May 27, 2009

John M. Connelly, Executive Director
Ohio Rehabilitation Services Commission
400 East Campus View Blvd., SW3B
Columbus, Ohio 43235-4604

SYLLABUS: 2009-022

1. The Bureau of Services for the Visually Impaired (BSVI), within the Ohio Rehabilitation Services Commission, is required to implement the provision of R.C. 3304.30 stating that "[e]ach blind licensee may employ and discharge personnel required to operate his vending facility, but employment preference shall be given to blind persons capable of discharging the required duties, and at all times at least one-half of the employees shall be blind" in a reasonable manner that is faithful to its plain mandate and to the requirements of federal and state law.

2. In implementing the one-half ratio of R.C. 3304.30 in situations where the blind licensee has a need for only one employee, BSVI is permitted to determine that the blind licensee who is the operator of a vending facility can also be regarded as an employee, such that: (1) if an operator has only one employee and that employee must be sighted for operational purposes, the operator need not hire a second person just to meet the mandates of R.C. 3304.30; (2) if an operator has one sighted full-time employee (working 40 hours per week), the operator need not instead hire two part-time employees, one who is blind and one who is sighted (each working 20 hours per week); and (3) if an operator has a need for only one employee and sight is not required for the position, that sole employee need not in all circumstances be a person who is blind.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

May 27, 2009

OPINION NO. 2009-022

John M. Connelly, Executive Director
Ohio Rehabilitation Services Commission
400 East Campus View Blvd., SW3B
Columbus, Ohio 43235-4604

Dear Executive Director Connelly:

We have received your request for an opinion concerning the obligation of licensees of the Bureau of Services for the Visually Impaired (BSVI) who operate vending facilities to hire employees who are blind. You have asked the following questions:

1. If an operator has only one employee who is sighted as a reasonable accommodation, is the operator required to hire a second person just to meet the mandates of R.C. 3304.30?

2. If an operator has one full-time employee (40 hours/week) who is sighted, is that operator required under R.C. 3304.30 to instead hire two part-time employees, one who is blind and one who is sighted (20 hours/week each)?

3. If an operator has a need for only one employee and sight is not required for the position, is the operator required to hire a person who is blind?

BSVI is part of the Ohio Rehabilitation Services Commission (RSC) and is responsible for implementing state statutes under which persons who are blind[1] are licensed to operate

[1] The relevant definition of "[b]lind" appears at R.C. 3304.28(B) and 5A Ohio Admin. Code 3304:1-21-01(A).

vending facilities on state property.[2] R.C. 3304.12, .15, .28(C), .29(C), .30-33. BSVI is also the designated Ohio agency responsible for implementing the federal Randolph-Sheppard Vending Stand Act, 20 U.S.C.A. §§ 107-107f (West 2000); 34 C.F.R. Part 395 (2008), under which blind persons licensed by BSVI are given priority to operate vending facilities on federal property. R.C. 3304.34-.35; 5A Ohio Admin. Code 3304-1-01(B), 3304:1-21-01(B); 2005 Op. Att'y Gen. No. 2005-021; 2002 Op. Att'y Gen. No. 2002-037.[3]

BSVI has authority to adopt rules and has exercised this authority in the adoption of 5A Ohio Admin. Code Chapter 3304:1-21, entitled "Visually Impaired Facility Operators." R.C. 3304.29(D). The rules provide for the creation of the Business Enterprise Program (BEP), which incorporates services under both the state vending program and the federal Randolph-Sheppard Vending Stand program. 5A Ohio Admin. Code 3304:1-21-01(F).

Your questions arise under R.C. 3304.30, which pertains to the vending program on state property and reads in relevant part as follows:

> Each blind licensee may employ and discharge personnel required to operate his vending facility, but employment preference shall be given to blind persons capable of discharging the required duties, and *at all times at least one-half of the employees shall be blind*. (Emphasis added.)

Existing rules state that, in hiring staff, the operator of a vending facility shall give preference to BE licensees, then people who are blind, then RSC consumers with visual impairments, then other RSC consumers, and then other persons. 5A Ohio Admin. Code 3304:1-21-04(A)(1)(b); *see also* 5A Ohio Admin. Code 3304:1-21-03(A)(1)(g), 3304:1-21-04(A)(1)(c). The existing rules do not address the statutory mandate for the one-half requirement.

