IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-K-2077

MARK E. SHEPHERD, SR.,

Plaintiff,

v.

UNITED STATES OLYMPIC COMMITTEE, et al.,

Defendants.

PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56(a)

Plaintiff Mark Shepherd, Sr., hereby submits this Supplemental Brief in Support of His Motion for Partial Summary Judgment Pursuant to Fed. R. Civ. P. 56(a).

BACKGROUND

In Plaintiff's Motion for Partial Summary Judgment Pursuant to Fed. R. Civ. P. 56(a) ("Plaintiff's Opening Brief"), Plaintiff argued that revenues received by the United States Olympic Committee ("USOC") from the commemorative coin program constitute federal financial assistance for purposes of the Rehabilitation Act. Plaintiff's Opening Brief at 20-21. Pursuant to the commemorative coin program, the United States government mints and sells coins, revenues from which are given to the USOC. The commemorative coin program has continued over the years through the passage of various Congressional Acts, including the "Doug Barnard, Jr.--1996 Atlanta Centennial Olympic Games Commemorative Coin Act," Pub.

L. 102-390, 106 Stat. 1620 (1992) (the "1996 Act") (attached hereto as Exhibit 1), and the "2002 Winter Olympic Commemorative Coin Act," Pub. L. 106-435, 114 Stat. 1916 (2000) (the "2002 Act") (collectively "the Acts") (attached hereto as Exhibit 2). The Acts require the government to pay all the costs of the program, including the costs of obtaining the gold and silver for the coins, the cost of minting the coins, and the cost of issuing the coins. 1996 Act at §§ 102-03, 105-06; 2002 Act at §§ 2-3, 5-6. The USOC pays none of these costs. The Acts further provide that the coins are to be sold at a price consisting of the face value of the coins, the cost of designing and issuing the coins, and a surcharge. 1996 Act at § 106; 2002 Act at § 6. The government can recoup its costs but cannot share in any profits of the program; all such profits are divided equally between the USOC and a third party. 1996 Act at §§ 108, 110; 2002 Act at § 7. The virtually identical preambles to the 1996 and 2002 Acts state that one of the purposes of the Acts is "to support . . . the programs of the United States Olympic Committee . . ." Preamble to 1996 Act; Preamble to 2002 Act.

ARGUMENT

The Rehabilitation Act prohibits discrimination on the basis of disability by recipients of "federal financial assistance." 29 U.S.C. § 794. Federal funding is "financial assistance" under the Rehabilitation Act if Congress intended that the funding subsidize the recipient, and is not "financial assistance" if Congress intended that the funding compensate the recipient for goods or services provided by the recipient. See DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 911 F.2d 1377, 1382 (10th Cir. 1990), cert. denied, 498 U.S. 1074 (1991). Thus, in order to determine whether revenues from the commemorative coin program constitute "financial

assistance," this Court must determine what Congress's intent was in giving these revenues to the USOC.

"We presume the plain language of a statute expresses congressional intent." In re Hamilton Creek Metro. Dist., 143 F.3d 1381, 1385 (10th Cir. 1998); see also New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Serv., 248 F.3d 1277, 1281-82 (10th Cir. 2001) ("'[W]e will assume that Congress's intent is expressed correctly in the ordinary meaning of the words it employs . . . .'" (citation omitted)). This cardinal principal applies in determining Congress's intent in providing federal funding. The single case cited by the USOC, Jacobson v. Delta Airlines, Inc., 742 F.2d 1202 (9th Cir. 1984), cert. dismissed, 471 U.S. 1062 (1985), emphasizes this point:

> Courts should determine whether the government intended to provide assistance or merely to compensate. The relevant intention is that of Congress . . . In short, the question of which programs are subject to the civil rights laws is a question of law, to be answered in most cases by reference to the statutory authority for the particular disbursements at issue . . ."

Id. at 1210 (emphasis added); see also United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 607 (1986) (Holding that in determining whether funding provided pursuant to a statute constitutes "financial assistance" for purposes of the Rehabilitation Act, "the relevant starting point is the grant statute."). Thus in this case, the Court should examine the 1996 and 2002 Acts to determine whether Congress set forth its intent in the language of those Acts.

