

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Labor and Industry,	:	
Office of Vocational Rehabilitation,	:	
Petitioner	:	
	:	
v.	:	
	:	
The Elected Committee of Blind	:	
Vendors,	:	No. 1032 C.D. 2007
Respondent	:	Argued: October 29, 2007

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: January 16, 2008

The Department of Labor and Industry, Office of Vocational Rehabilitation (OVR) petitions for review of the impartial hearing officer of the OVR, Bureau of Blindness & Visual Services, which ordered OVR to return \$963,886.90 of funds from Fund 650 that was used to pay for two years of retroactive Business Enterprises Program (BEP) staff salaries, ordered OVR to allow active participation by The Elected Committee of Blind Vendors (Committee) in its decision with regard to three Committee referenda on June 18, 2005, ordered OVR to actively participate with the Committee in the future in all major administrative decisions and policy and program development in the administration of the Randolph-Sheppard program. The Committee has moved to quash the petition for review.

OVR oversees the BEP, a program that establishes vending facilities for blind and visually impaired individuals to operate on Federal and Commonwealth

properties. The Committee is the representative body for blind vendors in the BEP. BEP uses three funds: Fund 33, Fund 499, and Fund 650. Fund 33 consists of commissions from vending machines from blind vendors and are from the vendors net proceeds. Fund 499 consists of commissions from vending machines on Federal properties without an onsite blind vendor. Fund 499 is used entirely to fund a retirement program for the blind vendors in Pennsylvania and is not at issue here. Fund 650 consists of commissions from vending machines at rest stops along Pennsylvania's interstate highways and the Pennsylvania Turnpike that are not serviced by an on-site blind vendor.

On May 26, 1988, the Committee agreed with the Bureau of Blindness and Visual Services (BBVS), then part of the Department of Public Welfare and now part of OVR, to use 15% of Fund 650 to fund BEP administrative expenses. When the Committee allocated this percentage, it contemplated that the money could be used to pay BEP staff salaries. The fifteen percent allocation was used to hire someone to find unassigned vending income for the BEP.

On June 28, 2005, the Committee considered and passed three demands. First, the Committee directed OVR to give up its future 15% share of Fund 650 to the control of the Committee. Second, the Committee directed OVR to transfer the entirety of Fund 650 to M&T Bank to pay for the Committee's medical insurance. Third, the Committee directed OVR to transfer \$650,000 from Fund 33 to M&T Bank to pay for the Committee's medical insurance.

On August 3, 2005, OVR refused to follow these directives and informed the Committee that it would be earmarking funds from its portion of Fund 650 and Fund 33 to pay for BEP staff salaries. In August 2005, OVR transferred \$963,866.90 from its 15% portion of Fund 650. This money was used to repay Title 1 monies expended on the salaries of the following individuals who worked directly with BEP over a two year period: the BEP coordinator, five BEP agents, a construction specialist, two warehouse personnel, an administrative assistant and clerical support person.<sup>1</sup>

On August 16, 2005, the Committee appealed OVR's refusal. On March 15, 2007, the hearing officer heard the Committee's appeal. Richard Kramer, chairman of the Committee from 1989 to 1998, testified that sometime before May 26, 1988, the Committee had a referendum to allocate the money from Fund 650. The Committee voted to allocate fifty percent to retirement, thirty-five percent to health care, and fifteen percent to BBVS, if it needed it, for program expenses. Notes of Testimony, March 15, 2007, (N.T.) at 33-34; Reproduced Record (R.R.) at 36a-37a. Hugh Nickerson, a vendor and Committee member, testified that since 1998, BEP requested that an individual be hired to assist in the operations along interstates and to find more unassigned vending facilities. This individual was paid from the fifteen percent. BEP also requested that it use the fifteen percent to get a computer program to assist it in preparing profit and loss statements. N.T. at 41-42; R.R. at 44a-45a. Kay Rilley, chairman of the Committee from 1999 to 2002, explained Fund 33. She estimated that seventy-five to eighty percent of vendors earned less than \$30,000 per year. N.T. at 51;

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<sup>1</sup> Title 1 monies are used to provide direct services to all individuals with disabilities. OVR has received flat funding of Title 1 monies for many years. The cost to operate the program which services all individuals with disabilities continues to increase.

