U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of MUSCOGEE (CREEK) Nation, Complainant, v. U.S. DEPARTMENT OF LABOR Respondent and OKLAHOMA TRIBAL ASSISTANCE PROGRAM, THE CHEROKEE NATION AND THE SEMINALE NATION Intervenors	Case No. 84-JTP-12

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Before: GLENN ROBERT LAWRENCE
Administrative Law Judge

DECISION AND ORDER OF DISMISSAL

I

FINDINGS OF FACT

A. General

1. This action arises under Section 401 of the Job Training Partnership Act. P.L. 93-300, 96 Stat. 1322, 29 U.S.C. §1617. It was heard April 16, and April 17, 1984 in Washington, D.C. Proposed Findings of Fact and Conclusions of Law and replys were filed by the parties. Complainant's June 6, 1984 submission of the new exhibits has been received into evidence. However these documents have limited relevance.

2. On May 27, 1983 the Employment and Training Administration (ETA) of DOL published a Solicitation of Notices of Intent (SNOI) in the Federal Register for applications for Program Year 1984 funds pursuant to Section 401 of the Job Training Partnership Act, 48 Fed. Reg. 23937. Prior to that, under date of May 20, 1983, copies of the notice were sent to Native American grantees under the Comprehensive Employment and Training Act (CETA) program. (AF, Tab D, 80-94). 1/

3. The SNOI sets forth "the process by which applicants will be selected and designated as potential grantees with whom the Department of Labor will negotiate Program Year grants." 48 Fed. Reg. 23,937 (May 27, 1983) (AF 79, 81). During the solicitation and selection process, applicants for grant funds were required to demonstrate that they possessed or could "acquire the managerial, technical, or administrative staff with the ability to properly administer grant funds, develop employment and training opportunities, evaluate program performance and comply with the provisions of the Act, DOL regulations at 20 C.F.R. 29-70, and forthcoming regulations specific to this program." Id. (AF, Tab D, 79, 84).

1/ "AF" refers to the Grant Officer's Administrative File.

4. Each applicant was also required to submit the Standard Form 424, and to supplement this form with additional data which included a description of the geographic area or areas proposed to be served, together with the Indian and Native American population in such area. 48 Fed. Reg. 23,938 (May 27, 1983). (AF, Tab D, 80, 86-87).

5. All of the provisions are relevant to the Grant Officer's determination of whether an applicant has met the necessary criteria to be designated as a grantee and whether two or more grantees seek to serve the same areas. Some of the specific sections which are directly applicable to this proceeding state in pertinent part:

> 2. References. Section 401, JTPA.
>
> 3. Types of Eligible Applicants. The following entities are eligible to submit a Notice of Intent.
>
> a. Indian Tribes, bands or groups. Indian tribes, band or groups which meet the requirements of Part 4, below.
>
> * * * *
>
> d. Public or private agencies. Private non-profit agencies or public agencies which meet requirements of Part 4, below,...to serve areas where there are significant numbers of Indians or Native Americans, but where there are no Indian tribes, bands or groups... eligible for designation....
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> * * * *

f. In a situation where the DOL does not designate Indian tribes, bands or groups...to serve such groups, the DOL will, to the maximum extent feasible enter into arrangements for the provision of services to such groups with other types of grantees which meet with the approval of the Indian tribes, bands or groups... to be served. In such cases, the DOL will consult with the governing body of such Indian tribes, bands or groups...prior to the designation of a Native American grantee.

g. In designating Native American grantees to serve groups other than those in Par. f., above, such as nonreservation Indians and Native Hawaiians, the DOL will, whenever feasible, designate grantees which are directly controlled by Indian or Native American people. Where it is not feasible to designate such types of grantees, DOL will consult with Indian and Native American controlled organizations in the area with respect to the designation of a Native American grantee. Where a private nonprofit organization is designated, DOL shall require any such grantee not directly controlled by Indian or Native American people to establish a Native American Employment and Training Planning Council and to implement an Indian preference policy with respect to hiring of staff and contracting for services with regard to all funds provided pursuant to JTPA (Sec. 7(b) of the Indian Self-Determination and Education Assistance Act).