The clear language of the 1996 and 2002 Acts conclusively demonstrates that Congress intended to subsidize, not to compensate, the USOC through the commemorative coin program. Indeed, the first sentence of both the 1996 and 2002 Acts, which sets forth the purpose of each

Act, states: "An Act to provide for the minting of commemorative coins to support . . . the programs of the United States Olympic Committee." Preamble to 1996 Act (emphasis added); Preamble to 2002 Act (emphasis added). Because this language plainly expresses Congress's intent to subsidize the USOC, the language is conclusive and no further analysis is necessary or appropriate. See Negonsott v. Samuels, 113 S. Ct. 1119, 1122-23 (1993) ("'Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.'" (citation omitted)).

The USOC argues that the commemorative coin program is akin to a "profit sharing arrangement" in which the revenues received by the USOC are essentially "royalties" to compensate the USOC for the use of its trademarks that are protected under 36 U.S.C. § 220506.

As an initial matter, Congress did not require that the commemorative coins include any USOC trademarks protected under 36 U.S.C. § 220506. The 1996 and 2002 Acts required that the coins:

- be emblematic of the participation of athletes from the United States of America in the Olympic Games; and
- include a designation of the value of the coin, an inscription of the date of the coin, and inscriptions of the words "Liberty," "In God We Trust," "United States of America," and "E Pluribus Unum."

The following marks are protected by 36 U.S.C. § 220506:

- The name "United States Olympic Committee;"
- The symbol of the International Olympic Committee, consisting of 5 interlocking rings;
- The symbol of the International Paralympic Committee, consisting of 3 TaiGeuks;

- The symbol of the Pan-American Sports Organization, consisting of a torch surrounded by concentric rings;

- The emblem of the corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief; and

- The words "Olympic," "Olympiad," "Citius Altius Fortius," "Paralympic," "Paralympiad," "Pan-American," "America Espirito Sport Fraternite," or any combination of those words.

Thus neither of the Acts require the use of USOC marks.

Even had Congress required that the coins include marks protected under 36 U.S.C. § 220506, there is nothing in the 1996 or 2002 Acts to indicate that Congress intended the revenues as compensation for such marks. Congress stated that its intention was "to support" the USOC, not to compensate it.

In fact, the express terms of both Acts prevent Congress and the government from receiving any profits which might justify paying "royalties" to the USOC. To "compensate" by definition requires that the compensating party have received something of value. See Black's Law Dictionary 283 (6th ed. 1990) (defining "compensate" as "to make equivalent return to"). Courts frequently focus on whether the government receives value from a transaction with a funding recipient to determine whether Congress intended the funding as a subsidy or as compensation. See, e.g., DeVargas., 911 F.2d at 1382 (funding was found to be compensation in part because transaction resulted in savings of $3.5 million to government); Mass v. Martin Marietta Corp., 805 F. Supp. 1530, 1542 (D. Colo. 1992) (distinguishing between Medicare and Medicaid payments, which are subsidies because the government receives no goods or services

in return, and compensation payments under a contract under which the government receives goods and services); Tanberg v. Weld County Sheriff, 787 F. Supp. 970, 974 (D. Colo. 1992) (holding that federal grants were subsidies because the government received no services in return).

In this case, no matter how successful the program is, the best that the government can do is to recover its costs. 1996 Act at §§ 108(b) & 110(a); 2002 Act at § 7(b). Once such costs are recovered, the government cannot receive any profits or surcharges from the commemorative coin program. This is why Defendant's "profit sharing" analogy is wrong. The government is precluded by the terms of the Acts from sharing in any profits resulting from the program. Thus the government receives nothing of value, further demonstrating that Congress meant it when it said that the commemorative coin program was intended "to support" the USOC.

CONCLUSION

For the reasons set forth above, the commemorative coin program revenues given to the USOC are subsidies and thus constitute "financial assistance" for purposes of the Rehabilitation Act.

Respectfully submitted,

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