

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005
(504) 589-6201



In the Matter of

'NATO INDIAN NATION,
Complainant

Case No. 97-JTP- 13

v.

U.S. DEPARTMENT OF LABOR
Respondent

APPEARANCES:

Henry Clayton, pro se
'Nato Indian Nation
P.O. Box 540922
Grand Prairie, TX 75054-0922
For the Complainant

Gary E. Bernstecker, esq.
Office of the Solicitor
U.S. Department of Labor
Suite N-2101
200 Constitution Avenue, NW
Washington, DC 20210
For the Respondent

BEFORE: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER

This is a dispute arising under the Job Training and Partnership Act (JTPA), 29 U.S.C. § 1501 et seq., and the implementing regulations contained at 20 C.F.R. Part 632 and 636. Complainant 'NATO Indian Nation (NATO) has requested an administrative review under 20 C.F.R. 636.10 of the decision of the Grant Officer to reject their application for a grant to provide job training services to the Indian population of the state of Texas under Title IV, Section 401 of the **JTPA**. On May 7,

EALJ 0436

1997, NATO filed a formal request for hearing in front of the Office of Administrative Law Judges.’ In lieu of a hearing, and pursuant to this Court’s Order of May 14, 1998, the parties’ have stipulated that the record of this matter will be comprised of the administrative file; Federally Recognized Native American Tribes, 1996, U.S. Department of the Interior, Bureau of Indian Affairs; Native American Data from 1990 Census - State of Texas; Native Americans PY 1997 JTPA Title IV-A Allotments, Employment and Training Administration, U.S. Department of Labor; and the June 26, 1998 deposition testimony of Grant Officer James C. DeLuca. Both parties submitted timely post-hearing briefs.

STATEMENT OF THE CASE

A. Background

Section 401 of the JTPA provides:

The Congress finds that —

- (1) serious unemployment and economic disadvantages exist among members of Indian, Alaskan Native and Hawaiian Native Communities;
- (2) there is a compelling need for the establishment of comprehensive training and employment programs for members of those communities; and
- (3) such programs are essential to the reduction of economic disadvantages among individual members of those communities and to the advancement of economic and social development in the communities consistent with their goals and lifestyles.

29 U.S.C. § 1671(a).

As stated above, Congress determined that this program should be administered by the Federal government versus administration by the individual states. This Section requires that the Secretary of Labor

. . . shall **after** consultation with representatives of Indians and other Native Americans, prescribe such rules, regulations and performance standards pursuant to section 1516 of this title relating to Native American programs under this section as may be required to meet special circumstances under which such programs operate.

¹ Ysleta Del **Sur** Pueblo, Tigua Indian Reservation and the Dallas Inter-tribal Center filed notices to participate as parties-in-interest. However, neither **party has** filed any pleadings, participated in any conference calls, or participated in the deposition of Grant Officer **DeLuca**.

29 U.S.C. § 1671(h)(1).

Competition for grants under the JTPA is conducted every two years. To implement the program, the Secretary of Labor promulgated the regulations located at 20 C.F.R. Part 632. The procedures for awarding grants under Section 401 of the JTPA are found at 20 C.F.R. §§ 632.10 through 632.125. Under these regulations, the Department of Labor is required and did publish the criteria for selection of JTPA grantees for the program years 1997 and 1998 in the *Federal Register*, the Solicitation for Grant Application: Final Designation Procedures for Grantees for Program Years 1997 and 1998 (SGA). 61 Fed. Reg. 4817048174. These criteria are based on the eligibility and application requirements promulgated by the U.S. Department of Labor at 20 C.F.R. § 632.10 and § 632.11. Section 632.1 l(a) specifically provides

... an applicant for designation as a Native American grantee shall submit a notice of intent to apply for **funds** . . . [and] the following information **shall** be included in the notice of intent: (emphasis added)

(1) Evidence that the applicant meets the requirements for a Native American grantee contained in §632.10; . . .

(3) A description of the applicant's organization, including the **legal status** of the applicant, the process of selection of the **governing** body, the duties and responsibilities of the governing body, and in the case of private non-profit organizations, a copy of the articles of incorporation. (emphasis added).

