

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: May 23, 1988
CASE NO. 87-JTP-19

NEBRASKA INDIAN INTER-TRIBAL
DEVELOPMENT CORPORATION,

COMPLAINANT,

v .

U.S. DEPARTMENT OF LABOR,

RESPONDENT,

and

REGION VII AMERICAN
INDIAN COUNCIL,

DEFENDANT.

BEFORE THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND

This is a challenge by Complainant, Nebraska Indian Inter-Tribal Development Corporation (Nebraska Indian), to the award to Defendant, Region VII American Indian Council (AIC), of a two year Native American grant for **Woodbury** County, Iowa, from July 1, 1987, to June 30, 1989, under Section 401 of the Job Training Partnership Act (JTPA), 29 U.S.C. § 1671 (1982). Nebraska Indian was one of the competing, unsuccessful applicants for the grant for **Woodbury** County which **was** awarded to AIC. Nebraska Indian requested a hearing before an

administrative law judge (**ALJ**) under 20 C.F.R. § 636.10 (1987). ^{1/}

AIC was notified by the Grant Officer by mailgram that a hearing would be held on Nebraska Indian's challenge and of **AIC's opportunity** to participate as a party in interest. **AIC's** counsel responded by letter to the Grant Officer notifying him of their representation of AIC and requesting that copies of all future notifications and other correspondence be served on **AIC's** counsel as well as AIC. That letter was never responded to and such service was never made, either by the Grant Officer, his counsel, Nebraska Indian, or the **ALJ**. ^{2/} Thirteen days before the hearing was to be held on November 3 to November 5, 1987, the Executive Director of AIC was notified by telephone by a representative of the Grant Officer that the hearing would begin on November 3, 1987. There is disagreement between the Grant Officer and AIC as to what AIC was told in that telephone call, as well as subsequent calls before and during the hearing, with respect to whether AIC was permitted to or

^{1/} Although not explicitly referred to in Nebraska Indian's request for hearing or in the **ALJ's** hearing notices or Decision and Order Confirming Ruling, the authority for holding a hearing under 20 C.F.R. Part 636 on a challenge to the designation of a Native American grantee is contained in 20 C.F.R. § 632.12(a), and the hearing presumably was held pursuant to that section.

^{2/} The Grant Officer concedes that "**this** letter was inadvertently not responded to in writing by the Grant Officer." Grant Officers's Brief to the Secretary of Labor at 8.

should participate in the hearing. Compare Affidavit of **Mayme** Mattwaoshshe, Executive Director of Region VII, with Affidavit of Veronica Dabney, Department of Labor Manpower Development Specialist. **AIC** did not appear and did not participate in the hearing.

At the close of the hearing, the **ALJ** issued an oral ruling, which was followed on December 11, 1987, by a brief **written** Decision and Order Confirming Ruling. ^{3/} The **ALJ** reversed the Grant Officer's determination that AIC met the responsibility **requirements** under 20 C.F.R. § 632.11(d) for its **JTPA** grant for **Woodbury** County. The **ALJ** ordered the Grant officer, by March **1**, 1988, to designate Nebraska Indian the **JTPA** Native American grantee for **Woodbury** County, unless he [the Grant Officer] found Nebraska Indian did not qualify. The **ALJ** ordered the Grant Officer, by July 1, 1988, to complete a new responsibility review of AIC to determine whether AIC meets the responsibility requirements of JTPA for areas, other than **Woodbury** County, covered by its grant. In addition, the **ALJ** ordered the Grant Officer to impose "financial integrity **mechanisms**" on AIC by November 23, 1987, "**to** assure the safekeeping and proper accounting of JTPA **funds**" until a new grantee is designated for **Woodbury** County

^{3/} It would have been appropriate and helpful in this review (and probably more fully complied with the requirements of the Administrative Procedure Act, 5 U.S.C. § 557(c) (1982)), if the **ALJ** had prepared a full written decision, after an opportunity for the parties to submit briefs or proposed findings and conclusions.

and the new responsibility review of AIC ordered by the **ALJ** is completed. **Those** fiscal controls were to be imposed on November 23, 1987, without regard to the **pendency of** appeals from the **ALJ's order**.

