

OPINION NO. 2002-037**Syllabus:**

1. Pursuant to R.C. 3304.30, a suitable vending facility operated by a blind licensee may be established on the property of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university if a joint decision to establish such a suitable vending facility is made by proper administrative authorities of the college or university and the Director of the Bureau of Services for the Visually Impaired. If there is no joint decision as to whether to establish a

suitable vending facility, then under R.C. 3304.32 there is a dispute concerning the establishment of a suitable vending facility. Such a dispute is subject to adjudication by a hearing board in accordance with R.C. Chapter 119.

2. In the case of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university, if there is no joint decision as to whether to establish a suitable vending facility pursuant to R.C. 3304.30, then the Bureau of Services for the Visually Impaired does not have authority to proceed to establish suitable vending facilities operated by blind licensees on the property of the college or university, and 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.
3. If there is a joint decision to establish a suitable vending facility operated by a blind licensee on the property of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university and the Bureau of Services for the Visually Impaired does not establish such a facility, then the Bureau has no statutory authority to require the payment of a commission by any other vending facility serving that property.

To: John M. Connelly, Administrator, Rehabilitation Services Commission, Columbus, Ohio

By: Betty D. Montgomery, Attorney General, December 11, 2002

We have received your request for an opinion concerning the authority of the Bureau of Services for the Visually Impaired with respect to the establishment of vending facilities on the property of public institutions of higher education. You have asked the following questions:

1. In the case of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university, if there is not a joint determination made as to the decision to establish a suitable vending facility, does the Bureau of Services for the Visually Impaired have a statutory priority to establish suitable vending facilities on a referenced entity's owned, leased and rented properties, or because there is not a joint determination can the referenced entity establish suitable vending facilities on its properties without any consultation and/or involvement of the Bureau?
2. In the case of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university, if there is a joint determination made to establish a suitable vending facility, if the Bureau of

Services for the Visually Impaired decides to not establish a vending facility, and if, as a consequence, the college or university enters into a private contract or concession to operate a vending facility at its owned, leased, or rented properties, does the Bureau have the statutory authority to require the college or university to pay it a commission from the proceeds from its vending facilities?

3. In the case of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university, if there is not a joint determination made as to the decision to establish a suitable vending facility, is the proper course of action to request an administrative hearing in accordance with R.C. 3304.32?

In order to address your questions, let us begin by examining the status and powers of the Bureau of Services for the Visually Impaired. The Bureau of Services for the Visually Impaired is one of the administrative subdivisions of Ohio's Rehabilitation Services Commission. R.C. 3304.15. A basic function of the Bureau is to serve as the state licensing agency under the Randolph-Sheppard Vending Stand Act, 89 Stat. 20-8 (1974), 20 U.S.C.A. § 107, as amended. R.C. 3304.34-.35; *see* 20 U.S.C.A. § 107a (West Group 2000).

The Randolph-Sheppard program was enacted to provide employment for blind persons, to increase their economic opportunities, and to encourage their economic self-sufficiency. It accomplishes these goals by authorizing blind persons to operate vending facilities on federal property and granting licensed vendors priority in the operation of the facilities. 20 U.S.C.A. § 107 (West Group 2000). The program also provides that certain percentages of the proceeds generated by vending machines operating on federal property are paid to or for the benefit of blind vendors, even if the machines are not operated by program participants. 20 U.S.C.A. § 107d-3 (West Group 2000); 34 C.F.R. § 395.32 (2002); *see Comm. of Blind Vendors v. District of Columbia*, 28 F.3d 130, 131 (D.C. Cir. 1994); *Tennessee Dep't of Human Servs. v. United States Dep't of Educ.*, 979 F.2d 1162 (6th Cir. 1992).

Under the Randolph-Sheppard program, the Bureau is responsible for licensing blind individuals to operate vending facilities and for providing for the organization and operation of the Ohio Vendors Representative Committee. The Bureau works with federal agencies to select sites for vending facilities and provides licensees with equipment and initial stock for those facilities. R.C. 3304.34; 20 U.S.C.A. §§ 107a, 107b, and 107b-1 (West Group 2000); 34 C.F.R. §§ 395.7, 395.14, 395.30, and 395.31 (2002); *see Comm. of Blind Vendors v. District of Columbia*, 28 F.3d at 131.

In addition to implementing the Randolph-Sheppard program, the Bureau implements Ohio's program for the operation of vending facilities by blind persons on state property. R.C. 3304.29; R.C. 3304.30. Ohio statutes provide for the establishment of suitable vending facilities, including vending machines and snack bars, on governmental property.