Further, Part III, "Final Notice of Intent," of the SGA provides that an applicant must submit a Final Notice of Intent (**FNOI**) and that the FNOI must contain (as outlined at 20 C.F.R. § 632.11):

An indication of the applicant's legal **status**, including articles of incorporation or consortium agreement as appropriate.

B. Chronology

On December 31, 1996, NATO filed their Final Notice of Intent (**FNOI**) with the Department of Labor seeking a grant for program years 1997 and 1998 pursuant to Title IV, Section 401 for all of the non-reservation land in the state of Texas. In addition to NATO, the Department also received **FNOI's** from the Alabama-Coushatta Indians for their reservation and the 122 counties in the eastern half of Texas, **from** Ysleta Del Sur Pueblos, Tiqua Indian Tribe for their reservation and the 122 counties in the western half of Texas, and from the Dallas Inter-tribal Center for the counties around Dallas, Texas. Both the Alabama-Coushatta Indians and the Ysleta Del Sur Pueblos, Tiqua Indian Tribe applied as **federally** recognized trii and the Dallas Inter-tribal Center as an Indian private, **non-**

profit organization. All three were incumbent JTPA Title IV grantees.

On **February** 19, 1997, the Grant **Officer** informed NATO that their **application/FNOI** had been ruled ineligible and rejected, as it did not provide documentation of NATO's legal status or documentation that NATO was a state or federally recognized tribe. On **March 1, 1997**, the Grant Officer designated the Alabama-Coushatta Indians, Ysleta Del Sur Pueblos, Tiqua Indian Tribe, and the Dallas Inter-tribal Center as Title IV, Section 401 grantees for program years 1997 and 1998 for the geographic regions requested in their **FNOIs**.

On **February** 27, 1997, attorney Kenneth Bonner, then representative of NATO, **filed** a petition for reconsideration, which included NATO's constitution and by-laws as a tribe, as well as their articles of incorporation as a non-profit entity. No documentation indicating that NATO was a state or federally recognized tribe was included, nor was any documentation that NATO had their own reservation. In an April 8, 1997 letter to Bonner, the Grant Officer denied NATO's petition for reconsideration, explaining that NATO's **application/FNOI** had been rejected as incomplete and that accepting any additional documents as part of a petition for reconsideration would be contrary to the Department's stated policy of not accepting new information after the deadline for submission of the FNOI. On May 7, 1997, NATO filed a request for a hearing before the Office of Administrative Law Judges.*

B. Deposition Testimony of Grant Officer James C. DeLuca

James DeLuca is a **contracting** grants management specialist for the U.S. Department of Labor and serves as the contracting and grant officer for the Department of Labor. He has held that position since 1989. DeLuca is responsible for decisions regarding Native American grants. His deposition testimony was taken in lieu of a formal hearing in this matter.

DeLuca **testified** that because the awarding of a grant is a competitive process, it is always incumbent on the applicant to provide all the specifically required information. This information includes the legal status of the organization. If the organization is a tribe, they can establish their legal status with the **documentation** provided to them **from** the Bureau of Indian **Affairs (BIA)**, or if the tribe is not BIA-recognized, then documentation from their state establishing state recognition. If the **organization** is applying as a private, non-profit organization, their legal status can be established with a letter from their state, their charter, and their articles of incorporation. Because of **staffing** restrictions, the Department does not have the resources to investigate an organization's legal status. The legal status of an **organization** is required because the Department provides grants to legal entities to operate Department programs, not to individuals.

² The Grant Officer **filed** a motion to dismiss for lack of jurisdiction on November 5, **1997**. **This** motion was denied.

DeLuca explained that under the JTPA an absolute preference is given to federal and state recognized Indian tribes applying for grants for their own reservations, but for off-reservation land, recognized tribes receive no greater preference than a private, non-profit organization. A Hierarchy 1 designation, for which NATO applied, is for federal or state recognized tribes on their own **reservations**.³ NATO provided no information that they had a reservation for which they were **applying**.

DeLuca does not **define** which organizations qualify as an Indian tribe. Rather, he relies on the BIA and the states to inform him of which organizations have received such recognition. If a **self-proclaimed** “tribe” is not BIA or state recognized, DeLuca consults with the Division of Indian Native American Programs (**DINAP**)⁴ prior to making the appropriate determination of status. Here, he concluded that, with exception self-attestation, NATO submitted no evidence of “tribe” status.