* * * *

4. BASIC ELIGIBILITY REQUIREMENTS. To be eligible for designation, an applicant must have:

a. A governing body;

b. An Indian or Native American population within its designated service area of at least 1,000 persons:

c. The capability to administer an Indian and Native American employment and training program. For purposes of this paragraph, "capability to administer" means that the applicant can demonstrate that it possesses, or can acquire the managerial, technical, or administrative staff with the ability to properly administer grant funds, develop employment and training opportunities, evaluate program performance and comply with the provisions of the Act, DOL regulations at 20 C.F.R. 29-70, and forthcoming regulations specific to this program.

5. Required Notice of Intent and Procedures...

* * * *

b. In addition to the standard form 424, an applicant must submit the following information:

1) a description of the geographic area or areas which the applicant proposes to serve, together with the Indian and Native American population in such areas, to the extent known, and the source of the population information. The description must include a list of counties, in alphabetical order, followed by a list of tribes, bands or groups (if any), in alphabetical order, and the square mileage of the requested service area. If the applicant was a Native American grantee for the period prior to the one which is being applied for, the applicant must also list any counties and tribes, band or groups, which are being added to, or deleted from, the previous fiscal year's service area and a complete and detailed explanation justifying the requested change.

48 Fed. Req. 2397-2398 (1983) (emphasis added). (AF, Tab D, pp. 82-86).

6. Section (b) (1) of the SNOI clearly contemplates applicants who were Native American grantees in FY 1983 to specifically identify any additions to the service areas which they were requesting.

7. In reviewing the Notice of Intent (NOI) a prior grantee, the Federal Representative placed great reliance on. the applicant's specification of any additions or deletions in proposed service areas for fiscal year 1984 from the 1983 allocations. Any such additions required a "complete and detailed explanation justifying the change" as required by the SNOI. (TR 92-93).2/

8. The SNOI does not address DOL procedures for allocation of funds.

9. The Muscogee (Creek) Nation submitted an NO1 on June 6, 1983. (AF, Tab D, p. 25).

10. The Native Americans in the State of Oklahoma, with the exception of one tribe, do not live on federally or State recognized reservations. (TR 97).

11. The Creek Nation's 1984 NO1 made an internally inconsistent application for service areas. (AR, Tab D, pp. 25, 29).

12. The Creek Nation identified the following areas on the Standard Form 424, as the "areas of project impact" were identified as Creek, Hughes, McIntosh, Muscogee, Okfuskee, Okmulgee, Tulsa and Wagnor. (AF, Tab D, p. 25). These same areas were also identified in the section of the NO1 captioned "geographic location."

2/ "TR" represent the transcript for these proceedings.

13. However, in the section of the Creek Nation's NO1 captioned "geographic areas/population to be served" the Creek Nation states:

> Counties to be served as: the land area comprising the jurisdictional boundaries of the Creek Nation is primarily located in East Central Oklahoma, some fifty-five (55) miles south of the Kansas border, sixty (60) miles west of the Arkansas border and one-hundred (100) miles north of the Texas border. Approximately 3.2 million acres or 5,000 square miles of land lay within the jurisdictional boundaries with eleven (11) counties either whole or in part represented (see map attachment #2). The represented counties include: Creek, Tulsa, Wagnor, Okmulgee, Hughes, Okfuskee, McIntosh; Muscogee, Mayes, Rogers, and Simonole.
>
> National population figures as provided by the United States Department of Commerce, Bureau of Census through the Decennial 1980 Population Count. Attachment #3.

COUNTIES COUNT	POPULATION
Creek	3,510
Tulsa	17,553
Wagnor	2,733
Okmulgee	3,471
Hughes	1,944
Okfuskee	1,620
McIntosh	1,887
Muscogee	3,692
Mayes	0
Rogers	112
Seminole	418
TOTAL	39,940

(AF, Tab D, p. 29).

14. References were made to the Creek population in Mayes, Rogers, and Seminole counties which does not appear anywhere else in the Creek's Notice. (AF, Tab D).

