

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF EMPLOYMENT
AND ECONOMIC DEVELOPMENT
STATE SERVICES FOR THE BLIND

In the Matter of the Appeal of
John Zitek

**FINDINGS OF FACT, CONCLUSIONS
AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Raymond R. Krause (ALJ) on November 6, 2006, at 9:30 a.m. at the offices of the State Services for the Blind, 2200 University Ave. W., Suite 240, St. Paul, Minnesota, 55114. The record in this matter closed on November 6, 2006.

Richard L. Varco, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101 appeared on behalf of the State Services for the Blind (SSB). Mr. John Zitek (Respondent) appeared on his own behalf.

STATEMENT OF THE ISSUES

Should the decision by SSB to grant and deny certain of Respondent's claims against SSB for the alleged failure to comply with its rules regarding start-up of a new operator at a vending stand be upheld?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Minnesota Department of Employment and Economic Development, State Services for the Blind, operates the Business Enterprises Program (BEP). The BEP operates snack shops and vending stands in various state owned buildings. The BEP grants the rights to operate these stands to persons who are legally blind.¹

¹ Exhibit 9.

2. On October 20, 2005, BEP put out a bid notice for Stand #146. The bid notice detailed the number and type of vending machines that are part of the stand, the locations and hours of operation and other relevant information. The bid notice also pointed out that income for the last year was below the program average and that remodeling of the building would further reduce sales over the next two to three years.²

3. On November 1, 2005, Respondent signed a BEP form stating that he had “carefully investigated all the available information about this enterprise” and decided to “sign-on”.³

4. On December 15, 2005, Respondent concluded an agreement with SSB to take over operation of Stand #146.⁴ Respondent began operating the stand on December 15, 2005.⁵

5. On March 29, 2006, Respondent sent an email to Mr. Stan Nichol, Supervisor of the BEP. The email stated that Respondent had incurred losses, reduced sales, and extra expenses for which he wished SSB to reimburse him.⁶ Respondent claimed the losses were due to initial inventory problems, lack of essential equipment such as carts and a cash register, and the cost of hiring labor to clean out the inventory room.⁷

6. On May 3, 2006, Mr. Nichol responded in writing that he had investigated Respondent’s claim and without further documentation, SSB could not substantiate the total of \$7,500 that Respondent was claiming.⁸ Respondent sent a letter to SSB dated May 15, 2006, explaining in more detail his claim for reimbursement and appealing the denial.⁹ SSB sent Respondent a notice of an administrative review scheduled for June 28, 2006, to be conducted by Mr. Nichol, Ms. Pamela Brown and Ms. Cathy Carlson, Director of Administrative Services for SSB.¹⁰

7. The administrative review was duly held and, as a result, SSB offered Respondent \$686.00 to compensate him for those claims that SSB felt were its responsibility and could be substantiated. A memorandum laying out the reasons for the denial of some claims and the offer to compensate for others was sent to Respondent on June 30, 2006.¹¹

² Ex. 7.

³ Ex. 8.

⁴ Ex. 9.

⁵ Testimony of J. Zitek, Tape 1.

⁶ Ex. 1.

⁷ Test. J. Zitek.

⁸ Ex. 2.

⁹ Ex. 3.

¹⁰ Ex.4.

¹¹ Ex.5.

8. On July 17, 2006, Respondent sent an email to Cathy Carlson declining the offer and requesting a formal hearing.¹²

9. SSB admits that some essential equipment was not furnished on time and that the storage room should have been cleaned out before Respondent took over the operation of the stand.¹³

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. State Services for the Blind and the ALJ are authorized to hear this matter under Minn. Stat. §§ 248.07, subd. 15 and 14.50 and Minn. R. 3321.1200, subp. 3.

2. Respondent received due, proper and timely notice of the time and place of the hearing. The SSB has complied with all relevant substantive and procedural requirements. This matter is, therefore, properly before the SSB and the ALJ.

3. Respondent has the burden of proof to show that the SSB is liable, through failure to comply with its rules, for the losses that Respondent claims and that the denial of the claims is unreasonable.

4. Respondent has not proven by a preponderance of the evidence that some of the claims are the result of SSB's failure to comply with its rules and has not proven that denial of some of the claims for lack of substantiation is unreasonable.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that: The decision of the administrative review be AFFIRMED.

Dated this 20th day of November 2006

s/Raymond R. Krause

RAYMOND R. KRAUSE
Administrative Law Judge

¹² Ex. 6.