R.R. at 54a. Jerry Manganello, the current chairman of the Committee, explained that the Committee received financial statements which indicated that in July of 2005, Fund 650 had a balance of \$1,064,557.58 and in August of 2005, there was a personnel expenditure of \$963,886.90. N.T. at 79; R.R. at 82a.

William Gannon (Gannon), executive director of OVR, explained the operations of OVR. N.T. at 164; R.R. at 167a. Dennis Bookwalter (Bookwalter), budget analyst with the Department of Public Welfare and formerly an accountant for OVR, explained Fund 650 and Fund 33. Bookwalter testified that the \$963,866.90 personnel expenditure was for two years worth of salaries for staff that worked directly with BEP. N.T. at 182; R.R. at 185a. Bookwalter explained that two years of salaries were taken because federal grant money under Title 1 is held open for two years. N.T. at 182; R.R. at 185a. Robert Anderson, BEP coordinator, testified that BEP provides employment opportunities to the blind through the establishment of food service vending in cafeterias. N.T. at 214; R.R. at 217a.

The hearing officer determined that, pursuant to the Randolph-Sheppard Act (Act), 20 U.S.C. §107 et seq. and its implementing federal regulations, OVR is the designated State Licensing Agency (SLA) that oversees the BEP and awards a license to a person who seeks a position as a blind vendor in the program. The hearing officer found that under the Act an SLA may only set aside funds from the net proceeds of the operation of the vending facilities to the extent necessary and for the following purposes: maintenance and replacement of equipment, the purchase of new equipment, management services, assuring a fair minimum return to operators of vending facilities, and retirement or pension funds, health insurance contributions, and provision for paid

sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by the SLA. See 20 U.S.C. §107b(3). The Act further provides that income obtained from the operation of vending machines on Federal property shall accrue (1) to the blind licensee operating a vending facility on such property, or (2) in the event there is no blind licensee operating such facility on such property to the state agency in whose state the federal property is located for uses designated in subsection (c) of this section. 20 U.S.C. §107d-3(a). Subsection (c) states that all vending machine income which accrues to an SLA shall be used to establish retirement or pension plans, for health insurance contributions, and for provision of paid sick leave and vacation time for blind licensees in such State, subject to a vote of blind licensees provided under Section 107b(3)(E). Any leftover income shall be used for the purposes specified elsewhere in the Act. 20 U.S.C. §107d-3(c).

The hearing officer further noted that the Act requires that the Committee actively participate with OVR “in major administrative decision and policy and program development” in the administration of the Randolph-Sheppard program. 20 U.S.C. §107b(3)(A). Neither the Act nor the Pennsylvania state enabling act, the Little Randolph-Sheppard Act (LRSA)<sup>2</sup>, provides a definition of active participation. The hearing officer looked at other state statutes and cases in other jurisdictions to determine that “OVR’s decision-making process in deciding to reject all three of the Committee’s referendums [sic] was made without adequate participation by the Committee in violation of the RSA [Act].” Hearing Officer’s Decision, May 6, 2007, (Decision) at 6. However, the hearing officer also determined that it was not clear to whom the Act

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<sup>2</sup> Act of April 9, 1929, P.L. 177. All sections of the LRSA were added by the Act of June 22, 1999, P.L. 1999, 71 P.S. §§580.11 – 580.20.

gives final authority in the decision-making process if the two parties did not reach a consensus. Based on the enabling statutes of Alaska and West Virginia, the hearing officer concluded, “it seems that in terms of final decision-making authority in the administration of the program, OVR would have the final say.” Decision at 6. The hearing officer ordered OVR to return the \$963,886.90 of funds from Fund 650 that was used to pay for two years of retroactive BEP staff salaries, ordered OVR to allow active participation by the Committee in its decision with regard to the three Committee referenda on June 18, 2005, and ordered OVR to actively participate with the Committee in the future in all major administrative decisions and policy and program development in the administration of the Randolph-Sheppard program.

