STATE OF MICHIGAN

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of Docket No. 2011-1165

Robin Kay, Agency No.

 Petitioner

v Agency: Michigan Commission Michigan Commission for the For The Blind

 Blind,

Respondent Case Type: Appeal

Issued and entered

this 4th day of May, 2012

by Robert J. Meade

Administrative Law Judge

RECOMMENDED DECISION

OF THE ADMINISTRATIVE LAW JUDGE

PROCEDURAL FINDINGS

This is a proceeding conducted pursuant to 1978 PA 260, as amended, MCL 393.351 *et seq.* (Act 260) and Chapter IV of 1969 PA 306, as amended, MCL 24.271 *et seq.* (Act 306).

Petitioner, Robin Kay (Petitioner) filed a request for an administrative hearing on or about August 16, 2011. On August 22 ,2011, the Respondent, Michigan Commission for the Blind (Respondent or Commission) forwarded a

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Request for Hearing to the Michigan Administrative Hearing System and a

was scheduled for September 27, 2011. Following a number of adjournments, a hearing was held on May 2, 2012. David Robinson appeared on behalf of the Petitioner. James Hull appeared on behalf of the Respondent. The record was closed on May 2,2012.

Petitioner's Witnesses: Robin Kay

Respondent's Witnesses: Joshua Hoskins

Petitioner's Exhibits: None

Respondent's Exhibits: Exhibit 1 -Sales Spreadsheet for Lansing Vending Route

ISSUE

Did the Commission violate Rules 393.18 or 393.21, or any provisions under Act 260, when closing one of the facilities on Petitioner's vending route?

FINDINGS OF FACT

1. Petitioner has operated the Lansing Vending for many years. One of sites on Petitioner's route, the Michigan National Guard Headquarters, located at 341 1 N Martin Luther King Boulevard in Lansing, Michigan, was closed in the summer of 2011, per the military's request.

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2. Due to some miscommunication between the Petitioner, Petitioner's promotional agent, and the military, the Petitioner lost some product when the Michigan National Guard site was closed. The Commission reimbursed Petitioner for the product that was lost, as well as product that became outdated because of the closure. The Commission also reimbursed Petitioner for the cost of locks that were removed from Petitioner's vending machines. Following an administrative review, the Commission agreed to work with Petitioner to add sites to her vending route to make up for the loss of the Michigan National Guard site.

3. According to Petitioner, the loss of the Michigan National Guard site has reduced her sales and income by approximately 33%.

4. Petitioner's promotional agent, Joshua Hoskins, has been working on adding a vending site at the Department of Human Services office in Eaton Rapids and the TSA Office in Lansing to Petitioner's vending route. Petitioner has also made additional recommendations for future sites that Mr. Hoskins has agreed to look into.

5. The proceeds from Petitioner's vending route from April 2011 through March 201 2 equal approximately $29,000. (Exhibit 1).

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CONCLUSIONS OF LAW

In an administrative hearing, the moving party must prove its position by a preponderance of the evidence. *Michigan State Employees Assoc v Michigan Civil Com*, 126 Mich App 797, 802; 338 NW2d 220 (1983). As such, here Petitioner must prove by a preponderance of the evidence, that the Commission violated Rules 393.18 or 393.21, or any provisions under Act 260, when closing one of the facilities on Petitioner's vending route.

Act 260 directs the Commission among other things to:

(f) Regulate concessions reserved for operation by blind persons pursuant to this act.

*MCL 393.355(f)*

Vending facility is defined in MCL 393.351(f) in the following manner:

(f) "Vending facility” means an automatic vending machine, cafeteria, snack bar, cart service, shelter, counter, or any other appropriate auxiliary equipment as the commission may prescribe by rule as being necessary for the sale of articles or services described in this act and which may be operated by a blind licensee.

Section 10 of Act 260 outlines facilities for which the Act is inapplicable:

393.360 Act inapplicable to certain concessions;

sighted person operating concession under contract or lease, or operating concession not applied for by blind person.

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Sec. 10.

(1) This act shall not apply to a concession operated in connection with the state fair, with the use of state fairgrounds, with a state educational institution, state penal institution, military establishment, armory, or state park.

(2) A sighted person operating a contract or lease at the time this act becomes effective shall not be required to surrender the rights before the contract or lease expires.

(3) A sighted person operating a concession which has not been applied for by a blind person may be permitted to continue in charge until the concession is applied for and a qualified blind person is chosen to operate the concession. (Underline added)

MCL 393.355 (g) permits Respondent to promulgate rules to implement the above provisions. Pursuant to this authority, Administrative Rules R 393.1 through 393.56 took effect October 1, 2004.

Rule 393.1 provides definitions applicable to the Vending Facility

Program. Rule 393.1 (hh) State Property:

(hh) "State property" means a business enterprise program facility in a building or on a property owned or occupied by the state, except for a concession operated in connection with any of the following:

(i) The state fair.

(ii) The use of state fair grounds.

(iii) Any state educational institution.

(iv) A state penal institution.

(v) Military establishments and armories.

(vi) A state park.

(Underline added)

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Rule 393.18 outlines the Commission's responsibilities with regard to

vending facility sites:

R 393.18 Commission responsibilities; vending facility site; equipment. Rule 18. The commission shall do all of the following:

(a) Determine if a potential site is suitable for a vending facility. In a building where more than 1 vending facility exists, the commission may merge the facilities into a single vending facility. Facility merging may occur when 1 of the vending facilities is vacated and has not been awarded to another licensee after being on the bid line for 2 or more weeks. Under these circumstances, applicable additional licensee training requirements shall be waived for a period to be determined by the commission board, with the active participation of the committee.