¹³ Ex. 5.

Reported: Taped, 1 tape
No transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Employment and Economic Development (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Charles E. Hamilton, State Services for the Blind, 2200 University Avenue W., Suite 240, St. Paul, Minnesota, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

MEMORANDUM

Background

The Business Enterprise Program (BEP) is a program of the State Services for the Blind (SSB) and has the right to operate vending machines and snack shops in various state buildings.¹⁴ The BEP, in turn, grants the opportunity to operate the stands to legally blind individuals. The terms of the agreement between the BEP and the operator are contained in state rules and an agreement signed by the operator and the Director of the BEP. The latter incorporates the terms of the rules by reference. The terms contained in both documents require each party to the agreement to accept some responsibilities for the operation of the stands.

The BEP is responsible by rule “for furnishing each vending stand or business enterprise with adequate, suitable equipment and replacement of such equipment and assistance in maintenance and repair of equipment;...”¹⁵ The operator is required by rule to “...determine what merchandise or supplies the new operator shall purchase from the departing operator”.¹⁶

In this case, Respondent claims that there were insufficient stocks left in the stand when he took over, that the BEP did not provide the equipment necessary to restock and sell inventory, and the stockroom was left in a condition that required him to hire assistance to clean it out and make it operational. As a result of these alleged failures, Respondent claims to have lost \$7,500 in revenue.

In reviewing the claim, SSB admits that the cash register and carts were not available at the start of Respondent’s tenure at Stand No. 146. SSB also admits that the transition should have been handled better and that there is a legitimate claim for costs associated with cleaning the storage room.

SSB disputes several claims, however, as not being the responsibility of the agency. Foremost among these is the difference in sales between the previous stand operator’s sales and Respondent’s. SSB attributes the sales decline to the remodeling of the building where the stand resides. Respondent was made aware of the remodeling and the expected decline in sales prior to the bid being made. Also SSB contends that the responsibility for tracking accurate sales tax obligations does not rest with SSB but with the operator. SSB also asserts that the operator is responsible for determining the amount of inventory being left by the previous operator and obtaining the proper amount of new inventory, if any is needed, in time to start operations.

¹⁴ Minn. Stat. §248.07, subd.7 (2005).

¹⁵ Minn. R. 3321.0600A.

¹⁶ Minn. R. 3321.0700, subp. 2.

SSB convened an administrative review panel to hear Respondent's appeal of the initial denial which was based on lack of substantiation. The result of SSB's review was a denial of some claims and the granting of relief for others, but in a lesser amount than claimed. SSB justified the reduction on the grounds that Respondent had failed to provide adequate supporting documentation of the losses or expenditures and that Respondent made business decisions that led to some of the expenditures and losses. Respondent appealed the denial of his claims for relief.

Analysis

SSB argues that the decision arrived at during the administrative review was proper and that the ALJ does not have jurisdiction to decide the matter, but only to decide whether the Director of Administrative Services for SSB has the authority to make the offer resulting from the administrative review.

Minn. Stat. § 248.07, subd. 15, states "An applicant for or recipient of rehabilitation service who is dissatisfied with an agency's action with regard to the furnishing or denial of services may file a request for administrative review and fair hearing in accordance with the rules adopted under subdivision 14a." Furthermore, Minn. R. 3321.1200, subp. 3, states "An opportunity for a fair hearing conducted pursuant to Minnesota Statutes, chapter 14 will be afforded to each operator dissatisfied with any action arising from the operation or administration of the vending stand program".

This matter involves an operator who is dissatisfied with the action of the agency. That action was the denial of his claim. The claim arose out of the operation of the vending stand program. The claim is based on an allegation that SSB did not comply with its own rules when making this stand available to Respondent. There is no statutory or other basis to suggest that the ALJ does not have jurisdiction to hear and decide the merits of this matter.

The internal administrative appeal conducted by SSB reviewed each of the claims made by Respondent and granted amounts for those items that it felt legitimately were, under the rules, its responsibility. SSB denied the claims that were, under the rules, the responsibility of the operator or those that were unsubstantiated.

At the hearing, Respondent relied upon the material already submitted to the administrative review panel. He did not produce any additional evidence that showed the decision of the panel to be in error. There is not sufficient evidence in the record to demonstrate that the decision of the administrative review was incorrect as a matter of law and rule or that the decision was unreasonable in its result. The decision of the internal administrative review must, therefore, be upheld.

R.R.K.