OVR then petitioned for review with this Court. OVR alleged:

6. The Hearing Officer erred as a matter of law by concluding that OVR’s decision to transfer monies out of Fund 650 to pay for BEP staff salaries violated the Committee’s right to actively participate in major program and policy decisions. . . .

7. The Hearing Officer erred as a matter of law by concluding that OVR violated the Committee’s right to actively participate in major policy decisions by rejecting the Committee’s referendums which were: 1) OVR must transfer its 15% share of fund 650 to the control of the Committee; 2) OVR must then transfer all of the 650 money into an account to pay for the Committee’s health care benefits; and 3) OVR must transfer \$650,000 from Fund 33 . . . into the same account to pay for the Committee’s health care benefits. To the contrary, the Committee actively participated in OVR’s decision when it related three demands to OVR concerning the expenditure of BEP funds. After consideration of these demands, OVR rejected them. (Footnote omitted).

Petition for Review, June 4, 2007, Paragraphs 6-7 at 3-4.

The Committee appealed to the United States Department of Education and argued that the hearing officer erred when she concluded that the Committee did not have the authority to unilaterally demand that OVR transfer monies from either Fund 33 or Fund 650. The United States Department of Education stayed its review of this appeal pending the conclusion of proceedings in Pennsylvania courts.

The Committee moved to quash the petition for review on the basis that this Court did not have jurisdiction because the determination to be reviewed was not a final order of a government agency under 42 Pa.C.S. §763 and because the administrative fair hearing decision which was made pursuant to the Act, 20 U.S.C. §107b(6) requires a two step process. The fair hearing was the first step, but the next step is federal arbitration. Because there was no arbitration under 20 U.S.C. §107d-2, there was no final order according to the Committee. The Committee also asserted in the motion that this Court lacked jurisdiction under Section 2240 of the LRSA, 71 P.S. §580.20, because the determination which OVR wanted this Court to review only involved issues under the federal RSA. OVR denied all allegations in its answer to the motion.

OVR contends that this Court has jurisdiction over a petition for review from a final order of a Commonwealth agency even when the petition raises issues concerning a federal statute and that the hearing officer erred as a matter of law when she concluded that OVR violated the Committee's right to active participation.<sup>3</sup>

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<sup>3</sup> Under Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, this Court's review is limited to a determination of whether constitutional rights have been violated, an error of law has been committed, or necessary findings of fact were not supported by substantial evidence.

The initial question before this Court is whether it should quash OVR's appeal as requested by the Committee. In its motion to quash, the Committee asserts:

1. The Commonwealth Court lacks jurisdiction under 42 Pa.C.S. §763 because the determination sought to be reviewed is not a 'final order of [a] government agency.' Petitioners [OVR] seek review of the May 6, 2007 administrative fair hearing decision, which was made pursuant to 20 U.S.C. §107b(6) of the federal Randolph-Sheppard Act ('RSA') and which requires a two step process. Pursuant to 20 U.S.C. §107d-1(a), the May 6, 2007 fair hearing decision was the first step. However, the RSA clearly states that a final order occurs only after federal arbitration pursuant to 20 U.S.C. § 107d-2. Congress explicitly stated that only the 'decision of such [arbitration] panel shall be final and binding on the parties.' Id. (emphasis added [by Committee]). Thus, the May 6, 2007 administrative fair hearing decision, which is the basis of the instant Petition for Review, is not a 'final order' of any governmental agency.

