designated by the division as being appropriate for participation in the business enterprise program;...."

<sup>21</sup> "(10) "licensee" means a blind or severely handicapped person licensed by the division of vocational rehabilitation under the [RSA], sec. 100(b)(5) of this chapter, and any regulations issued under federal law or sec. 100(b)(5) of this chapter;" FCCS HCSSB 272 1976 Chpt. 75 Sec. 2.

<sup>22</sup> Minutes, House Finance Committee March 23, 1976 p. 385.

<sup>23</sup> SB 778, "An Act relating to the operation of vending facilities on public property by blind persons." February 16, 1982 [hereinafter, SB 778]; Committee Files, SB 788 Bill File [hereinafter, Committee Files] National Federation of the Blind of Alaska (NFBA) Fact Sheet, Vending Facilities to be Operated by the Blind.

<sup>24</sup> AS 23.15.135.

<sup>25</sup> SB 778.

<sup>26</sup> Committee Files, February 22, 1982, Letter from Karen Williams, Chair, Division of Vocational Rehabilitation Advisory Board to Victor Fisher, Senator.

program.<sup>27</sup> Amendments were offered to recombine the programs and SB 778 went through several iterations before its final version. In its final form, SB 778 kept the severely disabled in the program and retained the language of former AS 23.15.100(b)(5) giving the blind first priority but moved it into location, at AS 23.15.100(a)(6).<sup>28</sup>

The legislature was made aware that the language retained at AS 23.15.100(a)(6) would give a "priority to blind persons in assigning vending facility locations" in keeping with the RSA,<sup>29</sup> and that SB 778 as amended would make vending facilities "available for operation by the blind and severely handicapped, while retaining the priority of the present state law for the blind."<sup>30</sup> Nonetheless, one committee aide,<sup>31</sup> and subsequently the governor's office,<sup>32</sup> apparently did not realize priority for the blind remained in the final version of the bill.

The RSA Regional Commissioner was consulted regarding the affect of separating the State program for severely disabled from its program for the blind. The division inquired whether blind vendors on State property under the CA would retain their access to the Federal arbitration procedures under the act.<sup>33</sup> The RSA Regional Commissioner acknowledged that the SLA operated its vending program for severely

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<sup>27</sup> Bill File, February 22, 1982, Letter to Senator Victor Fisher from Karen Williams, Chairman, Division of Vocational Rehabilitation Advisory Board; Bill File, March 1, 1982, Memorandum from Theda Mason-Smith to Senator Victor Fischer.

<sup>28</sup> See Ch. 69, SLA 1982 (HCS CSSSB 778 (HESS)). The language stayed substantially the same throughout the various committee substitutions. For example, SSSB 778 sought to amend AS 23.15.100(b)(5) by placing the blind within the category of severely handicapped person while retaining the blind's first priority for operation of vending facilities. "(5) license [BLIND AND] severely handicapped persons for the operation of vending facilities on public [FEDERAL] property [AND IN PUBLIC BUILDINGS], with blind persons having first priority for operation of the vending facilities;...." SSSB 778 Sec. 2. (March 29, 1982).

<sup>29</sup> Committee Files, Undated Briefing Paper for Members of the Alaska State Legislature, Twelfth Legislature-Second Session from the NFBA at 2 (discussing the language contained at AS 23.15.100(b)(5)).

<sup>30</sup> Minutes, House Health, Education and Social Services, Standing Committee, April 15, 1982; *See also* Committee Files, Undated Briefing Paper for Members of the Alaska State Legislature, twelfth Legislature-Second Session from the NFBA at 3 (discussing sponsored substitute for SB 778).

<sup>31</sup> Committee Files, April 20, 1982, Memorandum from Barbara Wilkins, C.A. to House HESS Committee.

<sup>32</sup> Committee Files, May 28, 1982, Transmittal Letter from Governor Jay S. Hammond to Senate President Jalmar Kerttula. "Some elements of this bill, particularly sec. 10 which eliminates the preference to the blind over severely handicapped, are commendable." Committee Files, May 25, 1982, Attorney general review of HCS CSSSSB 778, at 1. "Section 10 Repeals the preference of blind persons over severely handicapped persons for placement in facilities." *Id.* at 3.

<sup>33</sup> Although it is unclear from the history, because the letter is addressed to Michael Morgan, Director, Division of Vocational Rehabilitation, it is presumed that the inquiry came from the Division of Vocational Rehabilitation. *See* Bill File, March 10, 1982, Letter from Anthony S. DeSimone to Morgan.

handicapped persons concurrent with the RSA program and that the state was now considering separating the two programs. He advised Director Morgan that if the state were to separate the two programs, as proposed by the original SB 778, then before a blind vendor would be eligible for Federal arbitration, the state would need to designate some of its locations as belonging to the RSA program and the vendor would need to be eligible to participate in the RSA program, *i.e.* be legally blind.<sup>34</sup>

A few months later the Regional Commissioner was also asked to review proposed legislation<sup>35</sup> and analyze its impact on Alaska's RSA vending facilities. In his response he again acknowledged the division was running one program on state property for blind and severely disabled persons and the RSA program for the blind on Federal property.<sup>36</sup>

### 3. Regulations Implementing The CA

At the same time as SB 778 was making its way through the State Legislature, regulations to revise the vending program were being considered by the executive branch.<sup>37</sup> At that time the regulations were found at 4 AAC 54; they have since been

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<sup>34</sup> See Committee Files, March 10, 1982, Letter from DeSimone to Morgan.

<sup>35</sup> Attachment A to Final Supplemental Memorandum in Support of Division's Motion for Summary Disposition, the May 6, 1982, letter from DeSimone to Wilkins, House HESS Committee, does not identify which version of the bill the RSA Regional Office was asked to review. However, the May 6, 1982 letter was in response to a letter dated April 21, 1982. HCS CSSSSB 778(HESS) was offered that same day and the sections referenced in the letter match those of HCS CSSSSB 778(HESS) so it is reasonable to believe that was the version of the bill sent for review. Regardless, other versions offered during that same time period, such as CSSSSB 778(SA) am offered April 7, 1982, contained similar language and had recombined the programs for blind persons under the RSA and severely handicapped, including blind, under the CA.