R.C. 3304.30.¹ Governmental property is defined as property owned, leased, or rented by the state or a unit or agency of the state, with limited exceptions.²

R.C. 3304.30 provides that every person who is in charge of governmental property must consult with the Director of the Bureau of Services for the Visually Impaired prior to the renovation, acquisition, lease, or rental of the property to determine if sufficient numbers of persons will be using the property to support a suitable vending facility operated by a blind licensee. In general, if the Director determines that the property would be a satisfactory site for a suitable vending facility, provision must be made for appropriate electrical outlets, plumbing fixtures, and other requirements for the installation and operation of a suitable vending facility. The Bureau provides each suitable vending facility with equipment and an initial stock of items to sell and provides for the operation of the vending facility by a blind licensee. *Id.* An administrative hearing procedure is established to resolve disputes concerning the establishment of a suitable facility or the failure to comply with applicable statutory provisions. R.C. 3304.32; *see also* 20 U.S.C.A. § 107b(6) (West Group 2000); 34 C.F.R. § 395.13 (2002).³

¹The following definition applies to the vending facility program:

(A) "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 the bureau of services for the visually impaired 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 commission.

R.C. 3304.28.

²The following definition applies to the vending facility program:

(C) "Governmental property" means 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, but does not include any institution under the management of the department of rehabilitation and correction pursuant to section 5120.05 of the Revised Code, or under the management of the department of youth services created pursuant to section 5139.01 of the Revised Code.

R.C. 3304.28.

³The administrative hearing procedure is as follows:

If a dispute concerning the establishment of a suitable vending facility arises or if the bureau of services for the visually impaired determines that a department, agency, or governmental unit in control of governmental property has not complied with sections 3304.29 to 3304.34 of the Revised Code, an administrative hearing shall be held. The hearing shall be conducted by a board, which shall consist of one person designated by the director of the bureau who shall serve as chairman, one person designated by the head of the agency, department, or unit adversely affected, and a third person selected by mutual agreement of the two parties. If a third person cannot be mutually agreed on by the two parties, such person shall be designated by the governor. The board's adjudication of the dispute shall be conducted in accordance with Chapter 119. of the Revised Code, and any order issued by

With respect to property of state or state-affiliated colleges and universities, the Director is not given authority to determine independently whether the property would be a satisfactory site for a suitable vending facility. Rather, R.C. 3304.30 provides for a joint decision by the Director and the authorities of the college or university, as follows:

In the case of a state university, college of medicine, 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.

R.C. 3304.30 (emphasis added).⁴

Let us turn now to the consideration of your specific questions. Your first and third questions ask about the consequences of a situation in which no joint decision is made as to whether to establish a suitable vending facility on the property of a state or state-affiliated college or university. For this reason, we consider these questions together.

The procedure for determining whether to establish a suitable vending facility on the property of a state or state-affiliated college or university is prescribed by statute in these words: "the decision to establish a suitable vending facility shall be made jointly" by the Director of the Bureau of Services for the Visually Impaired and proper authorities of the college or university. R.C. 3304.30. The statute uses the word "shall," which indicates the mandatory nature of the action prescribed. *See Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 102, 271 N.E.2d 834, 835 (1971) (syllabus, paragraph 1). Therefore, 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.

If both parties agree either to establish or not to establish a suitable vending facility, they may proceed to act on their joint decision. However, if they do not agree on this matter, then it is necessary to turn to the statute for direction. Pursuant to R.C. 3304.32, if the parties are unable to make a joint decision, administrative hearing procedures are available. These procedures apply whenever "a dispute concerning the establishment of a suitable vending facility arises." R.C. 3304.32. A difference of opinion that prevents the parties from

the board shall be binding on both parties. An order issued by a board constituted under this section may be appealed in accordance with the procedure specified in section 119.12 of the Revised Code.

R.C. 3304.32 (emphasis added).

⁴State-affiliated colleges or universities are municipal educational institutions that serve as affiliated units pursuant to agreements with the Ohio Board of Regents. R.C. 3349.31-.33. The state-affiliated institutions receive state financial aid and are deemed to be instrumentalities of the state. R.C. 3349.31; R.C. 3349.33. The other colleges and universities listed in R.C. 3304.30 are defined by statute as "[s]tate institutions of higher education." R.C. 3345.011; R.C. 3345.12. Although the various state and state-affiliated colleges and universities are organized in different manners, all of them are units or agencies of the state for purposes of R.C. 3304.28(C), which defines "[g]overnmental property." *See, e.g.,* R.C. 3345.12(O); R.C. 3354.09; R.C. 3355.06; R.C. 3357.09; R.C. 3358.08; R.C. 5301.012; *cf.* 1992 Op. Att'y Gen. No. 92-056 (elementary and secondary schools are not governmental properties for purposes of R.C. 3304.28(C)).

agreeing as to whether to establish a suitable vending facility appears to fit neatly within this language, and thus to constitute an appropriate subject for an administrative hearing.

