

March 4, 2014

Kevin L. Miller, Executive Director
Opportunities for Ohioans with Disabilities Agency
150 E. Campus View Boulevard
Columbus, Ohio 43235

SYLLABUS

2014-008

1. R.C. 3304.30 requires a state university, medical university, technical college, state community college, community college, university branch district, or state affiliated college or university to consult with the Director of the Bureau of Services for the Visually Impaired to determine whether college or university property being acquired, renovated, leased, or rented would be a satisfactory site for the establishment of a suitable vending facility to be operated by the Bureau of Services for the Visually Impaired. The decision must be made jointly by the Director of the Bureau of Services for the Visually Impaired and proper administrative authorities of the college or university; the college or university does not have the authority to determine unilaterally a site is not suitable for a vending facility and therefore not offer the site for consideration to the Bureau. (2002 Op. Att’y Gen. No. 2002-037 (syllabus, paragraph 2), approved and followed.)
2. R.C. 3304.33 prohibits a state university, medical university, technical college, state community college, community college, university branch district, or state affiliated college or university from entering into a private contract for vending on its property unless the Bureau of Services for the Visually Impaired has determined that the property is not a satisfactory site for a suitable vending facility operated by a blind licensee. The college or university may not establish vending facilities of any kind, whether in-house or through private contract, if there is not a joint decision regarding the establishment of a suitable vending facility by the college or university and the Director of the Bureau. (2002 Op. Att’y Gen. No. 2002-037 (syllabus, paragraph 2), approved and followed.)
3. A state university, medical university, technical college, state community college, community college, university branch district, or state affiliated college or university may not require the Bureau of Services for the Visually Impaired pay a commission of the sales generated from a suitable vending facility that is operated on the college or university’s property by a licensed blind vendor.



MIKE DEWINE

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OPINION NO. 2014-008

Kevin L. Miller, Executive Director
Opportunities for Ohioans with Disabilities Agency
150 E. Campus View Boulevard
Columbus, Ohio 43235

Dear Executive Director Miller:

You have requested an opinion about the authority and responsibilities of the Bureau of Services for the Visually Impaired (BSVI) and public institutions of higher education. You ask several questions concerning the establishment of vending facilities on the property of state or state-affiliated colleges or universities:

1. In order to establish a suitable vending facility pursuant to R.C. 3304.30, may a state university, college of medicine, technical college, state community college, community college, university branch district, or state affiliated college or university require BSVI pay a commission of the sales generated from the suitable vending facility?
2. Is a state university, college of medicine, technical college, state community college, community college, university branch district, or state affiliated college or university required to consult with BSVI Director for the purpose of determining whether university property being acquired, renovated, leased or rented would be a satisfactory site for the establishment of a suitable vending facility to be operated by BSVI?
3. Is a state university, college of medicine, technical college, state community college, community college, university branch district, or state affiliated college or university prohibited from entering into a private contract for vending on its property unless BSVI has affirmatively determined that the property is not a satisfactory site for a suitable vending facility?
4. Can a state university, college of medicine, technical college, state community college, community college, university branch district, or state affiliated college or university establish vending facilities of any kind, whether it is in-house or through a private contract, on its property if there is no joint decision by the university and BSVI whether to establish a suitable vending facility for BSVI's operation?

5. Can a state university, college of medicine, technical college, state community college, community college, university branch district, or state affiliated college or university unilaterally determine a site is not suitable and therefore not offer the opportunity to BSVI because the state university, college of medicine, technical college, state community college, community college, university branch district, or state affiliated college or university wants to maximize its revenues by either: (a) entering into a private contract for vending where the university receives a higher commission and/or supplemental income from a pouring rights agreement or (b) provides vending services in-house?
6. Can a state university, college of medicine, technical college, state community college, community college, university branch district, or state affiliated college or university unilaterally determine a site is not suitable and therefore not offer the opportunity to BSVI because the state university, college of medicine, technical college, state community college, community college, university branch district, or state affiliated college or university bundles cafeteria/grill related businesses with vending (snack or cold beverage) and demand BSVI either service both or neither?