<sup>36</sup> Attachment A to Final Supplemental Memorandum in Support of Division's Motion for Summary Disposition, May 6, 1982, letter from DiSimone to Wilkins.

<sup>37</sup> The Committee Files contain undated proposed regulations addressing the vendor program; several pages of the Committee of Blind Vendors' comments on proposed regulations; and numerous pages of handwritten notes that appear to be minutes but cannot be positively identified as such (some notes reference SB 778 and others are silent as to whether they address the proposed regulations or SB 778). Unless otherwise noted citation to regulatory history were found in the bill file for SB 778. The undated proposed regulations and comments thereto contained in the bill file are, more likely than not the regulations proposed by the division because of the formatting, wording, and other documents contained in the bill file referring to proposed rules submitted by the division. Accordingly, these proposed regulations will be referred to as the division's proposed regulations and the comments will be referred to as the division's comments.

relocated to 8 AAC 98.<sup>38</sup> The regulation at issue in this case, 8 AAC 98.340, Licensing of Certified Vending Facility Managers, remains unchanged from when it was first proposed as 4 AAC 54.340. This regulation addresses the licensing of certified vending facility managers the priority to be assigned by the division when issuing a license. It states:

- (c) The division will apply the following priorities in the order listed to select a certified vending facility manager for licensure:
  - (1) a current licensee who requests a new location; when more than one licensee requests promotion or transfer to another facility, the division will review each candidate based on seniority, training, and past performance as described in 8 AC 98.370;
  - (2) a certified vending facility manager who has demonstrated his ability to manage a facility; when more than one manager requests placement in a facility, the division will review each candidate based on seniority, evaluations by the division staff, and evaluation reports filed by licensees for whom the manager has worked; and
  - (3) a former licensee who wishes to return to a vending program; the division will review each candidate based on training, experience, past performance, and reason for leaving the vending program.

The division's comment<sup>39</sup> to 4 AAC 54.340 characterizes licenses as applicable to specific locations.<sup>40</sup> The division's comments also indicate that the priorities found at 4 AAC 54.340(c) were intended to develop criteria for the transfer and promotion of vendors to different vending facilities.<sup>41</sup>

The Committee of Blind Vendors opposed the Division's proposed regulations and the division's position that a license to operate a vending facility should be site

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<sup>38</sup> The regulations were originally located at 4 AAC 54. As of Register 151 (October 1999), the provisions of 4 AAC 54 were relocated by the regulations attorney under AS 44.62.125(b)(6) to 8 AAC 98, in accordance with ch. 58, SLA 1999. The regulatory provisions of 8 AAC 98.340 were previously found at 4 AAC 54.340. Accordingly, when discussing the regulatory history of this provision the regulation will be referred to by its original citation, 4 AAC 54.340.

<sup>39</sup> *Supra* n. 36.

<sup>40</sup> “[4 AAC 54.340] (a)(1) deals with placement in a specific location for licensing. Licensees are placed in individual stands....” Committee Files, Division Comment to Proposed Regulation 4 AAC 54.340 (Estimated date 1982, exact date unknown).

<sup>41</sup> “[4 AAC 54.340] (c) allows criteria to be developed for transfer and promotion to different facilities or facilities which create greater income. Current licensees will have first option on a new location....” Committee Files, Division Comment to Proposed Regulation 4 AAC 54.340 (Estimated date 1982, exact date unknown).

specific. It supported the regulatory language that would make licenses vendor specific, not site specific.<sup>42</sup> As proposed by the Committee of Blind Vendors, a license issued by the division would certify that the person was qualified and eligible for placement in a facility.<sup>43</sup> The Committee's proposal was not adopted.

*B. Facts*

1. The Vendor Program

By statute the division issues licenses under the applicable regulations or the RSA.<sup>44</sup> As testified to by various witnesses,<sup>45</sup> the division groups its vending facilities into two categories: vending facilities on federal property and vending facilities on state properties. The division runs its vending facilities on federal property according to RSA rules and regulations and these sites are only available to blind persons. Vending facilities on state property are run according to state regulation and are available to either blind persons or severely disabled persons.<sup>46</sup>

To obtain access to an RSA site, a blind person must be trained and certified by the division to operate as a manager of a vending facility.<sup>47</sup> Once certified, when a vending facility on federal property is available, the SLA will enter into a written agreement with the certified blind vendor and a temporary (six month) license is issued.

<sup>48</sup> If the licensee successfully completes this probationary period, the licensee is issued a permanent license.<sup>49</sup> A blind person or disabled person must go through the same process to be licensed to operate a vending facility on state property.

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<sup>42</sup> Committee Files, The Committee of Blind Vendors, Proposed Amendments to Alaska DVR's Revised Vending Facility Program Rules at 3 (Estimated date 1982, exact date unknown). Comments were specific to 4 AAC 54.125, Licensing of Certified Vending Facility Managers. The language of the this regulation or proposed regulation was not located; however, because the comment to 4 AAC 54.340 states the position objected to by the Committee of Blind Vendors it is reasonable to conclude the language commented on was substantially similar to that proposed by the division and ultimately adopted at 4 AAC 54.340.

<sup>43</sup> Committee Files, The Committee of Blind Vendors, Proposed Amendments to Alaska DVR's Revised Vending Facility Program Rules at 3 (Estimated date 1982, exact date unknown).

<sup>44</sup> AS 23.15.133.

<sup>45</sup> Former BEP Coordinator, Nelida Irvine; Jim Dale, Division Administrative Manager; Russell Cusack, Chief of Rehabilitation Services testified in person and by deposition.

<sup>46</sup> AS 23.15.133; Testimony of Nelida Irvine; Testimony of Russell Cusack; Deposition of Russell Cusack at 35.

<sup>47</sup> 8 AAC 98.330(a).

<sup>48</sup> 8 AAC 98.340(b).

<sup>49</sup> 8 AAC 98.340(b).