Pursuant to R.C. 3304.32, an administrative hearing "shall be held" if a dispute arises concerning the establishment of a suitable vending facility or if the Bureau determines that someone in charge of governmental property has not complied with statutory requirements relating to the establishment of vending facilities. R.C. 3304.32. The administrative hearing is held by a three-member board in accordance with R.C. Chapter 119. *See, e.g.*, R.C. 119.09. Any order issued by the board is binding on both parties, subject to appeal in accordance with R.C. 119.12. R.C. 3304.32. A hearing board created under R.C. 3304.32 thus is empowered to address a dispute on the question whether to establish a suitable vending facility on the property of a state or state-affiliated college or university. *See generally, e.g., Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997); *Maryland State Dep't of Educ., Div. of Rehab. Servs. v. United States Dep't of Veterans Affairs*, 98 F.3d 165 (4th Cir. 1996); *Tennessee Dep't of Human Servs. v. United States Dep't of Educ.*

We conclude, therefore, in response to your third question, that pursuant to R.C. 3304.30, a suitable vending facility operated by a blind licensee may be established on the property of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university if a joint decision to establish such a suitable vending facility is made by proper administrative authorities of the college or university and the Director of the Bureau of Services for the Visually Impaired. If there is no joint decision as to whether to establish a suitable vending facility, then under R.C. 3304.32 there is a dispute concerning the establishment of a suitable vending facility. Such a dispute is subject to adjudication by a hearing board in accordance with R.C. Chapter 119. R.C. 3304.32.

We consider next, in the event that the parties do not make a joint decision to establish a suitable vending facility, if the Bureau has a statutory priority to establish suitable vending facilities on the property of the state or state-affiliated college or university. Ohio law does not provide for such a statutory priority.⁵ The authority for the Bureau to establish a suitable vending facility on a particular piece of state property arises only when the decision is made pursuant to R.C. 3304.30 that a satisfactory site exists. With regard to a state or state-affiliated college or university, the decision must be made jointly. Until that decision is made, the Bureau has no authority to establish a vending facility on the property of the college or university. The Bureau does, however, retain the right to take the position that the property would be a satisfactory site for a suitable vending facility, and the corresponding right to request an administrative hearing pursuant to R.C. 3304.32 if the parties do not reach agreement on the question whether to establish a vending facility operated by a blind licensee.

⁵In contrast, federal law expressly provides that, "[i]n authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency." 20 U.S.C.A. § 107(b) (West Group 2000); *accord* 34 C.F.R. § 395.30(a) (2002) ("[b]ind persons licensed by State licensing agencies shall be given priority in the operation of vending facilities on any Federal property"); *United States v. Mississippi Vocational Rehab. for the Blind*, 812 F. Supp. 85 (S.D. Miss. 1992) (finding that state licensing agency has priority and entitlement to a permit for the operation by a blind licensee of vending machines on federal property).

You have also asked, when no joint decision is made, if the college or university may establish suitable vending facilities on its property without consulting or involving the Bureau. It is clear, pursuant to R.C. 3304.30, that a state or state-supported college or university cannot acquire, lease, rent, or substantially renovate property without consulting with the Director of the Bureau of Services for the Visually Impaired about the possibility of providing a site for a vending facility operated by a blind licensee. The statute mandates that this issue be raised by "[e]very person in charge of governmental property to be substantially renovated or who is responsible for the acquisition, lease, or rental of such property." R.C. 3304.30. The requirement thus applies to persons in charge of the property of a state or state-affiliated college or university. *See* note 4, *supra*. 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.

In addition, there is 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. R.C. 3304.33. The absence of a joint decision does not in itself constitute a determination by the Bureau that a facility is not a suitable site. Accordingly, the failure to reach a joint decision regarding a vending facility is not sufficient to permit a college or university to proceed to secure a contract or concession to operate a vending facility on its property.⁶

In response to your first question, we conclude, therefore, that in the case of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university, if there is no joint decision as to whether to establish a suitable vending facility pursuant to R.C. 3304.30, then the Bureau of Services for the Visually Impaired does not have authority to proceed to establish suitable vending facilities operated by blind licensees on the property of the college or university, and 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.

