

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a light blue color with darker blue outlines for continents. The hourglass is centered on the page.

WikiLeaks Document Release

<http://wikileaks.org/wiki/CRS-RS22968>

February 2, 2009

Congressional Research Service

Report RS22968

The Randolph-Sheppard Act: Major Judicial Decisions

Carol Toland, American Law Division

October 9, 2008

Abstract. The Randolph-Sheppard Act requires that blind individuals receive priority for the operation of vending facilities on federal property. "Vending facilities" include automatic vending machines, cafeterias, and snack bars. This report will discuss several significant court decisions and recent legislation related to the Randolph-Sheppard Act. Two federal court of appeals decisions, *NISH v. Cohen* and *NISH v. Rumsfeld*, held that military troop dining facilities are "cafeterias" under the Randolph-Sheppard Act and that the act controlled over the Javits-Wagner-O'Day Act, which provides employment opportunities for the severely disabled. Other cases have analyzed the scope of the Randolph-Sheppard Act's application to military troop dining facilities. S. 3112, which was introduced on June 11, 2008, would amend the Javits-Wagner-O'Day and Randolph-Sheppard Acts and address several issues raised by these judicial decisions.

WikiLeaks



CRS Report for Congress

The Randolph-Sheppard Act: Major Judicial Decisions

Carol Toland
Legislative Attorney
American Law Division

Summary

The Randolph-Sheppard Act requires that blind individuals receive priority for the operation of vending facilities on federal property. “Vending facilities” include automatic vending machines, cafeterias, and snack bars. This report will discuss several significant court decisions and recent legislation related to the Randolph-Sheppard Act. Two federal court of appeals decisions, *NISH v. Cohen* and *NISH v. Rumsfeld*, held that military troop dining facilities are “cafeterias” under the Randolph-Sheppard Act and that the act controlled over the Javits-Wagner-O’Day Act, which provides employment opportunities for the severely disabled. Other cases have analyzed the scope of the Randolph-Sheppard Act’s application to military troop dining facilities. S. 3112, which was introduced on June 11, 2008, would amend the Javits-Wagner-O’Day and Randolph-Sheppard Acts and address several issues raised by these judicial decisions.

Background

The Randolph-Sheppard Act¹, originally signed into law by Franklin D. Roosevelt in 1936,² requires that blind individuals receive priority for the operation of vending facilities on federal property. The 1974 amendments to the act³ changed the term “vending stand” to “vending facility” and defined the term as meaning “automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment as the Secretary [of Education] may by regulation prescribe as being necessary for the sale of the articles or services described in section

¹ 20 U.S.C. § 107 *et seq.* (2008). For an overview of the act’s provisions and the program’s current operation, see CRS Report RL34609, *The Randolph-Sheppard Act: Business Enterprise Opportunities for the Blind*, by Andrew R. Sommers.

² P.L. 74-732.

³ P.L. 93-516.

107a(a)(5) of this title and which may be operated by blind licensees....”⁴ The regulations promulgated by the Department of Education define “cafeteria” as “a food dispensing facility capable of providing a broad variety of prepared foods and beverages (including hot meals) primarily through the use of a line where the customer serves himself from displayed selections. A cafeteria may be fully automated or some limited waiter or waitress service may be available and provided within a cafeteria and table or booth seating facilities are always provided.”⁵ The act does not apply to “income from vending machines within retail sales outlets under the control of exchange or ships’ stores systems[,] ... income from vending machines operated by the Veterans Canteen Service[,] ... or income from vending machines not in direct competition with a blind vending facility at individual locations” on the federal property.⁶

The Randolph-Sheppard Act and Military Troop Dining Facilities

Application of the Act to Military Troop Dining Facilities. Two major circuit court cases have dealt with the issue of whether the term “cafeteria” in the Randolph-Sheppard Act applies to military troop dining facilities. Both the Fourth Circuit and the Tenth Circuit concluded that military troop dining facilities are “cafeterias” under the Randolph-Sheppard Act.