15. The population data appearing in the "geographic/ population to be served" portion of the Creek Nation NO1 was taken from 1980 Census data of State, Counties, or County Subdivisions. (TR 200, 222; AF, Tab B, p. 29, P-l).

16. The Cherokee Nation of Oklahoma submitted an NO1 on June 10, 1983. (AF, Tab F, p. 146). In that NO1 applied for the following counties: Adair, Cherokee, Craig, Delaware, Mayes, Muscogee (portion), Nowata, Ottawa (portion), Rogers, Sequoyah, Wagnor (portion) and Washington, (AF, Tab F, pp. 146, 148, 150). The Cherokee Nation also listed other counties, parts of which were within its treaty boundaries but which were not being applied for. The counties were Tulsa and McIntosh. (AF, Tab F, pp. 146, 148, 149, 150).

17. In fiscal years 1982 and 1983 the Cherokee Nation received the full allocation for all Native American Indians identified as of poverty level and unemployed in Wagnor County (AF 1, Tab D, pp. 49, 55).

18. In the 1983 fiscal year, however, the Cherokee Nation split Muscogee County with the Creek Nation. The allocation of funds was based on the Native American Indians identified as of poverty level and unemployed in the County. (AF 1, Tab D, pp. 49, 55).

19. The Seminole Nation of Oklahoma applied to be the Native American grantee for Seminole County. It has been the grantee for Seminole County since the inception of the CETA program.

B. City of Tulsa

20. The City of Tulsa is not exclusively within the County of Tulsa. A portion of the City of Tulsa is within Osage County. (AF1, Tab B, p. 33).

21. The Creek Nation asserts that by merely identifying Tulsa with a population of 17,553 it put the Grant Officer on sufficient notice that it was applying for the "City of Tulsa." Nowhere in the Creek Nation's NO1 does the Creek Nation specifically indicate that they are requesting the "City of Tulsa."

22. The Creek Nation's NO1 does not indicate in any fashion that they were requesting service areas any different from those which the Grant Officer gave them in the prior fiscal year, i.e., 1983. (AF, Tab D). Specifically, there was no indication that the Creek Nation was requesting that they receive more than they

received in the 1983 allocation, much less the "complete and detailed explanation justifying the requested change" as required in the SNOI. 48 Fed. Reg. 23,938 (May 27, 1983). (AF, Tab D).

23. The actual areas for which the Creek Nation received funds to service the 1982-1983 program years did not include the City of Tulsa.

24. The areas identified in the Creek Nation's FY 1984 NO1 were the same areas identified in the 1982-1983 Notice of Intent. Buddy York, Director of the Tribal Affairs for the Muscogee Nation, testified that the areas for which the Nation applied were the same areas that the Muscogee Nation "always applied for." (TR 217).

25. The Creek Nation produced no evidence establishing that any attempt had been made to clarify their NO1 to reflect a request for the City of Tulsa.

26. In reviewing the Creek Nation's NOI, neither the Federal Representative, nor his Supervisor, Ms, Margaret H. Crosby, interpreted the application as applying for the City of Tulsa. (TR 176, 178).

27. The Oklahoma Tribal Action Program (OTAP) has served as the Native American grantee for the City of Tulsa for the fiscal years 1982 and 1983.

28. OTAP applied to serve as a Native American JTPA grantee for the City of Tulsa. (AF, Tab E). OTAP is an organization of Oklahoma Indians directly controlled as a private nonprofit corporation. (AF, Tab E, p. 112). The members of its Board of Directors are all Oklahoma Indians.

29. In light of information presented in the Creek Nation's NOI, the Federal Representative or his Supervisor's interpretation was reasonable. Had the Creek Nation specified that it was requesting an addition to its service area of the City of Tulsa, the review would have gone to a panel. (TR 121).

C. Grant Officer's Procedures for Designating Grantees and Determining Disallowed Funds.

30. ETA's review process for program year 1984 NOIs began with a Federal Representative who reviewed the application and filled out a form to determine if all the required elements were contained in the NOI. (TR 173-174).