There are more vending sites than certified vendors. The division does not want to lose a site once it has been designated as suitable for a program vending facility, and therefore if no vendor requests a license for an available site the division will enter into a temporary contract with a person to operate the facility at that site until a certified vendor requests a license for that site. If there is no certified vendor willing to operate the site on a temporary basis, a non-program person could enter into a contract with the division to operate the site.<sup>50</sup> However, as a practical matter most contract sites are operated by certified program vendors.

Russell Cusack, Chief of Rehabilitation Services, explained that the division treats a site operated under a license (which are commonly referred to as a licensee's "primary" site) differently than a site operated under a temporary contract (which are commonly referred to as a licensee's "secondary" site).<sup>51</sup> At a "primary" site, the division provides support, training, and equipment, and the license is for the duration of the vendor's desire to maintain that site; the operator of a "secondary" site under a temporary contract does not receive the same services.<sup>52</sup>

The division has issued vacancy announcements indicating that a facility was being bid as a satellite facility on a temporary basis,<sup>53</sup> as a primary site,<sup>54</sup> and as a primary or a temporary secondary site,<sup>55</sup> as well as vacancy announcements that were silent on the subject.<sup>56</sup>

The division applies its regulation at 8 AAC 98.340(c) such that if there is a certified vending facility manager who is blind and one who is severely disabled competing for a license to run a facility on state property, then the division believes that "[a]ll things being equal," the division will give a blind licensee priority over a severely

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<sup>50</sup> Testimony of Nelida Irvine; Testimony of Russell Cusack.

<sup>51</sup> The division views sites not operated under a license as "contract" sites, not as "secondary" sites. Testimony of Nelida Irvine; Testimony of Russell Cusack; Deposition of Russell Cusack at 40, 41. Throughout this hearing witnesses and documents refer to secondary and contract sites interchangeably.

<sup>52</sup> Testimony of Russell Cusack. Deposition of Russell Cusack at 43.

<sup>53</sup> 2003 Anchorage Jail Espresso Stand Vacancy Announcement, Div. Record at 81.

<sup>54</sup> 2004 Anchorage Jail Espresso Stand Vacancy Announcement; Exhibit FM 0076.

<sup>55</sup> 2005 Anchorage Courthouse Vacancy Announcement, Div. Record at 73.

<sup>56</sup> 2006 Anchorage Courthouse Vacancy Announcement, Div. Record at 1 – 8.

disabled person.<sup>57</sup> The division reasons that to best provide employment opportunities for the blind and severely disabled the vending program should provide an employment opportunity at one location per manager.<sup>58</sup> The division operates under the belief that a license is site specific, not vendor specific, and that a vendor may only have one licensed vending facility site.<sup>59</sup> If the program allowed vendors to be licensed to multiple sites, it would exclude other individuals from entering the program because there would be no sites available. It is Mr. Cusack's belief that is why 8 AAC 98.340(c)(1) gives a current licensee who requests a new location priority when selecting a certified vending facility manager for licensure.<sup>60</sup>

The division, in May of 2007, created a BEP policy and procedures manual by gathering the existing policies and procedures that were located in different locations and placing them in one location.<sup>61</sup> The manual has several boiler plate documents set forth in its appendices, including a license for vending facility managers and an operating contract.

The license authorizes the holder to "operate the following types of vending facilities:...."<sup>62</sup> The operating contract is for a set term and, in addition to other obligations, requires the division to provide to the vending facility manager: training, evaluations and other oversight to help the manager succeed, and a benefits package.<sup>63</sup> The operating contract is site specific.<sup>64</sup>

The manual mentions licenses in several places. For example, at BEP Policy and Procedure 2.0 where it states that once a vendor has been certified, the SLA will issue a license "which indicates that the individual is qualified to operate a certain type of

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<sup>57</sup> Deposition of Russell Cusack at 31, 32, 37, 52; *See also* March 24, 1995, Legislative Audit, at 5, n.1. "In practice, this statutory preference means little. It has been interpreted to mean that persons who are blind receive a preference if all other factors are equal between an applicant who is blind and one that is severely disabled."

<sup>58</sup> *See generally* Deposition of Russell Cusack at 37 – 41.

<sup>59</sup> Testimony of Russell Cusack; Testimony Nelida Irvine.

<sup>60</sup> Testimony of Russell Cusack.

<sup>61</sup> Deposition of Russell Cusack at 25 – 26.

<sup>62</sup> BEP Policy and Procedures Manual Appendix F at F-1.

<sup>63</sup> BEP Policy and Procedures Manual Appendix D.

<sup>64</sup> BEP Policy and Procedures Manual Appendix D at D-1.

facility.”<sup>65</sup> BEP Policy and Procedure 2.6 provides that “if only one appropriately licensed vending facility manager is applying, the BEP Business Manager may assign the facility to that vending facility manager....”<sup>66</sup> The BEP Policy and Procedure manual defines a licensed vending facility manager as a “blind or severely handicapped individual who is working under an operating contract....”<sup>67</sup>

Mr. Swartz has participated in the vending program since 1983. He was licensed in November 1984 and was BEP coordinator from 1994 -1996. He testified that he resigned in 1996 because he was being forced to open the vending program to a severely disabled person.<sup>68</sup> Until the 1990’s only blind persons participated in the program. From 1996 to the present Mr. Swartz has operated BEP facilities. Mr. Renaud has participated in the vending program since the mid 1990’s. He was the first (and is believed to be the only) severely disabled person who has participated in the vending program.

Mr. Swartz operates only one vending facility which is located at the Alaska Native Medical Center. Mr. Swartz could not recall having been licensed to a facility, nor does he recall ever being told he could not personally operate more than one facility. Mr. Swartz believes that if there is a licensed blind person who wants the operating agreement, a blind person has priority for award of the agreement over a severely handicapped person, regardless of the severely handicapped person seeks the site as a licensee or as a temporary contractor.