Regarding the rejection of NATO’s application, DeLuca testified that the Department’s Solicitation for Grant Application: **Final** Designation Procedures for Grantees for Program Years 1997 and 1998 (SGA), printed in 61 *Federal Register* 48 170-48 174, and the corresponding federal regulations require applicants to provide whether they are tribes or whether they are private, non-profit corporations, i.e. provide their legal status. The legal status is required of every applicant for **non-reservation** land. NATO **failed** to provide their legal status in their **application/FNOI**, and was rejected on that basis. The result would have been the same whether they had applied as a tribe or as a private, non-profit corporation. DeLuca testified that he did not review NATO’s proposal once he determined that their legal status was not provided.

After NATO was informed that their application had been rejected, DeLuca received **from** their representative NATO’s articles of incorporation and **501C3** status as a private, non-profit organization as part of their motion for reconsideration. He did not consider the additional information because it was not submitted with NATO’s original proposal (**FNOI**). This was due to the competitive nature of the process and the desire to be **fair** to all applicants involved. DeLuca explained that this was the usual treatment of information submitted after the original proposal deadline and that NATO was treated no differently than an other applicant who submits additional information with a motion for reconsideration.

³ An exception is provided for Oklahoma Indians, which is not relevant to **this** matter.

⁴ **DINAP** is **the** program office which administers JTPA Title 401 **programs**. They are responsible for the process of determining the hierarchy status of an applicant, which is determined by the division Chief or by committee, however, the Chief may overrule the **committee’s** determination. The final determination is then reported **to** DeLuca and used in setting up his **competitive** panel. In this matter, **the** **DINAP** Chief reached the same conclusion as **DeLuca**; that NATO failed to submit their **legal** status.

DISCUSSION

The role of the Administrative Law Judge in this matter is to review the evidence available to the Grant **Officer** at the time of the decision and to determine whether the decision was “arbitrary and capricious, an abuse of discretion, or not in accordance with the law.” County of Los Angeles Community and Senior Citizen Services v. I.L.S. Department of Labor, 87-JTP-17, 2 Decisions of the Office of Administrative Law Judges and Office of Administrative Appeals, No. 2, p. 136, 137 (ALJ June 29, 1988). This standard is met when the decision is based on “an erroneous view of the law or on a clearly erroneous assessment of the evidence.” Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 405 (1990).

In this matter, the record clearly establishes that NATO did not include evidence of their legal status as required by the regulations in their FNOI. Based on the undisputed evidence, NATO’s FNOI did not include the required documentation to establish their existence as an Indian tribe seeking a grant for their own reservation, or as a private, non-profit organization. The issue in dispute is whether **DeLuca**, acting for the Department, acted arbitrarily and capriciously in rejecting NATO’s application on this basis. As the credible testimony of DeLuca indicates, NATO’s application was rejected solely due to the lack of required documentation. He further testified that this was the Department’s standard procedure and that NATO was not treated any **differently** than any other applicant lacking the required documentation in their FNOI. Moreover, the decision was consistent with the express wording of the implementing regulations. Consequently, I **find** that the Department did not act arbitrarily or capriciously, and properly rejected Claimant’s initial **application/FNOI** in accordance with the applicant guidelines established in the regulations and the *Federal Register*.

Next I must determine whether the Department properly refused to consider the additional information, which established NATO’s legal status as a private, non-profit corporation, submitted by NATO as part of their motion for reconsideration. Part I, “General Designation Principles,” at (6)(b) of the SGA provides

All applicants described in Part IV, **(2), (3),** and (4) of the Preferential Hierarchy for Determining Designations’ will be considered on a competitive basis for such areas, and only information submitted with the Final Notice of Intent, as well as preaward clearances, **responsibility** reviews, and all regulatory requirements will be considered.

Further, Part III, “Final Notice of Intent,” of the SGA provides that

⁵ The SGA also provides a Preferential Hierarchy at Part IV, “Preferential Hierarchy for **Determining** Designations.” Category (1) provides an absolute **preference** for Indian tribes, bands, and groups for their own reservations. Because NATO provided no documentation that they had their own reservation, and the record indicates that they do not, NATO was excluded from Category (1).