NISH v. Cohen. In *NISH v. Cohen*,⁷ the court held that the Randolph-Sheppard Act applied to military troop dining facilities at Fort Lee in Virginia. NISH, a nonprofit agency designated “to represent other nonprofits employing the severely disabled in the production of items and services for government agencies under the Javits-Wagner-O’Day Act”⁸ (JWOD Act), had unsuccessfully sought to negotiate a contract for military troop dining facilities that was granted to a blind licensee. NISH filed suit seeking a declaratory judgment concerning the proper interpretation of the Randolph-Sheppard Act. In its appeal to the Fourth Circuit, NISH argued that military troop dining facilities are not “cafeterias” under the Randolph-Sheppard Act “because, in contrast to typical cafeterias (where meals are purchased by the general public from private funds), meals at military mess halls are provided to soldiers from appropriated funds.”⁹ Using a two-part *Chevron* analysis¹⁰, the court analyzed statutory and administrative interpretations and ruled that

⁴ 20 U.S.C. § 107e(7) (2008). Section 107a(a)(5) requires the Secretary of Education to designate state agencies to issue licenses for blind persons to operate vending facilities “for the vending of newspapers, periodicals, confection, tobacco products, foods, beverages and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws....”

⁵ 34 C.F.R. § 395.1(d).

⁶ 20 U.S.C. § 107d-3(d).

⁷ 247 F.3d 197 (4th Cir. 2001).

⁸ *Id.* at 199. The JWOD Act is codified at 41 U.S.C. §§ 46-48c (2008).

⁹ 247 F.3d at 203.

¹⁰ *See Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). “When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly (continued...) ”

Fort Lee’s contracting officer did not act unreasonably in applying the term “cafeteria” to the military troop dining facilities at Fort Lee.¹¹

NISH also argued that the JWOD Act applied to the awarding of the military troop dining facilities contract at Fort Lee because the Competition in Contracting Act (CICA) “preclud[ed] application of the Randolph-Sheppard Act.”¹² CICA “requires that the military use ‘full and open competition’ when contracting for ‘property or services’ except ‘in the case of procurement procedures otherwise expressly authorized by statute.’”¹³ The court ruled that the procurement provisions found in the Randolph-Sheppard Act met CICA’s sweeping definition of procurement,¹⁴ which meant both the Randolph-Sheppard Act and the JWOD Act could apply to the situation. The court further held that, of the two statutes, the Randolph-Sheppard Act was more specific and therefore controlling.¹⁵

NISH v. Rumsfeld. In *NISH v. Rumsfeld*,¹⁶ the court held that the Randolph-Sheppard Act applied to military troop dining facilities at Kirtland Air Force Base in New Mexico. NISH had a one-year contract for food services at the base with options for four additional years. Following the first year, the Air Force did not renew the contract with NISH and instead awarded it to the New Mexico Commission for the Blind (NMCB), citing compliance with the provisions of the Randolph-Sheppard Act. NISH filed suit seeking a declaratory judgment concerning the proper interpretation of the Randolph-Sheppard Act. In its appeal to the Tenth Circuit, NISH argued that Congress did not intend to include military troop dining facilities in the Randolph-Sheppard Act’s definition of “vending facilities.”¹⁷ The court rejected this argument by ruling that the plain language of the statute is unambiguous with respect to the inclusion of “cafeterias.”¹⁸ NISH further argued that the Randolph-Sheppard Act did not grant authority to the Department of Education (ED) to regulate military mess halls,¹⁹ but the court ruled that Congress did grant this authority to the ED. Using a two-part *Chevron* analysis,²⁰ the court held that the Air Force reasonably relied on the ED’s determinations

¹⁰ (...continued)

spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.... [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 842-43.

¹¹ 247 F.3d at 204.

¹² *Id.* at 200.

¹³ *Id.* at 201.

¹⁴ *Id.* at 204.

¹⁵ *Id.* at 204-05.