On December 11, 1987, the **ALJ** also issued an Order **Denying** Region VII Motions [sic] to Intervene and to Reopen Hearing. AIC had made that motion on November 13, 1987. The **ALJ** held that AIC had adequate notice of the hearing but had not taken any steps to intervene until after the hearing was held.

The Grant Officer and AIC filed exceptions to the **ALJ's** decision. The Grant Officer excepted to the **ALJ's** order that **the** Grant Officer impose fiscal controls on AIC and that the Grant Officer conduct a new responsibility review of AIC. The Grant Officer did not except to the **ALJ's** order that AIC be undesignated and Nebraska Indian be designated the Native American JTPA grantee for **Woodbury** County. AIC excepted to **the** denial of its motion to intervene and seeks reversal of the **ALJ's** decision and reinstatement of the Grant Officer's original determination awarding the JTPA Native American grant for **Woodbury** County to AIC. In the alternative AIC seeks a remand to a new **ALJ** to reopen the hearing with AIC participating as a party.

Nebraska Indian opposes **AIC's** motion to intervene and urges affirmance of the **ALJ's** denial of that motion. Nebraska

Indian has taken no position on the Grant Officer's exceptions to the **ALJ's** decision.

I accepted the case for review on January 26, 1988.

DISCUSSION

The Administrative adjudication section of JTPA, 29 **U.S.C. §** 166, provides that, **after a** hearing before an **ALJ**, the decision of the **ALJ** constitutes final action by the Secretary unless a party has filed exceptions within 20 days. If exceptions are filed, and the Secretary accepts the case for review within 30 days of such filing, the **ALJ's** decision does not become final if the Secretary issues her decision within 180 days **of** the date the case is accepted for review, **or** until 180 days have elapsed from that date with no decision having been issued by the Secretary. In other words, an **ALJ's** decision which has been excepted to and accepted for review has the status only of a recommended decision, and has no force and effect of its own until the passage of 180 days without issuance of a decision by the Secretary. Therefore, the **ALJ** had no authority in this case to order the Grant Officer to take any action notwithstanding the **pendency of** appeals. **ALJ** Decision and Order Confirming Ruling **para. 3**. Because I conclude, as discussed in more detail below, that I **will** not adopt the **ALJ's** recommendation that special financial integrity mechanisms be imposed on AIC, or that the Grant Officer be ordered to undertake a special responsibility review of AIC, those parts of the **ALJ's** order will be vacated.

Because I have also concluded that AIC is an indispensable party which should have been joined in this proceeding, the **ALJ's** order that AIC be undesignated as the JTPA Native American grantee for **Woodbury County** will be vacated and **this** matter will be remanded to the Administrative Law Judge to reopen the hearing with the participation of AIC with the full rights of a party.

Both Nebraska Indian and the Grant Officer assert that because AIC had knowledge of the hearing but did not comply with 29 C.F.R. **§ 18.10(c) (1987)**, the **ALJ's** order denying **AIC's** motion to intervene should be affirmed. I do not agree that that section of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, governs this situation. Section **18.10(c)** addresses the situation analogous to permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure (FRCP). Section 18.10(d) contemplates denial of a petition to intervene if the **ALJ** determines the petitioner does not have the requisite interest, implying that the party seeking to intervene may not be indispensable. Here, it can hardly be **gainsaid** that AIC is "'a party [] [whose] interests are sufficiently substantial that a court should not proceed to a decision on the merits in its absence.'" NLRB v. Doug Neal Manasement Co., 620 **F.2d** 1133, 1139 (6th Cir. **1980**), quoting from Boles v. Greenville Housing Authority, 468 **F.2d** 476; 478 (6th Cir. 1972). The rationale for this rule, the court

explained in Doug Neal Manaaement, is that **"the** interests of an **unjoined** party are especially vulnerable in that they are not **vigorously** asserted by counsel before the court. As a result it is possible that the true nature and extent of these interests may not be explored until after they are irreparably prejudiced.'" 620 **F.2d** at 1139, quoting Boles, 468 **F.2d** at **479 n.3.**

In Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 **F.2d** 765 (D.C. Cir. **1986**), three Indian Tribes disputed with **the** Department of the Interior and among themselves the method of distribution of the income from property held in trust for **them** by the United States. Analyzing whether a cross claim of one **of** the tribes against the other two could proceed when the two cross defendants could not be joined because they had not waived their tribal immunity, the court said **"[c]onflicting** claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a decision in his absence." 788 **F.2d** at 774. The court quoted Moore's Federal Practice on Rule 19 of the Federal Rules of Civil Procedure (FRCP) that **"'[w]here** the purpose of the suit is the disposition of a fund, a trust, or an estate to which there are several claimants, all of the claimants are generally indispensable.'" 3A Moore's Federal Practice, **para.** 19.08 at 19-165 (**1984**)."**"** 788 **F.2d** at 774. See also Cass Clay, Inc. v. Northwestern Public Service Co., 63 F.R.D. 34 (D.S.D. 1974)

(all persons having conflicting claims to a fund are indispensable parties to its disposition.)

None of the parties here, nor the **ALJ**, took adequate steps to assure that the case did not go to hearing without the presence of **AIC**, even though it was the liability of **AIC** for alleged mismanagement which, after all, was at issue. **AIC** itself, and its counsel, were not aggressive in protecting **AIC's** rights by making direct contact with counsel for Nebraska Indian and counsel for the Grant Officer, as well as the Office of Administrative Law Judges. I cannot conclude, however, that **AIC's** inaction was tantamount to a default, since its counsel **did** respond to the Grant Officer's mailgram notice, requesting to be served with all pleadings in the case. There has been no explanation why the Grant Officer and his counsel apparently ignored this letter and never **served** **AIC** with copies of all subsequently filed documents in the case. Nebraska Indian itself probably should have served **AIC** with copies of its request for hearing and all subsequent pleadings. Under 29 C.F.R. § 18.10(a) "[a] party against whom relief or other affirmative action is sought ... shall be designated as a 'defendant' or 'respondent,' as **appropriate.**"

Moreover, the **ALJ** should have taken a more active role to assure that the party whose grant was threatened with termination was before the court and given an opportunity to

defend itself. ^{4/} Under Rule 19(a) of the Federal Rule of Civil Procedure, a party must be joined **"if...(2)** he claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest ... [and] **[i]f** he has not been so joined, the court shall order that he be made a party."

(Emphasis added). ^{5/} As explained in Wright and Miller, Federal Practice and Procedure, § 1611 (1986), **"[i]f** joinder is feasible ^{6/}, the court must order it; the court has no discretion at this point because of the mandatory language of **the rule.**" (footnote omitted).

I note also that even though the absence of an indispensable party was not raised below, a reviewing court is not precluded from raising it sua sponte. **"When necessary . . . a court of**

^{4/} I would note, for example, that **"numerous** exhibits and testimony . . . were admitted over the Grant Officer's strenuous **objections"**. Grant Officer's Brief, supra, at 9, and of course AIC had no opportunity to object, cross examine, or offer exhibits or testimony in its own defense. Prejudice to the interests of AIC is not mitigated by the presence of the government at the hearing because the government's interest is not necessarily coextensive with that of AIC. Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d at 775. **See also** Manvaoats v. Kleppe, 558 F.2d 556, 558 (10th Cir. 1977).

^{5/} The Federal Rules of Civil Procedure govern **"any** situation not provided for or controlled **by"** 29 C.F.R. Part 18. 29 C.F.R. § 18.1(a).

^{6/} Joinder may not be feasible, for example, where a party is beyond service of process or where joinder would destroy complete diversity (thus making the party "indispensable"), considerations which are not applicable to administrative actions such as this.

appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below. Provident Tradesmens Bank and Trust co. v. Patterson, 390 U.S. **102**, 111, 88 S. Ct. 733, 738, 19 L.Ed. 2d 936 (1968).'" NLRB v. Doug Neal Manasement, 620 **F.2d** at 1139, quoting Boles v. Greenville, 468 **F.2d** 479 n.4.