Let us turn now to your second question. This question concerns the possibility that there might be a joint determination made to establish a suitable vending facility at a state or state-affiliated college or university, the Bureau might then decide not to establish a vending facility at that site, and the college or university might enter into a private contract or concession to operate a vending facility. The question is whether the Bureau has statutory authority to require that it receive a commission from the proceeds of such a vending facility.

Ohio statutes make no provision for the payment of such a commission. The Randolph-Sheppard program provides for income or commissions from vending machines on federal property that are not operated by a blind vendor, but no analogous provisions apply to vending machines on state property. *See* 20 U.S.C.A. §§ 107d-3 and 107e(8) (West Group 2000); 34 C.F.R. §§ 395.8 and 395.32 (2002). Our research discloses no provision of Ohio law that would permit the Bureau to require that proceeds from a private contract or

⁶Ohio law governing the Bureau of Services for the Visually Impaired expressly provides that existing statutes do not impair any valid contract for vending facilities on governmental property that was in existence prior to August 19, 1976, or preclude the renegotiation of such a contract on the same terms and with the same parties. R.C. 3304.33. We assume for purposes of this opinion that no such contract is at issue.

concession for a vending facility on property of a state or state-affiliated college or university be paid to the Bureau.

Further, when a decision is made that certain state property would be a satisfactory site for a suitable vending facility, state law requires the Bureau to establish such a vending facility. If the Director determines that particular property would be a satisfactory site, "provision shall be made" for electrical, plumbing, and other requirements for the installation and operation of a suitable vending facility. R.C. 3304.30. The Bureau "shall provide each suitable vending facility" with equipment and stock. *Id.* The use of the word "shall" indicates the mandatory nature of the Bureau's obligation to establish a suitable vending facility. *See, e.g.,* Ohio Legislative Service Comm'n, Analysis of Am. S.B. 86, 111th Gen. A. (1976) (eff. Aug. 19, 1976) (discussing mandatory nature of requirement that Director provide for the establishment and stocking of a suitable vending facility on a satisfactory site). This mandate applies when a decision to establish a suitable vending facility is made jointly by the Director and the proper authorities of a college or university.

Hence, when there is a determination that a state governmental site is satisfactory for a suitable vending facility, the Bureau is not permitted to decide not to establish a vending facility there. Rather, a determination by the Bureau not to establish a vending facility on state property must be deemed to be a determination that the site is not satisfactory for a suitable vending facility. If such a determination is made, there is no basis from which the Bureau may argue that it is entitled to receive a commission from the proceeds of any other vending facility serving that property.

This conclusion finds support in R.C. 3304.33, which states that "[n]o private contract or concession to operate a vending facility on governmental property shall be granted unless the bureau of services for the visually impaired has determined that such a facility is not a satisfactory site for a suitable vending facility operated by a blind licensee." R.C. 3304.33; *see* note 6, *supra*. A state or state-affiliated college or university is not permitted to enter into a private contract or concession for the operation of a vending facility on its property so long as the Bureau maintains that the facility is a satisfactory site for a suitable vending facility operated by a blind licensee. The Bureau cannot decline to establish a suitable vending facility and permit the college or university to proceed with a private contract or concession without effectively determining that the facility is not a satisfactory site for a blind licensee and, thus, that the Bureau has no further interest in locating a facility on the property.

Accordingly, we conclude in response to your second question that, if there is a joint decision to establish a suitable vending facility operated by a blind licensee on the property of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university and the Bureau of Services for the Visually Impaired does not establish such a facility, then the Bureau has no statutory authority to require the payment of a commission by any other vending facility serving that property.

In conclusion, it is my opinion, and you are advised:

1. Pursuant to R.C. 3304.30, a suitable vending facility operated by a blind licensee may be established on the property of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university if a joint decision to establish such a suitable vending facili-

ty is made by proper administrative authorities of the college or university and the Director of the Bureau of Services for the Visually Impaired. If there is no joint decision as to whether to establish a suitable vending facility, then under R.C. 3304.32 there is a dispute concerning the establishment of a suitable vending facility. Such a dispute is subject to adjudication by a hearing board in accordance with R.C. Chapter 119.

2. In the case of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university, if there is no joint decision as to whether to establish a suitable vending facility pursuant to R.C. 3304.30, then the Bureau of Services for the Visually Impaired does not have authority to proceed to establish suitable vending facilities operated by blind licensees on the property of the college or university, and 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.
3. If there is a joint decision to establish a suitable vending facility operated by a blind licensee on the property of a state university, college of medicine, technical college, state community college, community college, university branch district, or state-affiliated college or university and the Bureau of Services for the Visually Impaired does not establish such a facility, then the Bureau has no statutory authority to require the payment of a commission by any other vending facility serving that property.