As you acknowledge in your request letter, in 2002 the Attorney General issued an opinion to the Rehabilitation Services Commission (RSC), now the Opportunities for Ohioans with Disabilities Agency. 2002 Op. Att’y Gen. No. 2002-037. In that opinion, we addressed many of the same issues you pose in this request. Specifically, in 2002, the RSC Administrator asked two questions concerning what to do when BSVI and a state or state-affiliated college or university do not reach a joint decision and a third question concerning commission payments by a college or university to BSVI. Here, you pose six questions. Your first question concerns commission payments by BSVI to a college or university; we did not address this specific question in 2002. Your five remaining questions concern the joint decision requirement in R.C. 3304.30 and related issues that were resolved in the 2002 opinion. *See* 2002 Op. Att’y Gen. No. 2002-037 (syllabus, paragraph 2). In revisiting those topics, our research has not uncovered any material changes in the relevant provisions of law that would warrant different conclusions. Thus, our conclusions here follow those reached in 2002 Op. Att’y Gen. No. 2002-037.

Background Information

The Bureau of Services for the Visually Impaired is a subdivision of the Opportunities for Ohioans with Disabilities Agency. R.C. 3304.16. BSVI is responsible for implementing the federal Randolph-Sheppard Vending Stand Act, 89 Stat. 2-8 (1974), 20 U.S.C.A. § 107, as amended, under which licensed blind vendors are given priority to operate vending facilities on federal property. The Randolph-Sheppard Act was established “to provide employment for blind persons and to increase their economic opportunities and self-sufficiency.” 2005 Op. Att’y Gen. No. 2005-021, at 2-204. To accomplish this, the Act requires a state agency to license blind persons to operate vending facilities on federal property. *See* 20 U.S.C.A. §§ 107, § 107a (West 2014). Licensed blind vendors must be

given priority in the operation of these facilities. 20 U.S.C. §§ 107(b), 107a(b) (West 2014). As the state licensing agency, BSVI licenses blind vendors, works with federal agencies to select sites for vending facilities, and provides licensees with equipment and initial stock for the facilities. 2012 Op. Att’y Gen. No. 2012-032, at 2-284; *see* R.C. 3304.29(A); R.C. 3304.30.

BSVI also administers Ohio’s program for the operation of vending facilities by blind persons on state property. R.C. 3304.29. BSVI’s Business Enterprise Program encompasses both the Randolph-Sheppard program and Ohio’s licensed vendor program. 5A Ohio Admin. Code 3304:1-21-01(I) (2013-2014 Supplement). Ohio law gives BSVI the opportunity to establish suitable vending facilities on governmental property. R.C. 3304.28-.34. “Suitable vending facility”

means automatic vending machines, cafeterias, snack bars, cart service shelters, counters, and other appropriate auxiliary food service equipment determined to be necessary by [BSVI] for the automatic or manual dispensing of foods, beverages, and other such commodities for sale by persons, no fewer than one-half of whom are blind, under the supervision of a licensed blind vendor or an employee of the opportunities for Ohioans with disabilities agency.

R.C. 3304.28(A). Governmental property is “any real property, building, or facility owned, leased, or rented by the state or any board, commission, department, division, or other unit or agency thereof,” with the limited exception of property managed by the Department of Rehabilitation and Correction or the Department of Youth Services. R.C. 3304.28(C).

Your questions pertain to BSVI’s state program. R.C. 3304.30 provides that every person who is in charge of governmental property must consult with the Director of BSVI prior to the acquisition, lease, or rental of the property to determine if sufficient persons will be using the property to support a suitable vending facility operated by a licensed blind vendor. If the Director determines that the property would be a satisfactory site for a suitable vending facility, provision must be made for the installation and operation of a suitable vending facility. R.C. 3304.30. There is one exception to the general rule that the Director of BSVI shall alone make the decision whether a property would support a suitable vending facility: when the state property at issue is owned by a state university, medical university, technical college, state community college, community college, university branch district, or state affiliated college or university. *See id.*

Questions Two, Five, and Six: Consultation Regarding Suitable Vending Facilities

We now turn to your specific questions. Your second, fifth, and sixth questions ask whether a state or state-affiliated college or university is required to consult with the Director of BSVI to determine if campus property would be a satisfactory site for the establishment of a suitable vending facility to be operated by a licensed blind vendor, or whether a state or state-affiliated college or university may determine unilaterally a site is not suitable and not offer the opportunity to BSVI. The Attorney General addressed this issue in 2002. As there have been no changes to the law since then, we again conclude that it is mandatory that the decision to establish a suitable vending facility on state or state-affiliated college or university property be made jointly by the Director of BSVI and proper

authorities of the college or university. 2002 Op. Att’y Gen. No. 2002-037, at 2-238 to 2-239. We will briefly review the bases in the law for this conclusion.