31. The Federal Representative was responsible for making the initial determination regarding whether the areas were being requested by two applicants. (TR 76, 92, 175-176, AF, Tab C, 15).

32. The Federal Representative also examined the NOI to ensure that it complied with requirements

of the SNOI, and satisfied a responsibility review. (TR 77, 79, 90). A check was also made to ensure there were no outstanding debts or outstanding cases of fraud or abuse. Id. Past performance was considered in the responsibility review. (TR 80).

33. After the Federal Representative completed his/her review, his/her supervisor reviewed the Grantees' NO1 and the checklist which was completed by the Federal Representative to ensure it was properly completed. (TR 173-174).

34. The Creek Nation's NOI was reviewed as were those of all the applicants. (TR 173).

35. The Supervisor for the Federal Representative, Ms. Margaret Crosby, after follow-up conversations with officials of the Creek Nation to explain the substantial deviations between planned and actual performance (TR 180-181, 193-5, 198-199), determined that the Creek Nation was eligible to be a grantee under Section 401 of JTPA after a review of the NOI, the Federal Representative checklist and performance data.

36. Ms. Crosby's conversation during the process of the NO1 review focused on explanations in the deviations in performance data to ensure the Creek Nation threshold eligibility. (TR 179). After she received

sufficient information to satisfy eligiblity she recommended that they be designated as a grantee.

37. The Grant Officer concurred in the recommendation that the Creek Nation was a qualified applicant and designated the Creek Nation as a grantee for FY 1984.

38. The allocation of funds is a process distinct from the process of determining whether an applicant satisfies the minimum qualification to be eligible to be designated as a grantee.

39. Allocation of funds is based upon the number of poverty level and unemployed Native Americans in services areas. (TR 95, 156, 162).

40. In determining the allocation of funds, the Grant Officer awards each grantees service areas and computes the fund allocation based on the number of poverty level or unemployed Native Americans in these areas. (TR 95).

41. In prior years, the Grant Officer has attempted to use the Oklahoma Native American treaty boundaries as a guide in determining service areas to establish when the majority of any particular tribe resided in the state. (TR 133-134, 138, 142). Where counties are within the treaty boundaries of an Oklahoma

Native American Tribe and there were not significant numbers of other Native American Tribes in the areas, the Grant Officer attempted to allocate funds based upon the number of poverty level and unemployed Native Americans in that area to that Tribe. The treaty boundaries for the Native Americans, however, have been used as general guidelines.

42. In FY 1984, the allocation of funds continued to be premised on the number of poverty level and unemployed Native Americans in the counties of Oklahoma. (TR, 95, AF 1, Tab A & B).

43. 1984 was the first grant year when the 1980 Census was available in a usable form which identified the poverty level and unemployed Native Americans in the areas throughout the United States. (TR 93-94; 132-33).

44. Consequently, the process of determining the application of the 1980 Census data, the allocation of funds and service areas in FY 1984 was a bit different.

45. William McVeigh, a Manpower Development Specialist, was primarily responsible for applying the 1980 Census data for purposes of determining the allocation of funds to applicants designated as grantees in 1984.

46. William McVeigh tried to maintain basically the same concept for allocation of funds. He attempted to continue to award grantees service areas by counties using treaty boundaries for the Native Americans as general guidelines. (TR 140).

47. However, given the manner in which the 1980 Census data was provided, a different methodology was employed for determining the allocation of funds to service areas in some situations in Oklahoma. In those cases two other factors were also considered in the identification of services areas: a) the existence of a substantial number of an identifiable Native American tribes in a particular county, and b) the existence of contiguous counties assigned a grantee. (TR 144-146).

48. In situations where it did not appear reasonable, based on all these factors, to give one Native American Tribe an entire allocation of funds for a full county, disbursements were split based upon the distinction provided in the 1980 census data (i.e., the breakdown of the various Native American Tribes within the county). (TR 138-139).