2. The Commonwealth Court lacks jurisdiction also under Section 2240 of the Little Randolph-Sheppard Act (LRSA), 71 P.S. §580.20, because the determination sought to be reviewed involves grievances raised only under the federal Randolph-Sheppard Act, 20 U.S.C. §107, and Respondents' [Committee] do not pertain to the LRSA in any respect. Specifically, the Respondent's [sic] [Committee] grievances pertained entirely to violations of the following provisions in the federal Randolph-Sheppard Act, 20 U.S.C. § 107:

a. The federal Randolph-Sheppard Act requires that funds from vending machines on federal property, 20 U.S.C. §107d-3, be allocated according to federal requirements and priority. 20 U.S.C. §107d-3(c);

b. The federal Randolph-Sheppard Act requires that funds 'set aside' from net proceeds of the vending facilities must be used for specific purposes, but only 'if it is determined by a majority vote of blind licensees. . . .' 20 U.S.C. § 107b(3);



c. The federal regulations promulgated pursuant to the federal Randolph-Sheppard Act requires ‘active’ participation of Respondents [Committee] ‘with the State licensing agency in major administrative decisions and policy and program development decisions affecting the overall [sic] administration of the State’s vending facility program . . . .’ 34 CFR § 395.14(b)(1).

Respondents’ Motion to Quash Petition for Review, July 9, 2007, Paragraphs 1-2 at 2-3.

The Committee asserts that this Court does not have jurisdiction because the hearing officer’s decision was neither a final order nor an order of a Commonwealth agency. Initially, the Committee contends that the decision was not a final order of a government agency because the decision was made pursuant to the Act, 20 U.S.C. §107b(6).

The Judicial Code, 42 Pa.C.S. §763(a), provides:

**(a) General Rule.**—Except as provided in subsection (c), the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of government agencies in the following cases:

(1) All appeals from Commonwealth agencies under Subchapter A of Chapter 7 of Title 2 (relating to judicial review of Commonwealth agency action) or otherwise and including appeals from the Board of Claims, the Environmental Hearing Board, the Pennsylvania Public Utility Commission, the Unemployment Compensation Board of Review and from any other Commonwealth agency having Statewide jurisdiction.

(2) All appeals jurisdiction of which is vested in the Commonwealth Court by any statute hereafter enacted.

The Committee asserts that the hearing officer’s decision was not a final order because the fair hearing decision and order sought to be reviewed did not

constitute a final order and, consequently, is not subject to this Court's appellate jurisdiction.

The Act, 20 U.S.C. §107d-1(a), sets forth the hearing procedures when blind licensees have grievances:

(a) Hearing and arbitration. Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a state licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 3(6) of this Act. . . . If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 6 of this Act . . . , and the decision of such panel shall be final and binding on the parties except as otherwise provided in this Act . . . .

Further, under the Act, 20 U.S.C. §107b(6), requires a state licensing agency to provide “to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration. . . .”

In Commonwealth of Kentucky, Education Cabinet, Department for the Blind v. United States, 424 F.3d 1222 (D.C. Cir. 2005), the United States Court of Appeals for the Federal Circuit addressed a somewhat similar situation. In October 2003, the Department of the Army solicited bids for a military cafeteria at Fort Campbell, Kentucky. The contract was subject to the Act. The Kentucky Department for the Blind (KDB), an SLA, submitted a bid. Because there were three lower priced

bids, KDB's bid was deemed to be outside the competitive range. KDB's bid did not receive preferential treatment and KDB did not receive the contract. After a debriefing, KDB learned that it was placed outside the competitive range even though both KDB and the winning bidder received ratings of "satisfactory" on "price" and a rating of "very good" on past performance. KDB filed a bid protest action in the Court of Federal Claims. The government moved to dismiss for lack of jurisdiction. The Court of Federal Claims granted the motion because KDB's complaint had a reasonable nexus to the Act such that KDB was required to exhaust its administrative remedies under the Act by asking the Secretary of Education to convene an arbitration panel to resolve the dispute.<sup>4</sup> Kentucky, 424 F.3d at 1223-1224.

The United States Court of Appeals for the Federal Circuit affirmed. The Appeals Court concluded that arbitration was mandatory for claims arising under the Act. To support its decision, the Appeals Court cited Fillinger v. Cleveland Society for the Blind, 587 F.2d 336 (6<sup>th</sup> Cir. 1978) where the United States Court of Appeals for the Sixth Circuit held that blind vendors had to exhaust their administrative remedies before they could bring an action in federal district court against a state licensing agency, and Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986), where the United States Court of Appeals for the D.C. Circuit held that blind vendors and state licensing agencies have to first pursue their complaints under the Act in arbitration.