R.C. 3304.30 vests the decision to establish a suitable vending facility on the property of state or state-affiliated colleges and universities in two parties:

In the case of a state university, medical university, technical college, state community college, community college, university branch district, or state affiliated college or university, the decision to establish a suitable vending facility *shall be made jointly* by the director of services for the visually impaired and proper administrative authorities of the state or state-affiliated college or university. (Emphasis added.)

In statutory construction, the word “shall” is interpreted as mandating the action at issue. *See Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1); 2002 Op. Att’y Gen. No. 2002-037, at 2-238. Thus, “it is mandatory that the decision to establish a suitable vending facility on the property of a state or state-affiliated college or university be made jointly by the Director and the proper authorities of the college or university.” 2002 Op. Att’y Gen. No. 2002-037, at 2-238. Therefore, in response to your second question, we find that R.C. 3304.30 requires a state university, medical university, technical college, state community college, community college, university branch district, or state affiliated college or university to consult with the BSVI Director to determine whether a college or university property being acquired, renovated, leased, or rented would be a satisfactory site for the establishment of a suitable vending facility to be operated by BSVI.

As R.C. 3304.30 requires consultation and a joint decision between the Director of BSVI and administrative authorities of the state or state-affiliated college or university in regards to the establishment of a suitable vending facility on the property of the college or university, it follows that a state or state-affiliated college or university may not determine unilaterally a site is not suitable and therefore not offer it to BSVI. In posing questions five and six in your letter, you outline several reasons why a state or state-affiliated college or university may wish to decline offering a vending opportunity to BSVI: to maximize college or university revenues by entering into a private contract or offering services in-house, or bundle cafeteria/grill related businesses with vending businesses so that both businesses are provided by one operator. The language of R.C. 3304.30 is clear. The decision to establish a suitable vending facility must be a joint one between the Director of BSVI and the college or university authorities. Moreover, R.C. 3304.33 provides further support for this conclusion as it contains “an express statutory prohibition against granting a private contract or concession to operate a vending facility on governmental property unless the Bureau has determined that the facility is not a satisfactory site for a suitable vending facility operated by a blind licensee.” 2002 Op. Att’y Gen. No. 2002-037, at 2-240. Thus, we conclude in response to your fifth and sixth questions that a state or state-affiliated college or university does not have the authority to determine unilaterally a site is not suitable for a vending facility and therefore not offer the site for consideration to BSVI, no matter what reasons a college or university may advance.

Questions Three and Four: No Joint Decision Regarding Vending Facilities

If the Director of BSVI and the administrative authorities of the state or state-affiliated college or university jointly agree either to establish or not establish a suitable vending facility, they may proceed to act on their joint decision. 2002 Op. Att’y Gen. No. 2002-037, at 2-238. This leads us to the consideration of your third and fourth questions, which ask whether a state or state-affiliated college or university may establish vending facilities on its property if the two parties do not make a joint decision about whether to establish a suitable vending facility. The 2002 opinion addressed this issue, and our research shows that the answer has not changed.