¹⁶ 348 F.3d 1263 (10th Cir. 2003).

¹⁷ *Id.* at 1267.

¹⁸ *Id.* at 1269.

¹⁹ *Id.*

²⁰ *See supra* note 11.

about the meaning of the Randolph-Sheppard Act as well as its own determination in awarding the contract to NMCB.²¹

As in *NISH v. Cohen*, NISH also argued that the JWOD Act applied because of CICA.²² The court here reached the same conclusion, holding that the Randolph-Sheppard Act met CICA's procurement definition and controlled over the JWOD Act.²³

Other Cases. Small business concerns²⁴ eligible to participate in a program or contract under Section 8(a) of the Small Business Act²⁵ and HUBZone entities²⁶ have also filed claims objecting to the application of the Randolph-Sheppard Act to the military troop dining facility contract process.²⁷ In these cases the Comptroller General and the Court of Federal Claims both held that the blind vendor contracts within the competitive range of contracts had priority over the other groups' contracts.

Limits on the Act's Application to Military Troop Dining Facilities. The application of the Randolph-Sheppard Act to military troop dining facility contracts is limited by the requirement found in 48 C.F.R. 15.306 that the contract fall within the competitive range. In *Southfork Systems, Inc. v. United States*,²⁸ the Court of Appeals for the Federal Circuit held that a contract proposal from a blind vendor could fall within the competitive range of contracts as determined by the contracting officer. In this case Southfork lost its contract with the Air Force for military troop dining facility services to the Texas Commission for the Blind (the Commission) and contested the inclusion of the Commission's contract proposal in the competitive range.²⁹ The lower court rejected Southfork's claims.³⁰ The appellate court agreed with the lower court and specifically stated that it failed to see "how ... the Air Force could have concluded that the Commission did not have a 'reasonable chance of being selected for award'" without rejecting "out of hand the proposition that economic opportunities for the blind could be

²¹ 348 F.3d at 1271.

²² *Id.*

²³ *Id.* at 1272.

²⁴ *See* 15 U.S.C. § 632(n) (defining small business concerns).

²⁵ 15 U.S.C. § 637(a).

²⁶ *See* 15 U.S.C. § 632(p) (defining HUBZone entities).

²⁷ *In re Intermark, Inc.*, 2002 Comp. Gen. Proc. Dec. P180 (2002); *Automated Commc'n Sys., Inc. v. United States*, 49 Fed. Cl. 570 (2001).

²⁸ 141 F.3d 1124 (Fed. Cir. 1998).

²⁹ The Air Force established that its contract process would have a competitive range that "consist[ed] of all proposals which are considered to have a reasonable chance of being selected for award." *Id.* at 1136.

³⁰ Southfork filed twelve total counts in the case. *Id.* at 1130. Among other claims, Southfork alleged that the Air Force deviated from its contract process by considering, as part of the contract proposal, the experience of a non-blind subcontractor who would support the blind cafeteria manager. *Id.* at 1138.

enlarged by having a blind individual” managing the cafeteria.³¹ The court recognized that the “contracting officer had broad discretion to consider each factor [in the contract process] as a part of a totality of the circumstances” in making the competitive range determination.³² The determination of the competitive range has also been part of several federal district court rulings.³³