The commission shall determine, with the active participation of the committee, whether a potential location is suitable for operation as a vending facility or as a satellite. The criterion for determining if a potential location is suitable for operation as a vending facility is that the potential site's net annual income is expected to be 120% of the current federal minimum wage, based upon a 40 hour workweek.

(b) List and assign priority to suggested renovations. All renovation or remodeling activities are subject to the availability of funds. The commission shall make all final renovation decisions with input from the committee.

(c) The commission shall determine the equipment needs of each vending facility and furnish each vending facility with adequate equipment suitable to the needs of the vending facility.

(d) Maintain, or cause to be maintained, all vending facility equipment in good repair and cosmetically appealing condition and replace, or cause to be replaced, worn out or obsolete equipment as required to ensure the continued and successful operation of the facility.

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(2) The commission may authorize the lease of equipment for a vending facility. The cost of the lease shall be paid from the proceeds of the facility. A vending facility agreement signed by the licensee shall constitute informed consent to lease equipment. By signing the agreement, the licensee consents to all terms and conditions of the lease and accepts responsibility for the lease.

(3) Only the commission may transfer equipment between licensees or facilities. Equipment shall only be used in the assigned vending facility.

(4) Bill identifiers or other personal equipment transfers with the licensee to whom the identifier or other personal equipment is assigned. When a licensee leaves the program, the bill identifier or other personal equipment reverts to the commission.

Rule 393.21 outlines the duties of a promotional agent:

R 393.21 Promotional agent; role; duties.

Rule 21. (1) The promotional agent is the commission's representative to the vending facility licensees. A promotional agent fulfills a supervisory role in the program. A promotional agent shall do all of the following:

(a) Assign equipment to the stand.

(b) Monitor the licensee to ensure compliance employer responsibilities.

(c) Monitor compliance with applicable commission rules.

(d) Assist a licensee in running a clean and efficient business and in complying with all of the following provisions:

(i) Meeting state standards.

(ii) Being profitable and well managed.

(iii) Meeting the established profit expectations of the business.

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(iv) Providing high quality customer service.

(v) Conforming to the terms and conditions of the permit.

(2) A promotional agent shall visit the facility every 6 weeks, or more often as necessary, to offer suggestions and assist in obtaining the items of equipment or the service for which the commission is responsible. A promotional agent shall complete a field activity report after every visit, which shall include an assessment of the facility based upon the goals identified in subrule (1) of this rule. If a facility visit is not possible, then a promotional agent shall document telephone contact with the licensee.

(3) A promotional agent shall evaluate the facility annually, or more often if necessary, to ensure operation as described in subrule (1) of this rule. A new facility shall be evaluated semiannually during the first year of operation, or more often if necessary.

(4) A promotional agent shall monitor compliance with the rules and policies of the commission.

(5) A promotional agent shall hold in confidence information regarding the facilities for which the agent is responsible.

(6) A promotional agent shall arrange for additional licensee training, if needed.

(7) A promotional agent shall explain program rules and policies.

Here, there is no question that the Michigan National Guard Headquarters amounts to a "military establishment” as defined under Act 260 and Rule 393.1 (hh) and, as such, falls outside of the mandates of Act 260. The Michigan National Guard had the right to remove Petitioner from its facility and Petitioner does not seriously argue this point. Instead, the Petitioner

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argues that the Commission has violated Rules 393.18 and 393.21 by failing to diligently work to add vending sites to Petitioner's vending route to replace the lost site at the Michigan National Guard. When asked why it had taken so long to replace the Michigan National Guard site, Petitioner's promotional agent, Joshua Hoskins, testified that it takes time to meet with the owners and operators of prospective vending sites and to convince them to accept a BEP operator or to accept vending facilities at all when none are already in place. Mr. Hoskins testified that he will continue to work diligently to find new sites to add to Petitioner's vending route.

There is no provision in Act 260 that guarantees a certain amount of income to those placed in cafeterias or vending facilities. Both the Act and rules are an attempt to provide income to blind persons. There is no guarantee that this goal will be achieved, nor is there any guarantee that any facility will achieve a specific sales goal. Obviously, unforeseen events may cause a location to close or a facility to suffer decreased sales. The rules promulgated by the Commission provide that routes should return an income to operators of 120% of the federal minimum wage, and here, Petitioner's income from her route is still well above this amount. As long as Petitioner's promotional agent continues to work with her to add sites to her vending route,

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the Commission has not violated any provisions under the rules or under Act 260.

Petitioner also argues that the Commission has violated Rules 393.18 and 393.21 by failing to update Petitioner's operating agreement to reflect the closure of the Michigan National Guard site. While this omission by the Commission should be corrected, the omission itself has not harmed Petitioner in anyway and she is due no remedy for the Commission's failure to update her operating agreement. Clearly, all parties involved are aware of the fact that Petitioner no longer operates a vending site at the Michigan National Guard

RECOMMENDED DECISION

I recommend that the Commission for the Blind find that the Petitioner has failed to prove, by a preponderance of the evidence, that the Respondent violated Rules 393.18 or 393.21, or any provisions under Act 260, when the Michigan National Guard closed Petitioner's vending site. It is further recommended that the Commission continue to diligently work with Petitioner to add sites to her vending route and that the Commission update Petitioner's

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operating agreement to reflect the closure of the Michigan National Guard Headquarters.

Signed

Robert J. Meade

Administrative Law Judge

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PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on the 4th day of May, 2012.

Signed

Catherine S. Devine

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