There is an express statutory prohibition against granting a private contract or concession to operate a vending facility on governmental property unless BSVI has determined that the facility at issue is not a satisfactory site for a suitable vending facility to be operated by a blind licensee. R.C. 3304.33. The absence of a joint decision does not constitute a determination by BSVI that a property is not suitable for a vending facility operated by a blind vendor. 2002 Op. Att’y Gen. No. 2002-037, at 2-240. R.C. 3304.30 requires “[e]very person in charge of governmental property” to consult with the Director of BSVI prior to acquiring, leasing, renting, or substantially renovating property to determine whether that property would be satisfactory for a suitable vending facility. “Every person” includes the proper administrative authorities of state or state-affiliated colleges and universities. *See* 2002 Op. Att’y Gen. No. 2002-037, at 2-240. “Pursuant to R.C. 3304.30, a state or state-supported college or university that is acquiring or substantially renovating property does not have the option of establishing vending facilities on its property without involving or consulting with the Bureau.” *Id.* Thus, “if there is no joint decision as to whether to establish a suitable vending facility pursuant to R.C. 3304.30, ... the college or university does not have authority to proceed to establish vending facilities on its property without the involvement or consultation of the Bureau.” 2002 Op. Att’y Gen. No. 2002-037 (syllabus, paragraph 2). Therefore, in response to your third question, we conclude that R.C. 3304.33 expressly prohibits a state or state-affiliated college or university from entering into a private contract for vending on its property unless BSVI has determined that the property is not a satisfactory site for a suitable vending facility operated by a blind licensee. In response to your fourth question, we conclude that a state or state-affiliated college or university may not establish vending facilities of any kind, whether in-house or through private contract, if there is no joint decision regarding the establishment of a suitable vending facility by the college or university and the Director of BSVI.

Question One: Commission Payments

Finally, we turn to your first question: whether a state or state-affiliated college or university, in order to establish a suitable vending facility pursuant to R.C. 3304.30, may require BSVI to pay a commission of the sales generated from the suitable vending facility. To resolve this question, we must analyze whether BSVI has the authority to collect monies from licensed blind vendors, and if so, whether BSVI may remit those monies to state or state-affiliated colleges or universities as commission payments.

The Ohio Revised Code contains one reference to the collection and use of funds from blind licensees. R.C. 3304.35 states that no funds derived from blind licensees under the Randolph-Sheppard Vending Stand Act shall be spent for purposes other than those set forth in that act. The Randolph-Sheppard Act allows funds to be set aside from the net proceeds of the operation of vending facilities for five purposes only: (1) maintenance and replacement of equipment, (2) purchase of new equipment, (3) management services, (4) assuring a fair minimum return to operators of vending facilities, and (5) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time for blind licensees. 20 U.S.C.A. § 107b(3) (West 2014). Moreover, 20 U.S.C.A. § 107d-3 allows vending machine income obtained from the operation of vending machines on federal property to accrue only to the blind licensee operating the vending facility, though the Commissioner of the Rehabilitation Services Administration may impose a ceiling on income from vending machines for a blind licensee, above which income would accrue to the state agency, BSVI. 20 U.S.C.A. § 107d-3(a) (West 2014). Vending machine income that accrues to BSVI may be used for only the purposes outlined in 20 U.S.C.A. § 107b(3). 20 U.S.C.A. § 107d-3(c) (West 2014). There is no authorization in the Randolph-Sheppard Act for making commission payments to the agency on whose federal property the vending facility exists.

Similar to the federal statute, the rules promulgated in the Ohio Administrative Code allow BSVI to collect a monthly service charge from blind licensees in order to administer the Business Enterprise Program. 5A Ohio Admin. Code 3304:1-21-08(D)(1) (2013-2014 Supplement). This monthly service charge “shall be used pursuant to 34 CFR 395.9, and may include assuring a fair minimum return to a displaced operator.” 5A Ohio Admin. Code 3304:1-21-08(H) (2013-2014 Supplement). 34 C.F.R. § 395.9 allows funds set aside from the proceeds of a vending facility to be used only for: (1) maintenance and replacement of equipment, (2) purchase of new equipment, (3) management services, (4) assuring a fair minimum return to operators of vending facilities, and (5) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time. Rule 3304:1-21-08(H) adds a sixth permissible use: assuring a fair minimum return to a displaced operator, which is “an operator under a permanent [Bureau-operator agreement] whose facility has been temporarily closed, or whose facility sales have been temporarily reduced by no less than two thirds, for more than two weeks due to remodeling or by extraneous circumstances such as strike or disaster.” 5A Ohio Admin. Code 3304:1-21-01(P) (2013-2014 Supplement). These are the only permissible uses for the service charge collected by BSVI. These delineated uses allow BSVI to use the service charge to continue to operate and administer the BE program, assure some level of fair returns to both current and displaced blind vendors, and establish benefits programs for blind operators. Although Ohio law allows BSVI to collect funds from blind licensees, those funds may be used by BSVI only for several specific purposes. Nothing in statute or administrative rule allows the service charge to be used for commission payments to a state or state-affiliated college or university on whose property the vending facility exists.