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[2] The property subject to the state vending program is described as "[g]overnmental property," defined to include real property and facilities owned or rented by the state or a unit or agency of the state, with limited exceptions. R.C. 3304.28(C), .29(C), .30; 1992 Op. Att'y Gen. No. 92-056.

[3] The Randolph-Sheppard Vending Stand Act provides that, in licensing the operation of vending facilities on federal property, priority or preference should be given to blind persons who are licensed by the state agency or are in need of employment. 20 U.S.C.A. §§ 107(b), 107a(b) (West 2000); 34 C.F.R. § 395.30(a) (2008). The permit for the location of a vending facility must assure that services are provided without discrimination and must prescribe "such procedures as are necessary to assure that in the selection of vendors and employees for vending facilities there shall be no discrimination because of sex, race, age, creed, color, national origin, physical or mental disability, or political affiliation." 34 C.F.R. § 395.35(a) (2008). No federal provisions impose a requirement that a particular percentage of employees be blind.

Your representative has informed us that, in the past, the one-half ratio was not enforced in an effective manner, even though it is statutorily mandated. In recent years, BSVI has been working to bring all licensees into compliance with the one-half ratio, as expressly required by state law, but is encountering difficulties with the particular situation where an operator employs only one person and the job responsibilities for which that person is hired—such as driving to or from vending facilities, assisting with inventory, or providing bookkeeping duties and reading mail—may prohibit hiring an individual who is blind or visually impaired.[4]

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[4] Your letter uses the term "reasonable accommodation," a term used in the federal Americans with Disabilities Act (ADA) to describe steps that an employer must take to enable a person with disabilities to perform the essential functions of a job. 42 U.S.C.A. §§ 12101, 12111, 12112 (West 2005); 29 C.F.R. §§ 1630.2, 1630.9(a) (2008); *Scott v. Swearengin*, 2008 U.S. Dist. LEXIS 90012, at *2 n.2 (M.D. Ala. Oct. 17, 2008) (applying reasonable accommodations to individual employed in the Randolph Sheppard Vending Act program); *see also* Federal Rehabilitation Act, 29 U.S.C.A. § 794(d) (West 2008) (incorporating standards of the ADA, including reasonable accommodation standards); R.C. 4112.02 (unlawful discriminatory practices). The ADA also requires that public entities make reasonable modifications to their programs to enable persons with disabilities to participate. 42 U.S.C.A. §§ 12132, 12133 (West 2005). A reasonable accommodation or modification enables a person with a disability to perform an activity without changing the essential nature of the activity or causing the employer or provider undue hardship. *See Hoffman v. Fidelity Brokerage Servs., Inc.*, 959 F. Supp. 452, 457-59 (S.D. Ohio 1997).

BSVI offers training as a facility operator under BEP only to individuals who possess "sufficient physical stamina with or without reasonable accommodations to operate a facility." 5A Ohio Admin. Code 3304:1-21-02(A)(5). BSVI is required to "[d]o everything necessary and proper to carry out the laws, rules and regulations governing the business enterprise program and to comply with the Americans with Disabilities Act of 1990 (public law 101-336)." 5A Ohio Admin. Code 3304:1-21-11(A)(8).

Existing provisions of law do not prescribe precisely how R.C. 3304.30 and the ADA interact. For example, if an operator hires a person who is blind and that person needs the assistance of a sighted individual as a reasonable accommodation, does the sighted individual count as an employee for purposes of calculating the one-half ratio? If an operator hires an employee who is sighted (within the ratio) but has other disabilities that require an assistant as a reasonable accommodation, does that assistant count as an employee for purposes of calculating the ratio? Further, the financial impact upon the business must be considered in determining whether a particular accommodation is reasonable. *See* 42 U.S.C.A. §§ 12111(10), 12112(b)(5)(A) (West 2005) (accommodation is not required if it would impose an undue hardship on the operation of the business). An examination of circumstances in which reasonable accommodations may be required under federal or state law exceeds the scope of this

As a creature of statute, BSVI has the powers granted by statute, both express and implied. When an administrative agency such as BSVI is directed by statute to carry out specified functions and the manner in which the functions are to be performed is not prescribed, the agency may perform them in any reasonable manner that maintains full compliance with the applicable provisions of constitution and statute. *See, e.g.*, 2005 Op. Att'y Gen. No. 2005-021; 2004 Op. Att'y Gen. No. 2004-034, at 2-313; 2002 Op. Att'y Gen. No. 2002-037.

