

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BRENDA K. BANKS,

Defendant.

CASE NO. 8:22-CR-111

BRIEF IN SUPPORT OF MOTION FOR
DOWNWARD VARIANCE

WITNESSES

Depending on the evidence adduced by Plaintiff, Defendant Brenda Banks (“Banks”) may call the following witnesses at sentencing:

1. Mike Bunich; and
2. Scott Ford.

These witnesses worked with Banks and can provide information regarding the projects that were worked from the grant monies provided.

EXHIBITS

Banks intends to offer several character letters as exhibits for the purposes of sentencing. Those letters are attached to this Motion and Brief as Exhibits 101-106.

Exhibit 107: Discovery “Banks-00004715” p. 2;

Exhibit 108: Discovery “Banks-00004715” p. 99.

INTRODUCTION

Banks is a 61-year-old woman who has no prior criminal history. Her only previous contact with law enforcement was from traffic infractions. (PSR, ¶¶63-67).

She has one son and no history of mental health or substance abuse issues. (PSR, ¶¶79-80).

In 1999, Banks started a nonprofit organization, Angels on Wheels. Initially, Angels on Wheels focused on providing meals to those in need in the community. As the charity grew, it evolved into helping poor individuals become self-sufficient. Many of the beneficiaries of this organization are veterans, victims of domestic abuse and former convicts. (PSR, ¶82).

In 2008, Banks formed a subsidiary of Angels on Wheels called Cross Training Center. Cross Training Center focuses on providing individuals with work experience and networking opportunities. This is accomplished through recycling programs that collect and recycle electronics and vehicles. (PSR, ¶¶82-83). These recycling projects are typically funded through grants. The grant money pays for the cost of the collections events, recycling and disposal of materials and pay to the organizers and laborers.

Banks stepped down as president of Angels on Wheels and after 23 years of operating the charity, she currently earns approximately \$60,000 dollars a year as a Director of Programming. (PSR, ¶¶82, 85). Based on her financial condition, she does not have the ability to pay a fine in addition to any restitution. (PSR, ¶¶91-92).

Banks was placed on pretrial release on June 16, 2022. She has been fully compliant with all terms and conditions of her release. (PSR, ¶20).

The offense carries no mandatory minimum. Regardless of the loss calculated by this Court and the resulting advisory guideline range, Banks asks the Court to consider a sentence of probation.

PSR AND ADVISORY GUIDELINES RANGE

Banks objected to the enhancements related to the loss amount determined by U.S. Probation pursuant to §2B1.1(b)(1)(G). (PSR, ¶52). She also objected to the two-level enhancement for misrepresenting that she was acting on behalf of a charitable organization. (PSR, ¶53).

1. Total Amount of Loss.

The amount of loss adopted by the probation office (\$464,795 dollars) is the total amount of loan/grant money provided to Banks over a certain period of time. (PSR, ¶¶24, 29, 31-34). This amount is contrary to the definition of loss set forth in the guidelines and commentary.

The commentary to Section 2B1.1 states that loss is the greater of actual loss or intended loss. Banks sought grants for charitable work and accomplished the charitable work. She diverted a small amount for personal items but there is no evidence to suggest that she obtained the grants to obtain money for her personal benefit. Accordingly, the loss determination should be based on actual loss.

Actual loss is defined as “the reasonably foreseeable pecuniary harm that resulted from the offense”. Grant money was provided to fund charitable projects. Those charitable projects were completed. The actual loss is the amount of money that was diverted from the charitable project.

In determining the amount of loss, the Court “shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined”. U.S.S.G. 2B1.1, commentary note, 3B. The Court need only make a reasonable estimate of the loss and the Court’s determination will be entitled to appropriate deference. U.S.S.G. 2B1.1, commentary note, 3C.

The loss determination should be made after considering any credit against the loss. The commentary note indicates that loss “shall be reduced” by “services rendered”. U.S.S.G. 2B1.1, commentary note, 3E(i). Accordingly, whether the Court determines the actual loss is the amount of the grant money diverted (approximately \$26,000) or uses the total amount of the grants and then credits for the services rendered, the ultimate loss determination is the same. As the actual loss (money not used for its intended purpose) is between \$15,000 and \$40,000.00, four (4) levels should be added under guideline provision 2B1.1(b)(1)(C) and not twelve (12) as determined by Probation.

a. Government’s Argument.

The Government’s theory is that since Banks provided falsified or fictitious documents as part of the disbursement process, *all* of the money provided by the lenders should be counted as a loss. This approach is fundamentally flawed as it negates the fact that the projects intended to be completed with the grant money were completed. Additionally, this reasoning ignores the purpose and utility of applying credit for “services rendered” as set forth in the commentary. See commentary note 3E(i) to U.S.S.G. 2B1.1. The Government’s assertion that no known services were rendered to the State of Nebraska (PSR, ¶39) is contrary to the evidence collected through subpoenas.

For example, NET approved Angels on Wheels to utilize up to \$24,734 dollars for marketing expenditures while indicating the rest of the funds from the grant should be utilized for the cost of managing multiple electronic collection and recycling events. (Exhibit 107,

Discovery “Banks-00004715” p. 2). In the thousands of pages of discovery there are numerous receipts verifying the use of funds from these grants. One such summary for invoices submitted to NET verified the use of \$35,565 for the costs of recycling collected electronics and marketing for the collection events. (Exhibit 108, Discovery “Banks-00004715” p. 99). The financial records from Angels on Wheels and Cross Training Center also show that over \$250,000 dollars was paid directly to “Glassico” by Cross Training Center between 2019 and 2020. Glassico is a glass recycling company utilized by Cross Training Center during their recycling projects.