Our research has found no other statutory basis for the collection or use of proceeds from blind vendors. BSVI is a creature of statute and has the powers given it by statute. *See Coleman v. Rehab. Servs. Comm’n*, 8 Ohio App. 3d 132, 133, 456 N.E.2d 506 (Franklin County 1982). R.C. 3304.29(D) allows BSVI to “[a]dopt rules and do everything necessary and proper to carry out [R.C. 3304.29-.34].” BSVI has adopted rule 3304:1-21-08, which allows a monthly service charge to be collected by

BSVI from blind licensees in order to continue to administer the Business Enterprise program. BSVI has no authority, under the current statute or rules, to collect commission payments based on the sales of a vending facility from a blind vendor and pay those commissions to a college or university.

It is also instructive that R.C. 3304.30 gives only one criterion to be considered in determining whether a suitable vending facility will be established: whether sufficient numbers of persons will be using such property to support a suitable vending facility. R.C. 3304.30. The inquiry ends there. If the property is determined to be a satisfactory site, R.C. 3304.30 requires the installation and operation of a suitable vending facility. State and state-affiliated colleges and universities have a special place in the decision-making process insofar as the decision is a joint one between college or university officials and the Director of BSVI. Nothing in the statute, however, gives a college or university leave to require commission payments from BSVI in order to establish a suitable vending facility on college or university property. *See id.*

Moreover, a college or university's request for commission payments may impede the intent of the law, which was enacted to provide employment opportunities and economic self-sufficiency to blind persons. *See* 2002 Op. Att'y Gen. No. 2002-037, at 2-236. It is presumed the General Assembly did not intend to have a statute's operation lead to an unreasonable result. R.C. 1.47(C), (D); 2009 Op. Att'y Gen. No. 2009-022, at 2-155. "BSVI has discretion to interpret and apply its statutes in a manner that avoids unreasonable applications." 2009 Op. Att'y Gen. No. 2009-022, at 2-155. Thus, in accordance with R.C. 3304.29(D), BSVI has adopted rules for the establishment of the Business Enterprise program. These rules authorize the collection of monies from blind vendors to administer the BE program and operate it for the benefit of the blind vendors. These rules are in keeping with the requirements of the federal Randolph-Sheppard Act. Collecting commissions from blind vendors in order to remit them to state or state-affiliated colleges and universities contravenes the letter and spirit of the pertinent state and federal laws.

Therefore, in response to your first question, a state or state-affiliated college or university may not require BSVI pay a commission of the sales generated from the suitable vending facility that is operated on its property by a licensed blind vendor.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised:

1. R.C. 3304.30 requires a state university, medical university, technical college, state community college, community college, university branch district, or state affiliated college or university to consult with the Director of the Bureau of Services for the Visually Impaired to determine whether college or university property being acquired, renovated, leased, or rented would be a satisfactory site for the establishment of a suitable vending facility to be operated by the Bureau of Services for the Visually Impaired. The decision must be made jointly by the Director of the Bureau of Services for the Visually Impaired and proper administrative authorities of the college or university; the college or university does not have the authority to determine

unilaterally a site is not suitable for a vending facility and therefore not offer the site for consideration to the Bureau. (2002 Op. Att'y Gen. No. 2002-037 (syllabus, paragraph 2), approved and followed.)

2. R.C. 3304.33 prohibits a state university, medical university, technical college, state community college, community college, university branch district, or state affiliated college or university from entering into a private contract for vending on its property unless the Bureau of Services for the Visually Impaired has determined that the property is not a satisfactory site for a suitable vending facility operated by a blind licensee. The college or university may not establish vending facilities of any kind, whether in-house or through private contract, if there is not a joint decision regarding the establishment of a suitable vending facility by the college or university and the Director of the Bureau. (2002 Op. Att'y Gen. No. 2002-037 (syllabus, paragraph 2), approved and followed.)
3. A state university, medical university, technical college, state community college, community college, university branch district, or state affiliated college or university may not require the Bureau of Services for the Visually Impaired pay a commission of the sales generated from a suitable vending facility that is operated on the college or university's property by a licensed blind vendor.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General