## 2. Accounting for Program Revenues

As part of the CA, the legislature created a revolving fund, the Vocational Rehabilitation Small Business Enterprise Revolving Fund (BEP fund), where the net proceeds of vending facilities on public property, other than those operated by a licensee, are set aside (deposited).<sup>69</sup> By regulation, net proceeds from vending machines operated by private persons in federal buildings must be paid into the fund and income from

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<sup>65</sup> BEP Policy and Procedures Manual BEP 2.0 at 2.0-3.

<sup>66</sup> BEP Policy and Procedures Manual BEP 2.6 at 2.6-2.

<sup>67</sup> BEP Policy and Procedures Manual BEP 6.0 at 6.0-2.

<sup>68</sup> A legislative audit conducted in 1995 identified several concerns regarding the BEP Coordinator’s ability to effectively administer the program. March 24, 1995, Legislative Audit, at 12 – 14, found at Exhibit 3 to Division’s Opposition and Reply to Swartz’s Opposition to Division Motion for Summary Disposition.

<sup>69</sup> AS 23.15.130(a), (b) Revolving funds differ from non-revolving funds in that any left over monies are carried over to the next fiscal year. Excess funding is not returned to the general fund.

federal properties "will be held and accounted for separately from any income from vending machines in state owned or leased buildings and will be expended only to assist licensees on federal property."<sup>70</sup>

These set aside funds are just one source of funding for the division and its vendor program. The division also receives §110 funds. Section 110 funds are federal matching funds that are matched on a 3 to 1 ratio and are used by the division to operate all of its client services throughout the state, not just its BEP.

Jim Dale, Division Administrative Manager, is the individual responsible for complying with SLA reporting requirements. The division is very careful with its vending program accounting and utilizes separate accounts for federal and state income and expenses. The division understands that funds from RSA sites are restricted and may only be used for RSA expenses; state funds from state sites may be used at either RSA or state sites. The RSA vending program is not self-supporting and relies upon support from state vending program receipts and §110 funds. Program income and expenditures are recorded by the division in either the Randolph-Sheppard Small Business Enterprise Revolving Fund (RSA fund) or the BEP Fund depending on the source or facility location.<sup>71</sup> The accounting structure flows down from those funds into two separate yearly appropriations.

Direct expenses, such as health insurance, are coded to either RSA or state sites based on whether they are on federal or state property; indirect expenses, such as office supplies, DHL services, etc. are allocated by the division to the RSA fund or the BEP fund based on the amount of money that the program brings in. Positions, such as the BEP coordinator, are paid out of §110 funds. At one point the division attempted to track the BEP coordinator's time and code it to federal or state property but it proved too difficult. No management services are paid for from set-a-side revenues. If the state vending program expenses exceed program receipts, the division would utilize §110 funds to cover the difference.

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<sup>70</sup> 8 AAC 98.430(a). *See also* 8 AAC 98.440(e) ("Set-aside profits from vending facilities on federal property will be accounted for separately from those derived from vending facilities on state property, and will be expended in accordance with 8 AAC 98.430(d).(1) - (5) to assist only licensees on federal property.")

<sup>71</sup> Testimony of Jim Dale.

### 3. The Nesbett Courthouse

In 2005, the division issued a vacancy announcement for the courthouse.<sup>72</sup> This vacancy announcement stated that the facility would be considered as either a primary or secondary site with first priority being given to those applicants seeking a primary site.<sup>73</sup> The announcement restated the regulatory priorities that would be used to select the courthouse vendor. Any contract to operate the facility as a secondary site would be for a term of one year and it could be extended until a vendor seeking a primary site was selected.<sup>74</sup>

Mr. Renaud was awarded a temporary contract to operate the site as a facility secondary to his primary site at the Alaska National Guard Amory.<sup>75</sup> The contract was for one year, from February 14, 2005 through February 13, 2006, but it was extended to July 31, 2006.<sup>76</sup> Mr. Renaud's temporary contract contained terms and conditions requiring the division to provide him with "appropriate continuing education" so he could "expand and improve his capacity for successful operation of his facility and for upward mobility within the program, and adequate equipment."<sup>77</sup>

Because Mr. Renaud's contract was set to expire and because the division knew there was a qualified blind vendor named Joe Legner interested in the site, as was Mr. Renaud, the division issued a vacancy announcement seeking a qualified vending facility manager for the courthouse facility.<sup>78</sup>

The announcement was silent as to whether the site was offered as a primary or secondary site. Ms. Irvine believed the 2006 announcement was announcing the facility as a primary, not secondary site and that the language contained in the 2005 announcement announcing availability as either a primary or secondary site was not contained in the 2006 announcement because the division knew in advance that there

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<sup>72</sup> The exact date that the vacancy announcement was issued is unknown. The closing date was February 4, 2005 at 12:00 p.m. Div. Record at 179 – 185.

<sup>73</sup> Div. Record at 184.

<sup>74</sup> Div. Record at 184.

<sup>75</sup> Div. Record at 140 – 170.

<sup>76</sup> Div. Record at 137, 140.

<sup>77</sup> Div. Record at 141.

<sup>78</sup> The exact date that the vacancy announcement was issued is unknown. The closing date was March 8, 2006 at 12:00 p.m. Div. Record at 1 – 8. Testimony of Nelida Irvine.

were certified vendors who were interested in the facility as a primary facility.<sup>79</sup> Ms. Irvine understood that when assessing competing applications first priority goes to the applicant seeking a primary facility, then, as between two vendors seeking a primary facility, the division would consider whether one of the vendors was blind.<sup>80</sup>

The January 30, 2006, BEP Management Staff Meeting Minutes reflect that the courthouse vending facility would be announced as a secondary facility because Mr. Legner withdrew his bid when the facility was announced as a primary site and nobody was showing an interest in the facility as a primary site.<sup>81</sup>

In an e-mail message dated March 6, 2006, Mr. Swartz informed the division that he wanted to apply for the courthouse to run as a secondary facility to his primary facility at the Alaska Native Medical Center. Mr. Swartz wanted to “operate it [the courthouse facility] as a training facility with the intent of turning it over to a blind licensee when appropriate.”<sup>82</sup>

The BEP April 2006 Report Minutes identify three applicants who originally responded to the vacancy announcement: Joe Legner, Rick Renaud and Jim Swartz. The minutes note that Mr. Renaud sought to divest himself of the Armory and take the courthouse facility as his primary facility while Mr. Swartz requested the courthouse as a secondary facility. A committee was formed to evaluate Mr. Swartz’s and Mr. Renaud’s applications.<sup>83</sup>

The committee consisted of Linda Kell, a representative of the Anchorage Courthouse, Bobbie Cleland, a blind vendor and representative of the Blind Manager’s Committee, and Duane Mayes representing the division and the severely disabled.<sup>84</sup> The evaluation criteria consisted of two sections: 1) standards and priorities for placement and

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<sup>79</sup> Testimony of Nelida Irvine; *also* compare Div. Record at 184 with Div. Record at 7.

