

U.S. DEPARTMENT OF LABOR

SECRETARY OF **LABOR**
WASHINGTON, D.C.

DATE: June 7, 1991
CASE NO. 85-CPA-8

IN THE MATTER OF

NEBRASKA INDIAN INTER-TRIBAL
DEVELOPMENT CORPORATION,

COMPLAINANT,

v.

UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981), ^{1/} and the regulations promulgated thereunder at 20 C.F.R. Parts 675-680 (1990). On September 14, 1983, the Grant Officer disallowed \$19,209.12 in apparent outstanding advances during the close-out process of a CETA grant awarded to Nebraska Indian Inter-Tribal Development Corporation (NIITDC or grantee). ^{2/} NIITDC appealed the Grant Officer's disallowance to the Office of Administrative

^{1/} CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Training Act, 29 U.S.C. §§ 1501-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

^{2/} CETA Grant No. 99-9-087-30-89, for period from October 1, 1978, through September 30, 1980. Administrative File (A.F.) at 12.

Law Judges (OALJ) on September 28, 1983. ^{3/}

The Federal Cash Transaction Report (FCTR) NIITDC submitted to the Grant Officer on June 29, 1982, as part of its grant close-out documentation revealed a disparity of **\$19,209.12** between the grantee's withdrawals against the grant's letter of credit and the grantee's net disbursements pursuant to the grant. The Grant Officer disallowed this amount. ^{4/} The record indicates that NIITDC had made compensating bookkeeping errors in close-out documents concerning this CETA grant and its subsequent CETA grant, No. 99-1-087-03-95. The dispute concerning disallowed costs in the latter grant was formalized in another case before the OALJ, docketed as Case No. 85-CPA-44. Although there was correspondence between the parties during the next four years, the disputes in this case and in 85-CPA-44 were not resolved. In 1986, the Grant Officer discovered the offsetting aspect of the reporting under the separate grants and initiated further correspondence directing NIITDC in detail how to correct the reporting which led to the disallowance. Finally, NIITDC submitted corrected **FCTRs** pursuant to the detailed instructions set out in a May 14, 1987, letter from Grant Officer's counsel to **NIITDC's** counsel. ^{5/} The corrected documentation resolved the disputed issues in both cases. Accordingly, the Grant Officer moved for, and the **ALJ** issued, an order of dismissal in this case

^{3/} Id. at 7.

^{4/} Id. at 16.

^{5/} Exhibits of Grantee for Admission into the Record, Exh. E.

on July 20, 1987. **NIITDC's** counsel applied for attorney's fees and costs under the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, title II, 94 Stat. 2325 (1980), as amended by Pub. L. No. 99-80, 99 Stat. 183 (1985) (codified at 5 U.S.C. § 504 (1988) as applied to administrative agencies), and the **ALJ** recommended an award of **\$3,575.96.** ^{6/} Upon request of the Grant Officer the order awarding EAJA fees and expenses was accepted for Secretarial review. My review proceeds in accordance with the pertinent regulations at 29 C.F.R. Part 16 (1990).

DISCUSSION

The Equal Access to Justice Act provides that attorney's fees and expenses shall be awarded to a prevailing party unless the litigation position of the agency was substantially justified. In ruling in **NIITDC's** favor on both the prevailing party and substantially justified requirements of EAJA, the **ALJ** erred.

A party prevails when it establishes that it was right on a matter in issue and that the adjudication established the existence of or contributed to the enjoyment of that right. Smith v. University of North Carolina, 632 **F.2d** 316, 346-47 (4th Cir. 1980) (attorney's fee adjudication under Title VII of the Civil Rights Act of 1964). Although the **ALJ** cited Smith dicta in

^{6/} NIITDC also petitioned for attorney's fees on the same basis as here in Case No. 85-CPA-44. On October 5, 1987, the **ALJ** in that case denied **NIITDC's** application for attorney's fees on the ground that the Grant Officer was substantially justified in disallowing costs which were the result of erroneous financial reports filed by NIITDC.

support of the proposition that a "stipulated dismissal amounts to a fully favorable decision for **NIITDC**," R.D. and O. at 2, a resolution by settlement or consent judgment must be in the context of Vindication of rights [thereby] obtained," 632 **F.2d** 346-47. (The Smith plaintiff had obtained a preliminary injunction but lost on the merits and attorney's fees were denied.) The Supreme Court has determined that where there is a statutory provision awarding attorney's fees to the prevailing party, the party must prevail to some degree on the merits. Hanrahan v. Hampton, 446 U.S. 754, 756-59 (1980) (fee award reversed because plaintiffs did not prevail on the merits of their case, but merely established entitlement to trial). See also Proctor v. Consolidated Freightways Corp., 795 **F.2d** 1472, 1479 (9th Cir. 1986) (establishing right to a trial does not mean appellant has prevailed on the merits): Roman v. Schweiker, 559 F. Supp. 304, 305 (E.D. N.Y. 1983) (remand to agency to obtain more information is insufficient to elevate appeal to status of "prevailing party").

In this case, NIITDC submitted an erroneous FCTR in its original close-out package. Although the error in the report apparently was due to incorrect telephone advice from a Department of Labor employee, NIITDC was aware of the specific problem embodied in its close-out documents upon receipt in June 1983 of the Grant Officer's Initial Determination. ¹⁷ It was **NIITDC's** responsibility to search out the error in the report and

¹⁷ A.F. at 15.

to correct it. ^{8/} NIITDC periodically submitted documents to the Grant Officer but the submissions failed to address adequately the unaccounted-for draw down, and they did not result in a reversal of the disallowance. Not until NIITDC responded to the Grant Officer's instructions and corrected the FCTR were the **disallowed** funds allowed. The consequent motion for dismissal occurred only after NIITDC changed its submission, thereby establishing a basis in the record to allow the disputed funds. NIITDC did not assert and prevail upon the merits of its FCTR. Instead it changed its FCTR. The dismissal occurred not because NIITDC prevailed on merits of its position, but because NIITDC changed its position, thereby resolving the disparity. Such a stipulated dismissal cannot be equated to a "**vindication**", 632 **F.2d** at 346, of the merits.

While NIITDC failed to correct the erroneous FCTR or adequately explain the overage of the cash advance, the Grant Officer would have been derelict in not disallowing the questionable costs. The record does not indicate that the acceptable corrections eventually supplied to the Grant Officer had been offered by NIITDC prior to the Grant Officer's instructions. A grantee cannot shift to the Government or its agents the grantee's responsibility to conform to its grant's requirements. Heckler v. Community Health Servs. Inc., 467 U.S. 51, 63 (1984).

^{8/} Id. at 335-37.

In Pierce v. Underwood, 487 U.S. 552 (1988), the Court specifically addressed the phrase "substantially justified" in **EAJA**. The Court found the connotation of the word "**substantially**" to be "'justified in substance or in the **main**' -- that is, justified to a degree that could satisfy a reasonable person." 487 U.S. at 564. So long as NIITDC failed to correct the FCTR, the Grant Officer's continued disallowance of the unaccounted-for funds was "**justified** to a degree that could satisfy a reasonable person," *id.*, especially in view of his fiduciary responsibility to oversee Federal grantees' expenditures in furtherance of protecting the public **fisc**.

Because I find that NIITDC was not the prevailing party and that the Grant Officer's position in the litigation was substantially justified, I do not address the parties' additional arguments.

ORDER

The application for attorney's fees and costs under **EAJA** IS DENIED.

SO ORDERED.


Secretary of Labor

Washington, DC

CERTIFICATE OF SERVICE

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

Case No. : 85-CPA-8

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following
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