It is presumed that the General Assembly did not intend to have a statute reach an unreasonable result, and BSVI has discretion to interpret and apply its statutes in a manner that avoids unreasonable applications, as long as the mandatory one-half statutory ratio is met. R.C. 1.47(C), (D) (in enacting a statute, it is presumed that the intent is a result that is just, reasonable, and feasible of execution); *City of Cuyahoga Falls v. Gen. Mills Restaurants, Inc.*, 111 Ohio App. 3d 635, 639, 676 N.E.2d 1206 (Summit County 1996) ("[a] strong presumption exists against any construction which produces unreasonable or absurd consequences"). As a body with specialized knowledge of persons with vision impairments and their employment issues, BSVI is qualified to make reasonable determinations that enable it to implement R.C. 3304.30 in a manner that maintains compliance with state and federal law. 2002 Op. Att'y Gen. No. 2002-037. *See generally* 2000 Op. Att'y Gen. No. 2000-023; 1987 Op. Att'y Gen. No. 87-095.

In the instant case, BSVI is directed to "[a]dopt rules and do everything necessary and proper" to carry out R.C. 3304.29-.34. R.C. 3304.29(D). Its duties include administering the directive that "employment preference shall be given to blind persons capable of discharging the required duties, and at all times at least one-half of the employees shall be blind." R.C. 3304.30. This directive uses the word "shall," which is a mandatory term. *See* 1934 Op. Att'y Gen. No. 3052, vol. II, p. 1219, at 1223; *see also* 2004 Op. Att'y Gen. No. 2004-034. As long as this mandatory one-half ratio is satisfied, BSVI may adopt reasonable procedures to implement a regulatory program that is just and reasonable in its operation.

Your questions illustrate the peculiar issues that arise when the one-half ratio is applied to a situation where the blind licensee who operates a vending facility has only one employee. What happens if the employee must be sighted for operational purposes (as, for example, an employee who is needed to drive a vehicle)? Must another person be hired just to meet the one-half ratio? What happens if an operator has one sighted full-time employee who works forty hours per week? Must the operator instead hire two part-time employees, one who is blind and one who is sighted, each working twenty hours per week? If an operator has a need for only one employee and sight is not required for the position, must that sole employee in all instances be blind? The statute does not prescribe a resolution to these issues.

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opinion. However, BSVI should be aware of relevant provisions and construe the mandatory one-half ratio in a manner that provides for compliance with reasonable accommodation requirements while enabling operators to maintain their businesses without prohibitive expense.

However, our analysis indicates that a reasonable interpretation of R.C. 3304.30 would permit BSVI to determine that the blind licensee who is the operator of a vending facility can also be regarded as an employee in calculating the one-half ratio in these circumstances. This determination would be a permissible exercise of BSVI's reasonable discretion to implement R.C. 3304.30 in a manner that carries out the intent of the legislation and permits the operator to establish a suitable staff, while also complying with the ADA and other applicable state and federal laws, including the mandatory one-half ratio. *See* note 4, *supra*. If BSVI confronts other circumstances in which it finds the one-half ratio difficult or impossible to satisfy in a reasonable manner, BSVI would need to seek to have the General Assembly amend the statute.

Conclusions

Therefore, it is my opinion, and you are advised as follows:

1. The Bureau of Services for the Visually Impaired (BSVI), within the Ohio Rehabilitation Services Commission, is required to implement the provision of R.C. 3304.30 stating that "[e]ach blind licensee may employ and discharge personnel required to operate his vending facility, but employment preference shall be given to blind persons capable of discharging the required duties, and at all times at least one-half of the employees shall be blind" in a reasonable manner that is faithful to its plain mandate and to the requirements of federal and state law.

2. In implementing the one-half ratio of R.C. 3304.30 in situations where the blind licensee has a need for only one employee, BSVI is permitted to determine that the blind licensee who is the operator of a vending facility can also be regarded as an employee, such that: (1) if an operator has only one employee and that employee must be sighted for operational purposes, the operator need not hire a second person just to meet the mandates of R.C. 3304.30; (2) if an operator has one sighted full-time employee (working 40 hours per week), the operator need not instead hire two part-time employees, one who is blind and one who is sighted (each working 20 hours per week); and (3) if an operator has a need for only one employee and sight is not required for the position, that sole employee need not in all circumstances be a person who is blind.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General