<sup>80</sup> Testimony of Nelida Irvine.

<sup>81</sup> January 30, 2006 BEP Management Staff Meeting Minutes, Div. Record at 207.

<sup>82</sup> Div. Record at 9.

<sup>83</sup> BEP April 2006 Report, April 25, 2006, Div. Record at 204; E-mails dated May 17, 2006 – June 7, 2006, Div. Record at 11 – 13; Evaluation Forms, Div. Record at 14 - 43. Mr. Legner had withdrawn his application from consideration.

<sup>84</sup> BEP Policy and Procedure BEP 2.6 provides that the committee shall consist of a representative of the SLA, a representative of the appropriate manager’s committee and a representative from the building owner. Mr. Renaud is the only severely disable vendor on a possible manager’s committee. Mr. Mayes performed a dual role as a representative of the SLA and the disabled vendor’s committee.

2) applicant interviews.<sup>85</sup> The standards and priorities used to determine placement assigned points based upon the applicant's experience in the BEP, food service management experience, food service inspection score, and whether the applicant was requesting a new location. An applicant requesting a new location received 15 points. At the bottom of the evaluation criteria sheet was the following:

**NOTE: Per AS 23.15.100(a)(6): persons who are blind will receive a preference if all other factors are equal.**<sup>86</sup>

Mr. Renaud was ranked considerably higher than Mr. Swartz:

	Possible Points	Points Awarded to Swartz	Points Awarded to Renaud
Standards & Priorities for Placement			
Cleland	90	45	90
Mayes	90	70	85
Kell	90	70	85
Interview			
Cleland	35	15	32
Mayes	35	31	18
Kell	35	35	28
Total Points	375	266	338

Mr. Swartz believes Ms. Cleland's low scores were retaliatory because they have had disagreements in the past and Ms. Cleland had complained to the BEP Director that Mr. Swartz was creating a hostile work environment.<sup>87</sup>

Ms. Cleland is active in the BEP's Blind Manager's committee and runs a food service facility on a military base in partnership with Blackstone. She has had many interactions with Mr. Swartz and testified that he can be very charming or very rude. She denied that her ratings were retaliatory or based on personal feelings. Rather, she explained that she rated Mr. Renaud higher because he was dressed professionally and made a professional presentation. Conversely, she found Mr. Swartz was dressed casually and felt Mr. Swartz did not see the interview as an opportunity to show the committee what he could do. She was left with the impression that Mr. Swartz was

<sup>85</sup> Div. Record at 44 – 48.

<sup>86</sup> See e.g., Div. Record at 15 (emphasis in original).

<sup>87</sup> Swartz Testimony; January 30, 2006 BEP Management Staff Meeting Minutes, Div. Record at 206.

depending upon his reputation to carry his application. Finally, Ms. Cleland understood that the BEP policy is one vendor per facility.<sup>88</sup>

### III. Discussion

There are three primary issues in this case. The first issue is whether the Nesbett Courthouse is “other property” within the meaning of the RSA; if it is, then only a blind person may be awarded the contract at that site. The second issue is whether the “first priority” for blind persons under AS 23.15.100(a)(6) gives all blind persons priority over all severely handicapped persons, or whether, as the division argues, it gives blind persons priority only if other things are equal, that is, a preference that must be considered when competing applications are ranked. The third issue is whether the division, under 3 AAC 98.340(c), may, as it does, limit licenses to one per person, whether the person is blind or handicapped.

#### A. *The Nesbett Courthouse In Anchorage Is Not “Other Property” Under The Randolph Sheppard Act*

Regardless of whether a property is located on non-federal property, it is considered “other property” under the RSA if RSA vending facilities located on that property “are established or operated by the use of any funds derived in whole or in part, directly or indirectly, from the operation of vending facilities on any Federal property.”<sup>89</sup> Therefore, to prevail on his claim that the Nesbett Courthouse is “other property” under the RSA, Mr. Swartz must prove that the vending facility is funded directly or indirectly from the operation of vending facilities on Federal properties; a burden which he has not met.

The division treats federal vending facilities and revenues generated from those properties differently than revenues generated from state facilities. When a federal site becomes available, it is announced to blind vendors only.<sup>90</sup> When a state site becomes available it is announced to severely handicapped persons and blind persons.

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<sup>88</sup> Testimony Bobbie Cleland.

<sup>89</sup> 34 CFR 395.1(n) “*Other property* means property which is not Federal property and on which vending facilities are established or operated by the use of any funds derived in whole or in part, directly or indirectly, from the operation of vending facilities on any Federal property.”

<sup>90</sup> Deposition of Russell Cusack at 38, 45.

Mr. Swartz argued that income from vending machines on federal property is used to provide management services to non-federal property, and that because licensees on federal property are included in the group for group plan insurance purposes, non-federal licensees receive an indirect benefit in the form of lower health insurance premiums.

Mr. Swartz's assertion that non-federal vendors received an indirect benefit from having federal vendors included for purchasing health insurance is not supported by the evidence. By statute, vendors are included in the group policy procured by the Department of Administration for state employees.<sup>91</sup> The premiums are paid per person and are coded based upon the vendor's primary site. Mr. Swartz has not presented convincing evidence that the number of vendors participating in the BEP program has any influence on the price of the insurance.

