

BEFORE THE
DEPARTMENT OF REHABILITATION
STATE OF CALIFORNIA

In the Matter of the Appeal of:

GARY CROCKER,

Appellant.

OAH No. 2013090974

PROPOSED DECISION

This matter was heard by Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, on December 31, 2013, in Sacramento, California.

Appellant Gary Crocker appeared at hearing and was represented by Christine Rose, his authorized representative, pursuant to California Code of Regulations, title 9, section 7227.2, subdivision (g)(3).

Attorney Matthew W. Kruse represented respondent Department of Rehabilitation (Department), State of California.

Evidence was received, and the record was left open for the parties to submit simultaneous closing and reply briefs. On January 29, 2014, the parties submitted their respective closing briefs, which are marked as Exhibits 11 (appellant's) and H (Department's). The Department also filed a proposed stipulation, which is marked as Exhibit I. On February 12, 2014, the parties submitted their respective reply briefs, which are marked as Exhibits 12 (appellant's) and J (Department's.) The record was closed and the matter submitted for decision on February 12, 2014.¹

¹ On February 13, 2014, appellant filed a response to the Department's reply brief without leave of court. That response was not considered, as it was untimely.

SUMMARY

On July 11, 2013, the Department issued an invoice charging appellant a late fee for submitting a monthly operating report late. Appellant requested an evidentiary hearing challenging that invoice on July 22, 2013. The Department denied appellant's request as untimely because the regulation he was challenging was promulgated more than 30 days prior to the date of his request. The sole issue to be decided is whether appellant's request for hearing was in fact untimely. While appellant may have expressed his dissatisfaction with the applicable regulation in his request for hearing, he ultimately was challenging the application of that regulation to him, an action taken by the Department within the 30 days immediately preceding his request. Therefore, appellant is entitled to an evidentiary hearing.

FACTUAL FINDINGS

1. Appellant is a vendor in the Business Enterprises Program for the Blind (BEP), a federal and state program that provides remunerative employment and economic opportunities for blind persons that was created by the Randolph-Shepherd Act (20 U.S.C. § 107 et seq.) and is administered in California by the Department.

2. As a vendor in the BEP, appellant is required to submit Monthly Operating Reports (MOR) to the Department's Accounting Section, along with the requisite set-aside and insurance fees, each month. The MOR and fees are due by the 25th day of the following month for which they apply. A vendor who submits his MOR and fees late is subject to a late penalty.

3. Appellant submitted his March 2013 MOR 30 days late. Therefore, on July 11, 2013, the Department's Accounting Section issued him an invoice in the amount of \$341.55, the late fee the Department's Accounting Section determined appellant owed for submitting his March 2013 MOR late.

4. On July 22, 2013, appellant sent the Department's chief counsel an e-mail stating, in pertinent part, the following:

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Request for a Full Evidentiary Hearing

[¶]...[¶]

Ms. Hargreaves, your office is receiving this grievance today due to a notice I received from the Departments' [sic] Accounting Section on 15 July 2013. This notice, dated 11 July 2013, indicates that I owe a late penalty fee of 341.55 dollars [sic] because my March 2013 Monthly Operating Report was received late by the department. This penalty amount is based on a 15% month after month penalty assessment as stipulated in Section 7221 of the programs [sic] regulations. Please see invoice number B 5464 currently on file with the Departments' [sic] Accounting Section. The fact that my March 2013 MLR was received late is not a point of contention in this grievance. It was sent 30 days late and this was surely received late by the department.

[¶]... [¶]

Ms. Hargreaves, the purpose of this grievance is to convey my dissatisfaction with the department's policies or more specifically, with the program's regulations stated above requiring BEP vendors to pay a 15%, month after month, assessed penalty fee on all late payments due to the set aside [sic] fund. This 15% month after month penalty fee is equivalent to an annual interest rate of 180%. In the lawful world, or should I say, only in the unlawful world are crooked loan sharks able to demand interest rates of this extreme nature. Not even the most questionable credit card issuers are allowed to charged [sic] rates this excessive under the laws of the federal government.

[¶]... [¶]

After giving this a great deal of thought, I decided to do some research in this area. Here's what I found out about

interest rates on loans or forbearance of any monies, goods, or things in action, or on accounts after demand.

These issues are addressed in our state's constitution under article 15 Usury. I believe that the Department of Rehabilitation is violating my rights, as well as the rights of all licensed offenders of this program, under article 15 of the California constitution [*sic*]. The following excerpt is found in the state's constitution [*sic*]. the [*sic*] opening paragraph as well as item (2) of the article seem to state that only a maximum of 10% interest rate can be charged on an annual basis for money, goods, or things in action, or on accounts after demand.

(Emphasis original.)

5. On August 2, 2013, the Department responded to appellant's demand as follows:

Dear Mr. Crocker: I have received your request for a full evidentiary hearing. You indicated that you do not dispute that you submitted a late monthly operating report, or the calculations, but are dissatisfied with the regulation. I am not able to forward your request for a hearing to the Office of Administrative Hearings because the action that you have disputed is not something done within the past 30 working days.

The conditions for a full evidentiary hearing, including that the action disputed must be within the past 30 working days, are in [*sic*] regulation that was developed by the CVPC.