The application of the Randolph-Sheppard Act to military troop dining facility contracts also may be limited by the types of services provided by the blind individual. In one case, *Washington State Department of Services for the Blind v. United States*,³⁴ the Court of Federal Claims held that dining facility attendant services contracts were not covered by the Randolph-Sheppard Act. In this case, the Washington State Department of Services for the Blind (WSDSB) challenged the Army’s determination that the Randolph-Sheppard Act did not apply to contracts for dining facility attendant services at Fort Lewis.³⁵ WSDSB argued that the Randolph-Sheppard Act’s requirement that blind persons be given priority for “operation of a vending facility” on federal property included dining facility attendant services contracts,³⁶ but the court held that the Army’s interpretation that “operation” did not include dining facility attendant services was not arbitrary or capricious.³⁷ However, in *Mississippi Department of Rehabilitation Services v. United States*,³⁸ the Court of Federal Claims held that a contract for day-to-day services, as opposed to dining facility attendant services, fell under the Randolph-Sheppard Act even though the Navy retained control over menu selection and food supply purchasing.³⁹ In this case, the Mississippi Department of Rehabilitation Services challenged the Navy’s determination that the Randolph-Sheppard Act did not apply to a contractor for services at the Naval Air Station in Meridian, Mississippi, who was required to “manage the cafeteria, prepare the food, serve the food, provide cleanup and cashier services, implement quality control and training programs, provide certain supplies and equipment and hire the personnel, both managerial and support.”⁴⁰ The court concluded that the contractor was considered the facility’s “operator” because of its daily responsibilities.⁴¹

³¹ *Id.*

³² *Id.* at 1139.

³³ *See, e.g.* North Carolina Division of Services for the Blind v. United States, 53 Fed. Cl. 147 (2002); Oklahoma Department of Rehabilitation Services v. United States, 1998 U.S. Dist. LEXIS 23041 (W.D. Okla. 1998).

³⁴ 58 Fed. Cl. 781 (2003).

³⁵ *Id.* at 782. “‘Under a dining facilities attendant contract, military personnel cook the food in a mess hall, but an outside contractor provides other services, such as washing dishes.’” *Id.*

³⁶ *Id.* at 786-87.

³⁷ *Id.* at 796. This statutory standard of review is found in 5 U.S.C. § 706(2)(A).

³⁸ 61 Fed. Cl. 20 (2004).

³⁹ *Id.* at 29-30.

⁴⁰ *Id.* at 30.

⁴¹ *Id.*

Legislation in the 110th Congress

The Javits-Wagner-O'Day and Randolph-Sheppard Modernization Act of 2008⁴² was introduced by Senator Enzi on June 11, 2008. This legislation would, among other things, address several issues raised by the judicial decisions previously discussed. The bill would establish the Committee for the Advancement of Individuals with Disabilities that would jointly administer both the Randolph-Sheppard program and the AbilityOne program (which implements the JWOD Act).⁴³ The bill also would require state licensing agencies to grant licenses for the operation of a vending facility to individuals with disabilities other than blindness starting three years after the bill's enactment.⁴⁴ Additionally, with respect to military troop dining facilities, the bill would grant equal priority in the contract process to a state licensing agency bidding for a contract under the Randolph-Sheppard Act, a small business concern eligible to participate in a program or contract under Section 8(a) of the Small Business Act, a HUBZone entity, an Alaska Native Corporation,⁴⁵ and other socially disadvantaged groups as defined by the Department of Defense.⁴⁶ For military troop dining facility contract proposals from the AbilityOne program, the bill would prohibit new proposals and require that proposals be removed from the procurement list five years after the bill becomes law.⁴⁷ Finally, the bill would specify that the term "cafeteria" in the Randolph-Sheppard Act, when used in reference to a military troop dining facility, would refer only to "services pertaining to a full food service military dining facility."⁴⁸ This definition would not include "mess attendant, dining facility attendant, dining support" or other activities that supported the operation of the cafeteria.⁴⁹

The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions on June 11, 2008. No similar legislation has been introduced in the House.

⁴² S. 3112, 110th Cong. (2nd Sess. 2008).

⁴³ *Id.* at § 3. This committee would replace the existing Committee for Purchase From People Who Are Blind or Severely Disabled.

⁴⁴ The individuals also must receive training required by the state licensing agencies.

⁴⁵ *See* 43 U.S.C. § 1602(m) (defining Alaska Native Corporation).

⁴⁶ S. 3112 at tit. III, § 303(c).

⁴⁷ *Id.* at tit. III, § 302(a)(2).

⁴⁸ *Id.* at tit. III, § 303(a).

⁴⁹ *Id.*