

program grantee in FY 1982. The Grant Officer cited **TIC's** recordkeeping and reporting deficiencies as the reasons for the **nondesignation.**^{3/} TIC appealed the Grant Officer's decision to the Office of Administrative Law Judges (OALJ), and **DINAP** designated the United Southern and Eastern Tribes (**USET**), another non-profit organization which operated Section 302 programs elsewhere, as the Tennessee Section 302 grantee for FY 1982. After a hearing, the Administrative Law Judge (ALJ) ordered that TIC be designated as the Section 302 grantee in FY 1982.^{4/} However, the **ALJ's** decision became final on the last day of FY 1982.^{5/} TIC applied to be the Section 302 grantee for FY 1983 but it was not selected. DINAP again designated USET as the Tennessee Section 302 grantee in FY 1983 relying, at least in part, on the basis of **USET's** incumbent grantee status in FY 1982.^{6/} The Grant Officer's worksheet reflects that TIC was not designated as grantee because USET had a "sound program" as the incumbent.^{7/} TIC appealed its nondesignation for FY 1983 and after a hearing, the ALJ

^{3/}Grant Officer's final determination letter to TIC, dated September 30, 1981.

^{4/}Decision and Order in Tennessee Indian Council, Inc., Case No. 82-CET-27, dated August 21, 1982.

^{5/}20 C.F.R. § 676.91(f) (1985)

^{6/}U.S. Department of Labor Exhibit 5. Designation Decision file, dated July 1, 1982.

^{7/}U.S. Department of Labor Exhibit 4. Designation Decision file, dated July 2, 1982.

ruled that TIC should be designated, as the Section 302 grantee for Tennessee. The **ALJ's** decision was based on **DINAP's** reliance on **USET's** incumbent status although, under his previous decision, TIC should have been the FY 1982 grantee.⁸¹ The Grant Officer appealed this decision to the Secretary, and after review the case was remanded to the OALJ because the presiding ALJ did not give USET, an interested party, an opportunity to appear to support its designation as grantee.²¹ The ALJ, after considering the applications of both USET and TIC, again designated TIC as the FY 1983 Section 302 grantee for Tennessee.²² On September 30, 1983, the Secretary expressly adopted the **ALJ's** decision as the final action of the Department in this case.²¹

On October 12, 1983, TIC submitted its application for attorney's fees under EAJA. On November 23, 1983, TIC submitted an amendment to its application for the additional fees and costs it incurred in responding to the Grant Officer's opposition to its application. The ALJ granted **TIC's** application in a decision dated April 3, 1984, and the Grant Officer appealed.

^{8/} **Decision** and Order in Tennessee Indian Council, Inc., Case No. 83-CET-13, dated January 10, 1983.

^{9/} Secretary's Remand Order in Tennessee Indian Council, Inc., Case No. 83-CET-13, dated July 13, 1983.

^{10/} Decision and Order in Tennessee Indian Council, Inc., Case No. 83-CET-13 dated September 1, 1983.

^{11/} Final Decision and Order of the Secretary in Tennessee Indian Council, Inc., Case No. **83-CTA-13**, dated September 30, 1983.

DISCUSSION

The statutory authority under which TIC applies for attorney's fees and costs requires that the applying party must have prevailed in an adversary adjudication that falls within the purview of 5 U.S.C. § 554,^{12/} the adjudication provision of the Administrative Procedure Act. Section 554(a) states, inter alia:

This section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing (emphasis supplied)

The Grant Officer contests TIC's application for attorney's fees on the ground that TIC's appeal of its nondesignation as a Section 302 grantee is permitted by regulation [20 C.F.R. §688.147 (a)(4) (1985)] but not required by statute. This argument is appealing, since it appears that Congress did not intend that EAJA authorize attorney's fees to every party who prevails in an adjudicated dispute with the federal government. This intention is apparent since section 504(b)(1)(C) was amended by explicitly adding another category of proceeding, i.e., contract disputes,^{13/} to the definition of "adversarial adjudications" but leaving untouched the limitations on "adversarial adjudications" as defined by section 554 and which apply to all other administrative proceedings. However, in this case

^{12/5} U.S.C. § 504(b)(1)(C) (1982); the pertinent language of this section was not altered by the 1985 amendments in Public Law 99-80.

^{13/} Pub. L. No. 99-80 § (c)(2), 99 Stat. 183(1985).

it is not necessary to address the question of whether the **regu-**lations which permit appeals by unsuccessful applicants for Section 302 programs were integral to the statute and therefore necessary to its implementation, or merely a procedure devised solely by the Department so that its use by a party falls outside the scope of EAJA.

The initiation of this case was TIC's appeal of the Grant Officer's original finding in 1981 that TIC was not suitable to continue to act as the Tennessee Section 302 grantee. CETA provides for this appeal at Section 106(d)(1) of the statute. 29 **U.S.C. §** 816(d)(1) (Supp. V 1981). TIC prevailed in its appeal of the Grant Officer's action. All of the subsequent proceedings stem directly from the Grant Officer's erroneous decision in September, 1981, not to designate TIC as the Tennessee Section 302 grantee. TIC prevailed in every action it took to remedy the Grant Officer's decision. The fact that the **ALJ's** original decision that designated TIC as the FY 1982 grantee was not implemented was a matter of the passage of time; it was never reversed on the merits. Had the proper decision been made by the Grant Officer and implemented in a timely fashion, TIC and not USET would have been the FY 1982 grantee, and therefore would have had the incumbent's advantage in the FY 1983 selection process. Clearly it was the Grant Officer's erroneous underlying action that was at the foundation of the adjudications and appeals

that followed. Under CETA itself, TIC was entitled to appeal that decision and it is entitled to recover the attorney's fees consequent to its successful pursuit of that appeal.

ORDER

The April 3, 1984 decision of the Administrative Law Judge is hereby affirmed, and the Tennessee Indian Council is awarded attorney's fees and costs in the sum of \$13,414.21.



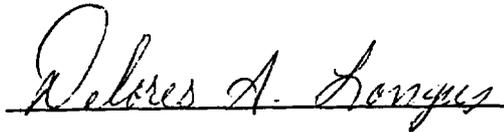
Secretary of Labor

Dated: DEC 3 1 1983
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Tennessee Indian Council, Inc.
Case No.: 83-CET-13
Document: DECISION AND ORDER
BACKGROUND

A copy of the above-referenced document was sent to the following persons on December 31, 1985.



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