Nor has Mr. Swartz presented persuasive evidence that funds from federal properties are commingled with funds from state properties or used to support state program facilities. The uncontradicted testimony of Mr. Dale was that expenses and income are coded based upon a vendor's licensed site. For a brief period of time the division attempted to parse the BEP coordinator's time between the State program and the RSA, but it was concluded that if the BEP coordinator's time was allocated based on real time, the RSA could not cover the BEP Coordinator's expenses. If there is any transfer of support from one program to the other it is that State funds are used to support the operation of vending facilities on federal properties.

Mr. Swartz relies upon *Tamashiro v. Dept. of Human Services, State of Hawaii*,<sup>92</sup> to support his contention that State properties are subject to the requirements of the RSA as other property. In *Tamashiro*, the issue was whether the state court had subject matter jurisdiction over disputes arising from the operation of the state's RSA program on state properties. The majority of the court concluded that the state court lacked subject matter jurisdiction reasoning that 1) Hawaii incorporated the federal adjudication path into

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<sup>91</sup> "Group insurance for certain licensees. The agency shall purchase group insurance coverage under AS 39.30.090 for licensees holding current operating agreements. The employer share of the insurance premium shall be paid from the vocational rehabilitation small business enterprise revolving fund". AS 23.15.136.

<sup>92</sup> 146 P.3d 103 (Hawaii 2006) (Pollack, J. and Acoba, J. dissenting).

Hawaii's program by regulation applied to non-federal properties; 2) states are not required to participate in the RSA, but those that do must agree to federal adjudication; 3) funds derived from the operation of facilities on federal property were used to operate facilities on non-federal properties; and 4) the statute establishing a RSA Revolving Account acknowledged Hawaii's acceptance of the federal vending program as applicable to the state and county property.

The facts and issue addressed in *Tamashiro* are so dissimilar to the matter at hand that the case has minimal persuasive value. First, the issue here is not whether Alaska's civil court has subject matter jurisdiction to resolve a dispute under the CA; rather the issue is whether, under Alaska's CA, the department's regulations and the evidence presented, Mr. Swartz has established that the state's vending facilities are "other property" under the RSA. Another distinction is that, Alaska's vending program is open to the blind and severely disabled persons; Hawaii's vending facility program is exclusively for blind vendors. Finally, Alaska, by regulation, provides that funds from federal properties will be accounted for separately,<sup>93</sup> whereas the Hawaiian legislature established an account within the state treasury called the "Randolph-Sheppard revolving account" and vending machine income generated by federal, state, and county operations were commingled and deposited into that account.<sup>94</sup>

Moreover, the evidence establishes that as early as 1982, the RSA Regional coordinator was aware of Alaska's dual program, and it was his position that if the state were to separate the vending programs as contemplated by SB 778 then before a vendor would be eligible for federal arbitration under the RSA that Alaska would need to designate some of its state locations as belonging to the RSA program. This is persuasive evidence that the federal government does not consider state vending facilities under the CA to be "other property" subject to the RSA. If it did, there would be no need for Alaska to affirmatively designate some of its state vending facilities as RSA facilities.

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<sup>93</sup> "The commissioner of administration shall separately account for receipts under [vending facilities on public property excluding licensees] of this section that are paid into the vocational rehabilitation small business enterprise revolving fund. The annual estimated receipts of the fund may be used by the legislature to make appropriations to the department to aid licensees in operating vending machine facilities." AS 23.15.130(c). "Set-aside profits from vending facilities on federal property will be accounted for separately from those derived from vending facilities on state property, and will be expended in accordance with 8 AAC 98.430(d)(1) - (5) to assist only licensees on federal property." 8 AAC 98.440(e).

<sup>94</sup> Haw. Rev. Stat. §347-12.5 (2007).

B. *The Legislature Intended To Give Blind Persons A Blanket Priority Over Severely Handicapped Persons for Licensing Purposes*

Much of this case centers on the interpretation of the phrase “first priority” as used in AS 23.30.100(a)(6), which directs the division to:

license blind persons and persons with severe disabilities in accordance with AS 23.15.133 for the operation of vending facilities on public property, with blind persons having first priority for operation of the vending facilities...<sup>[95]</sup>

In construing AS 23.100(a)(6), the administrative law judge applies the same principles as a court:

The purpose of statutory construction is “to give effect to the intent of the legislature, with due regard for the meaning that the statutory language conveys to others.” Statutory construction begins with the language of the statute construed in light of the purpose of its enactment. If the statute is unambiguous and expresses the legislature’s intent, statutes will not be modified or extended by judicial construction. If we find a statute ambiguous, we apply a sliding scale of interpretation, where “the plainer the language, the more convincing contrary legislative history must be.”<sup>[96]</sup>

A statute must be interpreted “according to reason, practicality, and common sense, ‘taking into account the plain meaning and purpose of the law as well as the intent of the drafters’.”<sup>97</sup>

1. The Priority Is For All Blind Persons

The division asserts that the priority for blind persons under AS 23.15.100(a)(6) is a preference that applies when all other things are equal. Mr. Swartz argues that the priority is a blanket priority, and that under the statute all blind persons have priority over all severely handicapped persons, without regard to other ranking factors.

The plain language of the statute is susceptible of either reading. However, the legislative history reveals that the legislature understood and intended to bestow blind persons who participate in the CA’s vending program a prior right and not a mere

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<sup>95</sup> AS 23.15.100(a)(6).

<sup>96</sup> *Tesoro Petroleum Corporation v. State*, 42 P.3d 531, 537 (Alaska 2002) (internal citations omitted).

<sup>97</sup> *Alaska Department of Commerce, Community and Economic Development v. Progressive Casualty Ins., Co.*, 165 P.2d 624, 628 (Alaska 2007) (citations omitted).

preference to be applied as a tiebreaker if all other factors were equal. This is evidenced by the committee discussions, the statute's retention of its original verbiage granting priority to the blind.<sup>98</sup> This interpretation is also consistent with the interpretation given to similar language in the RSA.<sup>99</sup> As used in the RSA, the priority granted to blind persons has been interpreted to mean a prior right or a first choice.<sup>100</sup>

Alaska law does not, for purposes of assigning priority, distinguish between blind licensees on federal or state properties. Therefore, as between two competing vendors, one blind and one severely disabled, the legislative history shows that the legislature intended that the blind vendor would be awarded the license, without regard to other ranking factors.