It is **DOL's** policy that no information **affecting** the panel review process will be solicited or accepted past the regulatory postmarked or hand-delivered deadlines.

Once again, the record clearly establishes that the Department was operating within its established guidelines when Grant Officer DeLuca did not consider the additional information submitted by NATO with their motion for reconsideration. Again DeLuca's testimony indicated that NATO's application and additional information was treated **nodifferently** than would any other applicants in a similar situation. Again Grant Officer DeLuca's actions were consistent with the express wording of the implementing regulations. Consequently, I find that the Department did not act arbitrarily and capriciously, and properly refused to consider NATO's additional information, regardless of content, submitted with their motion for reconsideration.

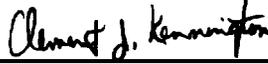
In conclusion, NATO's **application/FNOI** was properly rejected due to their failure to provide the mandatory documentation, as specifically outlined in the implementing regulations to the JTPA Pursuant to 20 C.F.R § **632.13(a)(2)(ii)**, the Grant Officer is entitled, upon the receipt of a Petition for Reconsideration, to uphold his original determination as correct. Grant Officer DeLuca properly did so in this matter.

ORDER

Based on the foregoing findings of fact and conclusions of law and the record in its entirety, I enter the following order:

It is hereby ordered that the request of 'NATO Indian Nation to have the decision of the Grant **Officer** reversed and to be designated as the JTPA Title IV grantee for the Program Years 1997 and I998 is **DENIED**.

ORDERED this 7th day of October, 1998, at Metairie, Louisiana.



CLEMENT J. KENNINGTON
Administrative Law Judge

SERVICE SHEET

CASE NAME: 'NATO INDIAN NATION

CASE NO.: 97-JTP- 13

TITLE OF DOCUMENT: **DECISION AND ORDER**

A copy of the above was sent to the following:

Gary E. Bernstecker, Esq.
Office of the Solicitor
U. S. Department of Labor
Suite N-2101
200 Constitution Ave., NW
Washington, D.C. 20210

Henry Clayton
Chief Justice
'Nato Indian Nation
First Federal District Court
P. O. Box 540922
Grand Prairie, TX 75054-0922

Cruz Rodriguez
JTPA Program Director
Tigua Indian Reservation
119 S. Old Pueblo Road
P. O. Box 17579
El Paso, TX 79917

Kenneth P. Martinez
Acting Executive Director and JTPA
Director
Dallas Inter-Tribal Center, Inc.
209 E. Jefferson
Dallas, TX 75203-2690

James E. White
Regional Solicitor
U. S. Department of Labor
Office of **the Solicitor**
525 **Griffin** Square Building
Suite 501
Griffin and Young Streets
Dallas, TX 75202

Kenneth P. **Bonner**, Jr., Esq.
Boyle & Bonner
Texas Bank Building
Suite 320
2525 **Ridgmar** Blvd.
Fort Worth, TX 76 116

R. Lance Grubb
Grant/Contract Officer
Office of Grants and
Contracts Management
U. S. Department of Labor, ETA
200 Constitution Ave., NW
Room N-47 16, FPB
Washington, DC 20210

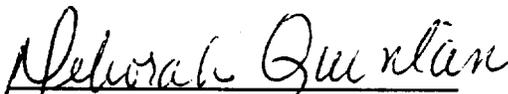
Brian T. Keilty
Administrator
U. S. Department of Labor, ETA
Office of Financial and Administrative
Management
Room N-467 1, FPB
200 Constitution Ave., NW
Washington, DC 202 10

Harry Sheintfield
Counsel for Litigation
Office of the Solicitor
U. S. Department of Labor
Room N-2101, FPB
200 Constitution Ave., NW
Washington, DC 20210

Edward A. **Tomchick**
Director
Office of the Grants and Contracts
Management
Employment Training Administration
U. S. Department of Labor
Room N-467 1, FPB
200 Constitution Ave., NW
Washington, DC 20210

Charles D. Raymond
Associate Solicitor for Employment and
Training Legal Services
Office of the Solicitor
U. S. Department of Labor
Suite N-2101, FPB
200 Constitution Ave., NW
Washington, DC 20210

Reporting


DEBORAH QUINLAN
DATED: *October 7, 1998*