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<sup>4</sup> The procedure to be used when an SLA determines that a federal agency has failed to comply with the Act or its regulations is that the SLA files a complaint with the Secretary who shall convene an arbitration panel. Section 107d-1(b) of the Act, 20 U.S.C. §107d-1(b), contains this procedure. In the case before this Court, Section 107d-1(a) of the Act, 20 U.S.C. §107d-1(a) applies when a vendor is dissatisfied with the SLA.

Similarly, in Massachusetts Elected Committee of Blind Vendors v. Mataya, 482 F.Supp. 1186 (D. Mass. 1980), the United States District Court for the District of Massachusetts held that the Massachusetts Elected Committee of Blind Vendors, akin to the Committee here, and four individual vendors were required to go through the administrative process outlined in the Act before seeking recourse in federal courts:

I am impressed by the obvious congressional preference that disputes under the Randolph-Sheppard Act be resolved through administrative rather than judicial proceedings. Finally, I note that the structure of the arbitration panel, consisting as it does of a one member each from the Commission and from the blind vendors in addition to a neutral member, is well suited to resolving the present dispute. Given the above factors, I hesitate to conclude from the mere failure to expressly mention the Committee in the review statute that Congress desired the Committee to pursue judicial remedies directly. The fact that the Massachusetts Elected Committee of Blind Vendors is joined with individual blind vendors as a plaintiff in this suit does not warrant deviating from the procedure established by Congress for challenging action by the state licensing agency.

Massachusetts Elected Committee of Blind Vendors, 486 F.Supp. at 1189.

Although these cases do not involve a party attempting to pursue a matter in State court before going through the arbitration process outlined in the Act, it is instructive that federal courts have stated that the exhaustion of the administrative remedies is required before a party seeks recourse through the court system.

In LPG Construction Co., Inc. v. Commonwealth of Pennsylvania, Department of Transportation, 501 A.2d 360 (Pa. Cmwlth. 1985), LPG Construction Co., Inc. (LPG) applied to the Pennsylvania Department of Transportation (DOT) for

certification as a Minority Business Enterprise (MBE). DOT denied the application. DOT informed LPG that it had a right to appeal to the Civil Rights Office of the United States Department of Transportation pursuant to 49 C.F.R. §23.55. Instead of appealing to the Civil Rights Office, LPG filed an action with this Court seeking an evidentiary hearing on its certification application and attempted to invoke this Court's original jurisdiction as well as an appeal from the denial of certification. DOT moved to quash on the basis that the denial of the application for MBE certification was not an appealable final order in that LPG had an available administrative appeal with the Civil Rights Office of the United States Department of Transportation. LPG, 501 A.2d at 361.

This Court granted the motion to quash:

Section 702 of the Administrative Agency Law, 2 Pa.C.S. § 702, provides that any person aggrieved by an 'adjudication' of a Commonwealth agency shall have the right to appeal therefrom. Section 101 of the Administrative Agency Law, 2 Pa.C.S. § 101, defines 'adjudication' as '[a]ny final order, decree, decision, determination or ruling . . .'. As conceded by Appellant [LPG], PennDOT's denial of its application for MBE certification was not conclusive on that application as it had an appeal as of right to U.S.DOT under 49 C.F.R. § 23.55. Administrative actions are 'adjudicatory' in character when they culminate in a final determination affecting personal or property rights. . . . Since PennDOT's action did not 'finally' dispose of Appellant's [LPG] application for MBE certification, there was no 'adjudication' from which an appeal could be taken under 2 Pa.C.S. § 702 or Article 5, § 9 of the Pennsylvania Constitution.

We further note that in a case such as this, there will never be an adjudication appealable to this Court. In the event Appellant [LPG] exercises its right to appeal to U.S.DOT under 49 C.F.R. § 23.55, the final decision of U.S.DOT will be a final order of a *federal* agency, not a Commonwealth

agency. Since our jurisdiction limits our review to adjudications of Commonwealth agencies, should Appellant [LPG] be dissatisfied with the result with U.S.DOT, it must turn to the federal courts for review.