## 2. The Priority Does Not Apply to Temporary Contracts

The plain language of AS 23.15.100(a)(6), however, limits the first priority for blind persons to licensure. The statute mandates that the division provide the priority when issuing a license "in accordance with AS 23.15.133 for the operation of vending facilities on public property."<sup>101</sup> AS 23.15.133 discusses when an agency shall issue a license and when it may revoke a license. In light of the plain language of subsection (a)(6), particularly when read together with AS 23.15.133 and the legislative history, "that should there not be enough blind persons to fill *licensee* rolls, that within the states' program, [the division] could select other severely handicapped persons,"<sup>102</sup> the phrase "with blind persons having first priority for operation of the vending facilities"<sup>103</sup> does not extend to a temporary contract to operate a facility.

## C. The Division's Interpretation Of Its Regulation That A Vendor May Only Have One License Is Reasonable

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<sup>98</sup> May 28, 1982, Transmittal Letter from Governor Jay S. Hammond to Senate President Jalmar Kerttula "Some elements of this bill, particularly sec. 10 which eliminates the preference to the blind over severely handicapped, are commendable." May 25, 1982, Attorney General review of HCS CSSSSB 778, at 1. "Section 10 Repeals the preference of blind persons over severely handicapped persons for placement in facilities." *Id.* at 3.

<sup>99</sup> 20 USC 170(b).

<sup>100</sup> *New Hampshire v. Ramsey*, 366 F.3d 1 (1<sup>st</sup> Cir. 2004).

<sup>101</sup> AS 23.15.100(a)(6).

<sup>102</sup> House Finance Committee March 23, 1976 p. 385 (emphasis added).

<sup>103</sup> AS 23.15.100(a)(6).

The division did not award Mr. Swartz the courthouse vending facility because it interprets 3 AAC 98.340(c) as limiting a vendor to a single license that is site specific.

Mr. Swartz contends that the division manages the program in a manner that eliminates any meaningful distinction between a license and a temporary contract, other than the duration of the operating contract. For support, he points to the division's boiler plate license authorizing the holder to "operate the following types of vending facilities:"<sup>104</sup> and the terms and conditions of the temporary contract between Mr. Renaud and the division.<sup>105</sup> Mr. Swartz argues that because the division has failed to maintain a distinction between these two methods of operating a vending facility, the statutory priority for the blind applies to all operating agreements under the vending program regardless of whether the site is operated under a license ("primary") or under a temporary contract ("secondary"). The division's interpretation of 3 AAC 98.340(c) is therefore erroneous, Mr. Swartz contends.

#### 1. A License Is Site Specific.

The division must take actions "it considers necessary or appropriate to carry out the purposes of AS 23.15.010 - 23.15.210 and adopt regulations" to carry out these purposes.<sup>106</sup> The division "shall issue a license for the operation of a vending facility on public property"<sup>107</sup> to a blind person or a severely disabled person, "with blind persons having first priority for operation of the vending facilities."<sup>108</sup> "A license does not authorize the holder to operate a vending facility at a location other than that described in the license."<sup>109</sup> "A license issued [by the division] does not expire."<sup>110</sup>

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<sup>104</sup> BEP Policy and Procedures Manual Appendix F at F-1.

<sup>105</sup> Div. Record at 140-170. Mr. Swartz notes that the probationary contract, contrary to Mr. Cusack's assertions regarding the differences between temporary and primary sites, requires the division to provide "Appropriate continuing education for the vending facility manager to expand and improve his capacity for successful operation of his facility and for upward mobility within the program, and adequate equipment" to Mr. Renaud. Div. Record at 141.

<sup>106</sup> AS 23.15.100(a)(1); *see also* AS 23.15.100(b)(5) (the division may "adopt regulations necessary for carrying to the provisions of AS 23.15.010- 23.15.210.").

<sup>107</sup> AS 23.15.133(a) (emphasis added).

<sup>108</sup> AS 23.15.100(a)(6).

<sup>109</sup> 8 AAC 98.340(b).

<sup>110</sup> AS 23.15.133(b).

The process for obtaining a license is governed by regulation.<sup>111</sup> A blind or severely disabled person seeking a license must first be certified by the division that he or she meets certain requirements and has completed the division's training program.<sup>112</sup> Once certified by the division as a vending facility manager, the division will "license a certified vending facility manager into a vending program" when there is a vending facility available and the division and the manager have entered into a written operating agreement.<sup>113</sup> Therefore, there are three conditions that must be met before the division will issue a license:

1. the division must have certified the applicant as a vending facility manager;
2. a vending facility must be available; and
3. a written agreement between the division and the certified vending facility manager must be completed.<sup>114</sup>

The division initially issues a temporary license for a six month evaluation period.<sup>115</sup> Upon successful completion of the evaluation period, the division issues a permanent license.<sup>116</sup> Once issued, a license may not be terminated except under certain circumstances.<sup>117</sup>

The division "shall issue a license for the operation of a vending facility on public property."<sup>118</sup> A license is issued for an indefinite period of time and may be suspended or revoked if the division "finds that the licensee is not operating the facility in accordance with regulations ...."<sup>119</sup>

When, as here, there are several regulations involved they should be interpreted together, "in context with other pertinent provisions rather than in isolation, and with a

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<sup>111</sup> 8 AAC 98.330; 8 AAC 98.340.

<sup>112</sup> 8 AAC 98.330.

<sup>113</sup> 8 AAC 98.340(a).

<sup>114</sup> 8 AAC 98.340(a).

<sup>115</sup> 8 AAC 98.340(b).

<sup>116</sup> 8 AAC 98.340(b).

<sup>117</sup> AS 23.15.133(b) ("A license issued under this section does not expire. However, a license may be revoked if the agency finds that the licensee is not operating the facility in accordance with regulations adopted by the agency."); 8 AAC 98.460.