Although Banks provided some false information, ultimately, the money granted to her was used as intended. Banks applied for grant money to complete recycling projects, the money was provided to complete recycling projects and the recycling projects were completed.

When the Probation Office asked the case agent how any “purloined funds were spent,” the agent could only suggest that “there was *some* amount of personal spending on behalf of the defendant.” (PSR, ¶44) (emphasis added). At the sentencing hearing in response to the objection, the Government must show evidence of specifically how funds were diverted away from their intended use or misused by Banks.

b. Banks loss calculation.

Banks concedes that some money was used improperly. She used some of the proceeds to purchase a vehicle and jewelry for her son. However, the majority of the funds were used for their intended purpose. Accordingly, the determination of loss should be limited to those monies that were not used as intended, not the full balance of the grant amounts.

If an individual requested \$100,000 dollars from a lender to start a construction company and then proceeded to use \$90,000 dollars for that exact purpose but gambled away the remaining \$10,000 dollars improperly, the loss to the lender would not be \$100,000 dollars.

The total loss to the lender would be \$10,000 dollars, the amount that was diverted from the intended use.

Banks completed recycling projects that were used to collect electronics and recycle or dispose of them at different facilities. The funds received allowed for basic overhead expenses such as commercial mortgage payments, compensation to employees and temporary workers, utilities and marketing/advertising expenses. The total loss calculation should not be premised on an argument that claims that because some funds may have been misused that all the funds received constitute loss. As stated in the PSR, the lenders have not been able to provide any specific indication of loss. (PSR, ¶¶39, 46).

Additionally, there is no information to support any argument that Banks improperly used the PPP loan of \$60,420. Although she did provide incorrect *paperwork*, stating the Board of Directors approved of her applying for the loan, she did not misuse or divert the loan proceeds from their intended purpose. The false allegation that the Board of Directors approved of her application was not essential or required to obtain or receive the PPP loan. There is no allegation that the material and essential statements required to obtain the PPP loan were false. Additionally, there is no evidence that she did not use the PPP loan as intended. The PPP loan was forgiven as there was sufficient documentation provided to show that the loan was used for company payroll.

Banks has accepted responsibility for her acts and has acknowledged that some of the funds were misused. Banks believes that the following misappropriations resulted in loss:

- a. The purchase of a personal vehicle (\$20,000); and
- b. Personal expenses for her or her family (\$6,500).

This results in a total loss amount of \$26,500. Such a loss results in an enhancement under §2B1.1(b)(1)(G) of 4 levels.

2. Misrepresentation of acting on behalf of a charity is improperly scored..

Probation improperly applied the misrepresentation enhancement under Section 2B1.1(b)(9)(A). That enhancement applies if the offense involved a “misrepresentation that the defendant was acting on behalf of a charitable” organization. This enhancement may apply when a defendant is associated with a charity “when, in fact, the defendant intended to divert all or part of that benefit”. See Commentary Note 8(B) to 2B1.1. The commentary note provides examples of when the enhancement applies that would exclude Banks. This provision applies if there is evidence that a defendant intended to divert personal funds at the time of the request. That is not the situation here.

Banks owned and operated a charity that used funds for charitable purposes. While a small portion of funds received were diverted for personal expenses, she was not obtaining the funds (in the hundreds of thousands) for her small, personal expenditures. This enhancement is aimed to increase the punishment of individuals who falsely claim to work for a charity to receive funds.

Banks operated Angels on Wheels and Cross Training Center for over two decades. During that time those charities provided the community with food, education and job experience. Her misuse of a small portion of funds does not negate the fact that she operated a charity, requested and received funds for that charity and utilized those funds for her charity. She did not misrepresent that she was acting on behalf of her charity. Those funds were delivered directly to the bank accounts belonging to the charity and used for charitable purposes.

ARGUMENT

Removing eight (8) levels from the total loss calculation and two levels for misrepresentation of a charity, Banks' adjusted offense level becomes thirteen (13).

BOL	7
Loss amount	+4
Abuse of trust	+2
AOL	13
Acceptance	-2
Zero CH	-2
TOL	9

This results in an advisory guidelines range of four (4) to ten (10) months. This falls in Zone B of the Sentencing Table.

Banks has no prior criminal history and spent the previous two decades operating a charity in the Omaha Community that started off serving warm meals and evolved into a job training center that assists the homeless, victims of domestic violence and those recently released from incarceration.

She used funds from the charity to purchase personal items. She did not fail to complete tasks or projects due to any diversion of funds. She mismanaged funds but did so while still providing the intended services. She misused funds to purchase a \$20,000 Subaru and a few thousand dollars in personal expenses. She was not living an extravagant lifestyle or using the funds for any other illegal or immoral reasons (i.e. drugs, gambling, etc.). The intended charitable work was done and the projects funded by the grant money were completed.

A sentence of probation would provide just punishment for the offense and provide Banks with correctional treatment in the most effective manner. It would also provide the

most effective means of obtaining restitution. This was a non-violent offense committed by a 61-year-old woman. A sentence of probation would be sufficient but not greater than necessary.

CONCLUSION

For these reasons and any other reasons that may be presented at the time of sentencing, Banks respectfully requests that this Court grant her Motion for Downward Variance and sentence her to a term of probation.

BRENDA K. BANKS, Defendant,

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CERTIFICATE OF SERVICE

I certify that on January 22, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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