Therefore, since PennDOT's denial of Appellant's [LPG] application for MBE certification does not constitute an appealable adjudication, we are without jurisdiction to entertain this action. (Citation omitted. Emphasis in original).

LPG, 501 A.2d at 361-362.

Although none of these cases present exactly the same factual situation as the controversy before this Court, they are instructive. The federal cases indicate the acceptance of the two step process set forth in the Act: first, a hearing before the state licensing agency and second, an appeal to the Secretary for arbitration. The federal cases also stress the exhaustion of administrative remedies. LPG is quite similar to the present case. In LPG, LPG made an application to the state agency under the auspices of a federal program. There, the applicant attempted to appeal to this Court, but this Court determined that DOT's decision was not a final order and that the next step was an appeal to the Civil Rights Office of the United States Department of Transportation.

Here, as in Kentucky and Massachusetts, a request for a hearing was made under Section 107d-1 of the Act. The parties here have completed the first step of the process. The Committee has appealed to the Secretary for arbitration. What is different from Kentucky and Massachusetts is that here both sides have appealed. OVR asserts that the Act does not provide for a method for the SLA to appeal from the fair hearing conducted by the SLA, the blind vendors or a committee of blind vendors may only appeal for arbitration. While that is true, this Court does not believe that Congress intended for aggrieved vendors to appeal from a fair hearing to arbitration under the

Act, but for aggrieved state agencies to appeal from a fair hearing to a state appeals court. Indeed, the Committee points out that Congress contemplated that arbitration be “the means by which aggrieved vendors and state agencies may obtain a final and satisfactory resolution of disputes.” S.Rep. No. 93-937 at 20 to accompany S.2581, 93d Cong., 2 Sess. 20 (1974). As in LPG, this Court believes it lacks jurisdiction because the congressionally mandated process is to proceed to arbitration. Similarly, as in LPG, the decision of the hearing officer does not constitute an adjudication because it does not finally dispose of the Committee’s grievance and is not a final order.

Nevertheless, OVR asserts that this Court has jurisdiction because the Committee raised issues under the LRSA and other Pennsylvania statutes. According to OVR, the hearing officer’s interpretation of the LRSA means that OVR denied the Committee its right to active participation concerning OVR’s decision to refuse to transfer \$650,000 from Fund 33 to Fund 650. The Committee asserts that the hearing officer only applied the Act and that no vending sites under the LRSA were involved. In fact, the Committee’s brief to the hearing officer did not even mention the LRSA and only requested that its rights under the Act be enforced. Fund 650, which is at issue here, is generated from federal funds. Any portion of Fund 33, not generated from federal funds, was neither at issue before the hearing officer nor before this Court now.

OVR also asserts that this Court has concurrent jurisdiction over issues raised under the Act because the right to collect money for Fund 650 is granted by Section 111(b) of the Safe, Accountable, Flexible, Transportation Equity Act – A Legacy for Users, 23 U.S.C. §111(b), which refers to a state giving priority for vending machines at interstate highway rest stops which are operated through an SLA under the

Act, which necessitates that this Court has concurrent jurisdiction over this controversy. However, this Court has determined that there has not been a final order for this Court to review. The issue of whether this Court has concurrent jurisdiction to review a decision under the Act is not before us.<sup>5</sup>

Accordingly, this Court grants the Committee's motion to quash.

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BERNARD L. MCGINLEY, Judge

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<sup>5</sup> Because this Court has determined that it does not have jurisdiction, this Court need not address the merits of the controversy.



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Labor and Industry,	:	
Office of Vocational Rehabilitation,	:	
Petitioner	:	
	:	
v.	:	
	:	
The Elected Committee of Blind	:	
Vendors,	:	No. 1032 C.D. 2007
Respondent	:	

**ORDER**

AND NOW, this 16th day of January, 2008, this Court grants the motion of the Elected Committee of Blind Vendors to quash the petition for review of the Department of Labor and Industry, Office of Vocational Rehabilitation.

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BERNARD L. MCGINLEY, Judge