For the reasons discussed above, therefore, the **ALJ's** order reversing the Grant Officer's designation of AIC as the Native American JTPA grantee for **Woodbury** County, Iowa is VACATED, and this matter is REMANDED to the Administrative Law Judge to reopen the hearing with the participation of AIC as a party.

The Grant Officer excepted to the **ALJ's** order that special fiscal controls be imposed on AIC and that a new responsibility review of AIC for the remainder of its grant be conducted by July 1, 1988. The Grant Officer points out that 20 C.F.R. **§** 632.12(a), under which, as noted above, the hearing here presumably was held, limits the available remedy in an appeal from denial of designation as a Native American JTPA grantee to the right to be designated in the future. The regulation sets a clear limit on the **ALJ's** authority in a case of this kind. An **ALJ** does not have the authority to order remedies with respect to the administration of grants and apparent misexpenditure of funds which are not properly before him in the nondesignation appeal. By purporting to order such remedies, the **ALJ** has in effect assumed the administration,

management, and quasi-prosecutorial roles of the Grant Officer and his counsel. The ALJ's order that the Grant Officer impose special fiscal controls on AIC and conduct a new responsibility review of AIC therefore is VACATED.

The recommended order of the ALJ is VACATED and this matter is REMANDED to Administrative Law Judge Brenner for further proceedings consistent with this decision.

SO ORDERED.



Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Nebraska Indian Inter-Tribal Development Corn.
v. U.S. Department of Labor

Case No. : 87-JTP-19

Document : Decision and Order of Remand

A copy of the above-captioned document was sent to the
following persons MAY 23 1988 .


A handwritten signature in cursive script, reading "Renee Kearney", is written over a horizontal line.

CERTIFIED MAIL

John M. Peebles, Esq.
Steier & Kreikemeier, P.C.
1065 North 115 Street
Suite 100
Omaha, NE 68154

James F. Ralls, Jr., Esq.
Quitmeier & Ralls, P.C.
4370 North oak Trafficway
Suite 200
Kansas City, MO 64116

Charles D. Raymond
Associate Solicitor
Attn: Vincent C. Costantino, Esq.
U.S. Department of Labor
Room N-2101
200 Constitution Avenue, N.W.
Washington, DC 20210

Ms. Neola E. Walker
Pres. Board of Directors
Nebraska Indian Inter-Tribal
Development Corp.
Route 1, Box 66-A
Winnebago, NE 68071

Mr. Frank LaMere
Director
Nebraska Indian Inter-Tribal
Development Corp.
Route 1, Box 66-A
Winnebago, NE 68071

George E. Barta
 Board Chairman
 Region VII American
 India Council, Inc.
 310 Armour Road, Suite 205
 Kansas City, MO 64116

Mayme Mattawoshshe
 Executive Director
 Region VII American
 India Council, Inc.
 310 Armour Road, Suite 205
 Kansas City, MO 64116

REGULAR MAIL

Robert D. Parker
 Grant Officer
 Division of Acquisition &
 Assistance
 U.S. Department of Labor
 Room C-4305
 200 Constitution Avenue, N.W.
 Washington, DC 20210

David O. Williams
 Office of Program & Fiscal Integrity
 U.S. Department of Labor
 Room N-4671
 200 Constitution Avenue, N.W.
 Washington, DC 20210

Herbert Fellman
 Chief, DINAP
 Attn: Designation Desk
 U.S. Department of Labor
 Room N-4671
 200 Constitution Avenue, N.W.
 Washington, DC 20210

Hon. Lawrence Brenner
 Office of Administrative Law Judges
 Suite 700
 1111 20th Street, N.W.
 Washington, DC 20036

Hon. Nahum Litt
 Chief Administrative Law Judge
 Office of Administrative Law Judges
 Suite 700
 1111 20th Street, N.W.
 Washington, DC 20036