<sup>118</sup> AS 23.15.133(a).

<sup>119</sup> AS 23.15.133(b).

view toward reconciling conflict and producing ‘a harmonious whole’” in light of the legislative intent.<sup>120</sup> An interpretation that avoids inconsistency should be adopted unless it is “plainly unreasonable in light of [the legislature’s] intent.”<sup>121</sup> Here, the interpretation that avoids internal inconsistency and is reasonable in light of the statutory intent is that the vending program be administered in a fashion that will permit the greatest number of participants. A reasonable way to achieve this end is to interpret the applicable regulations as limiting the number of licenses that may be awarded to a single person.

That only one license may be awarded to a single person is consistent with 8 AAC 98.380(b) which requires a vendor “personally operate the facility unless” the vendor has a designated manager approved by the division and 8 AAC 98.460(a)(2) which permits revocation of a license if a vendor is absent from the facility more than four days without approval. A vendor can only “personally operate” one facility at a time. Limiting a vendor to one licensed facility at a time prevents internal inconsistency.

The division’s interpretation of its own regulations to mean that a vendor may operate only one facility under a license is reasonable taking into account the plain meaning and purpose of the CA as well as the legislative intent.<sup>122</sup>

Mr. Swartz’s view that applicable law should be interpreted to allow vendors more than a single license is not wholly unreasonable.<sup>123</sup> However, if the licensing program were administered as advanced by Mr. Swartz, a person who is certified would be a *de facto* licensee and there would be no need for the division to have a program that first certifies a vending facility manager and then licenses the manager when a vending facility becomes available. Theoretically, under Mr. Swartz’s interpretation, the single most qualified blind vendor would be able to obtain all of the sites available.

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<sup>120</sup> *Progressive Insurance Co. v. Simmons*, 953 P.2d 510, 516 (Alaska 1998) (quoting *City of Anchorage v. Scavenius*, 539 P.2d 1169, 1174 (Alaska 1975) [quoting 2 J. Sutherland, STATUTES AND STATUTORY CONSTRUCTION, §4703, at 336-37 (Horrack ed., 3d. ed. 1943)].

<sup>121</sup> *Progressive Insurance Co. v. Simmons*, 953 P.2d 510, 517 (Alaska 1998).

<sup>122</sup> Neither party argued that, because the state ran two programs, a blind vendor is entitled to a primary site under each program.

<sup>123</sup> Although Mr. Swartz’s position appears to be supported by the boilerplate license at appendix F to the division’s policy and procedure manual. The division’s policy and procedure manual and document templates therein do not supersede statutes and regulations.

Mr. Swartz has not shown that the division's interpretation is unreasonable, in light of the legislative and regulatory history as well as the purpose and policy of the program – to provide for the vocational rehabilitation of individuals with disabilities.<sup>124</sup>

2. Operating A Vending Facility Under A License Is Not The Same As Operating A Facility Under Contract.

There are more vending sites than certified vending facility managers. Because the division does not want to lose those sites for future vendors it issues temporary contracts. Mr. Swartz believes that there is nothing prohibiting a vendor from having multiple facilities and that the distinction drawn by the division between a primary and contractual site is superfluous.

The division's testimony regarding the differences between the two methods of operating a vending facility does not in all respects reflect the documents it uses. For example, Mr. Cusack testified that one difference between a primary site and a temporary site was the amount of training and support provided, but Mr. Renaud's temporary contract had a provision obligating the division to provide training. Similarly, the division has taken the position that its vending licenses are site specific, yet the boiler plate license and other language in its policies and procedures imply that an individual is licensed to operate different types of vending facilities.

However, these inconsistencies are immaterial. While a temporary contract awarded by the division and a license awarded by the division may appear similar, legally they are polar opposites. A license once granted may not be revoked except under specific circumstances set forth in law and is issued for an indefinite period of time.<sup>125</sup> The terms of a contract are within the discretion of the division, and it may be revoked or terminated on any grounds specified by the division. A license and a contract are not two interchangeable documents.

3. Mr. Swartz Was Not Seeking A License To Operate A Vending Facility, Therefore He Did Not Have A Prior Right To The Courthouse Vending Facility And The Division Was Correct When It Granted Mr. Renaud A License To Operate The Facility.

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<sup>124</sup> AS 23.15.100(a)(4).

<sup>125</sup> AS 23.15.133(b); 8 AAC 98.460.

Once the division knew it was offering the courthouse as a primary facility, had Mr. Swartz been willing to give up his licensed facility at the Alaska Native Medical Center and sought a license to operate the courthouse vending facility, Mr. Swartz would have had first priority. However, Mr. Swartz was unwilling to transfer his license and unequivocally expressed his desire to run the facility under a temporary contract until there was a blind certified vending facility manager willing to operate the facility. Thus, he was not entitled to the statutory priority. Moreover, because Mr. Renaud was the only certified vending facility manager seeking a license to operate the courthouse facility as a primary site, the evaluation committee process was not required, and it is unnecessary to address Mr. Swartz's allegation that the selection process was flawed.

#### **IV. Conclusion**

1. The Nesbett Courthouse is not other property under the Randolph Sheppard Act because Mr. Swartz did not establish that facilities on State property were established or operated by the use of any funds, either directly or indirectly from the operation of vending facilities on Federal property.
2. A blind certified vending facility manager seeking a license to operate a vending facility has first priority over a non-blind severely disabled vending facility manager seeking a license to operate a vending facility.
3. Mr. Swartz was not entitled to a first priority because he was not seeking a license to operate the courthouse vending facility.

#### **V. Order**

The division's decision to award the license to operate the courthouse facility to Mr. Renaud is affirmed.

DATED this 29th day of May, 2008.

By: *Signed*  
Rebecca L. Pauli  
Administrative Law Judge

### **Adoption**

On behalf of the Commissioner Labor and Workforce Development, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 7<sup>th</sup> day of July, 2008.

By: *Signed*  
Signature  
Guy Bell  
Name  
Assistant Commissioner  
Title

[This document has been modified to conform to technical standards for publication.]