The regulation that you are contesting is a regulation that was promulgated years ago in consultation with CVPC. The Office of Administrative Law and the U.S. Department of Education Secretary approved the regulation in 2010 [*sic*] although the specific late fee may have been in regulation for years before that time. Therefore, your request is not timely. Even if your

dispute was timely, an administrative law judge has no authority to strike down a regulation which has the effect of law. Taking your ideas to the CVPC and the DOR which could amend the regulation, and the DOR then taking steps through the Office of Administrative Law, is the only way to change the regulation.

LEGAL CONCLUSIONS

Applicable Law

1. California Code of Regulations, title 9, section 7221, subdivision (a), states the following regarding the filing of an MOR with the Department:

Vendors operating a Business Enterprises Program for the Blind, hereafter BEP, vending facility shall pay a set-aside fee into the Vending Facility Trust Fund.

(1) Payment of the set-aside fee shall be made monthly based on the net proceeds, as defined in Welfare and Institutions Code section 19629(d) of the vending facility for the preceding month. The fees shall not exceed 6 percent of the monthly gross sales, and the vendor may determine if he or she shall pay 6 percent of the monthly gross sales or use the BEP established set-aside fee schedule that has been approved by the Rehabilitation Services Administration to determine the set-aside fees to be paid. When using the set-aside schedule, the fees shall not exceed 6 percent of the monthly gross sales.

(2) Payment of the set-aside fee shall be made to the Department of Rehabilitation, Vending Facility Trust Fund, Accounting Section, P.O. Box 944222, Sacramento, California, 94299-9222. Payment of the fee shall be accompanied by the completed DR 478, Vendor's Monthly Operating Report (Rev. 07/07), incorporated by reference herein. The income and expenses of each vending facility shall be reported using

a DR 478, Vendor's Monthly Operating Report (Rev. 07/07).

2. California Code of Regulations, title 9, section 7221, subdivision (c), provides the following regarding the due date for MORs:

The DR 478, Vendor's Monthly Operating Report (Rev. 07/07), set-aside fee and payment for liability and workers' compensation insurance either must be received by the Department of Rehabilitation Accounting Section or postmarked by the 25th day of the month following the month being reported, in accordance with subdivision (a)(2) of this section. When the 25th day of the month falls on a Saturday, Sunday or a holiday, the DR 478, Vendor's Monthly Operating Report (Rev. 07/07) and the set-aside fee, shall be considered timely if postmarked on the following business day pursuant to Government Code section 6706.

3. Any vendor who submits his MOR and requisite fees late is subject to a late penalty as follows:

(1) A penalty not to exceed either 15 percent of the late set-aside charge or \$75, whichever is greater, shall be assessed against a vendor for each month that the DR 478, Vendor's Monthly Operating Report (Rev. 07/07) or set-aside fee is late when one or more of the following conditions occur:

(A) Set-aside fees or the DR 478, Vendor's Monthly Operating Report (Rev. 07/07), or both, are not received pursuant to subsection (c) herein.

(B) The set-aside fee shall be considered past due if some of the amount owed is received, but the accompanying payment is incorrect and less than the amount that is due in accordance with the DR 478, Vendor's Monthly Operating Report (Rev. 07/07) submitted for that month.

(C) The set-aside fee shall be considered past due if payment is made by check, and the check is returned for insufficient funds.

(D) The DR 478, Vendor's Monthly Operating Report (Rev. 07/07), shall be considered past due, if it is not signed by the vendor or the vendor does not use the DR 478, Vendor's Monthly Operating Report (Rev. 07/07) adopted by the Department.

(Cal. Code Regs., tit. 9, § 7221, subd. (c).)

4. A vendor in the BEP has a right to a full evidentiary hearing challenging an action taken by the Department as follows:

Licenses or vendors who are dissatisfied with an action of the Department arising from licensing, selection as a vendor, termination or suspension of a license or vendor operating agreement, probation, or administration of the BEP may request a full evidentiary hearing before a hearing officer. All requests for a full evidentiary hearing shall:

(1) Be made within 30 working days of the action with which the licensee or vendor is dissatisfied, or within the time frame specified in Section 7227.1(e) of these regulations, if the licensee or vendor elected to participate in the administrative review process. In cases involving the suspension or termination of licensure or probation, the date of the action shall be deemed to be two days after the date the Department mails the written notice of proposed action specified in Section 7213.1 of these regulations.

(Cal. Code Regs., tit. 9, § 7227.2, subd. (a).)

Conclusion

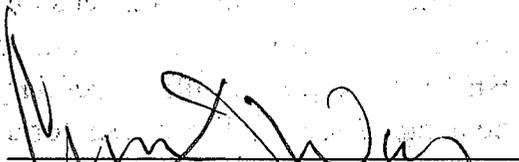
5. As discussed above, on July 11, 2013, the Department issued appellant an invoice charging him a late fee for submitting his March 2013 MOR

late. Appellant requested an evidentiary hearing challenging the invoice on July 22, 2013, just 11 days after it was issued. While the Department is correct that appellant cannot challenge the constitutionality of California Code of Regulations, title 9, section 7221 (Cal. Const., art. III, § 3.5; see, *Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, 617-619), his request for hearing challenges the manner in which that regulation was applied to him. Therefore, the Department improperly denied him an evidentiary hearing.

ORDER

Appellant Gary Crocker's appeal of the Department of Rehabilitation's denial of his request for a full evidentiary hearing is GRANTED.

DATED: February 14, 2014


COREN B. WONG
Administrative Law Judge
Office of Administrative Hearings