49. In counties where it did not appear reasonable, to give one Native American Tribe an entire alloca-

tion of funds and two or more Native American Tribes were identified as having a significant number of poverty level or unemployed in the county, the entire county was designated as a service area for both tribes and the funds were allocated to each tribe based upon the number of poverty level and unemployed members of each tribe in the county and half of the eligible Native Americans not identified in the Census by tribal membership. **(TR 134, 138).**

II

CONCLUSIONS OF LAW

A. City of Tulsa

1. The Creek Nation asserts that the Grant Officer's failure to assign it the City of Tulsa was arbitrary and capricious. It maintains that it properly requested the City as a service area and that, having made this request, it had an absolute preferential right of selection. Neither of these assertions is supportable as matters of fact or law.

2. The Creek Nation asserts that it has applied for the City of Tulsa as they "always" had. (TR 217). Mere intent, however, is insufficient. Applicants for Federal grants are required to comply with the terms and conditions of the application procedures.

4. The Grant Officer has the authority to reject applications or parts thereof for their failure to properly comply with the grant application procedures.

Section (b)(l) of the SNOI provides in part:

> If the applicant was a Native American grantee for the period prior to the one which is being applied for, the applicant must also list any counties and tribes, bands or groups, which are being added to, or deleted from, the previous fiscal year's service area and a complete and detailed explanation justifying the requested change.

48 Fed. Reg. 2397-2398 (1983) (emphasis added). (AF, Tab D., pp. 82-86).

5. Where, as here, a Grant Officer reasonably believed that the Creek Nation's NO1 did not include a request for the City of Tulsa, his decision must be upheld.

6. As previously indicated, the Creek Nation's NO1 failed to comply with the SNOI requirement that it specifically state its request for any additional service areas from those allocated in 1983 and explain its basis for this request. There is no evidence which indicates that the Creek Nation expected or intended to receive increases in the service areas or proportionate allocation of funds in FY 1984 that was any greater than it received in 1983.

9. Given the Creek Nation's failure to specify their request for the City of Tulsa in their NOI, or produce any evidence to establish that any efforts were made to inform the Federal Representative or his/her Supervisor that their request encompassed the City of Tulsa, they acted reasonably in assuming that their request was the same as the FY 1983 allocation which did not include the City of Tulsa.

10. Assuming, arguendo, that the Creek Nation properly applied for the City of Tulsa it has no absolute preferential right of selection over OTAP.

11. Section 401 of JTPA, like the provision under its predecessor statute, Section 302 of the Comprehensive Employment and Training Act of 1973 (CETA), as amended, 29 U.S.C. § 872, articulates a general preference for having Native Americans operate Native American employment and training programs where possible.

12. JTPA and CETA both provide that the Secretary shall whenever possible utilize Native American tribes, bands, or groups on Federal or State reservations and Oklahoma Indians.

Section 401(c)(l)(A) of JTPA provides in part:

> In carrying out responsibilities under this section, the Secretary shall, wherever possible, utilize Indian tribes, bands, or groups on Federal or State reservations,

> Oklahoma Indians,...having a governing body for the provision of employment and training services under this section. When the Secretary determines that such tribe, band, or group has demonstrated the capability to effectively administer a comprehensive employment and training program, the Secretary shall require such tribe, band, or group to submit a comprehensive plan meeting such requirements as the Secretary prescribes.

29 U.S.C. § 1671(c) (1) (A) (emphasis added). The 1978 amendments to Section 302(c)(l) (A) of CETA provided in part:

> In carrying out responsibilities under this section, the Secretary shall, wherever possible, utilize Native American Indian tribes, band or groups on Federal or State reservations...and the Oklahoma Indians, having a governing body and such organizations as the Secretary determines will best serve Native Americans, for the provision of employment and training services under this section. When the Secretary determines that such tribe, band or group has demonstrated the capability to effectively administer a comprehensive employment and training program, the Secretary shall require such tribe, band or group to submit a comprehensive plan meeting such requirements as the Secretary prescribes.

Similarly, the applicable provision of the original CETA Act provided in part:

> In carrying out his responsibilities under this section, the Secretary shall wherever possible, utilize Indian tribes, band or groups... having a government body, for the provision of manpower services under this title. When the Secretary determines that such tribe, band, or