



**Issue Date: 11 July 2011**

Case No: 2010-WIA-00009

In the Matter of:

**AMERICAN INDIAN CENTER OF ARKANSAS,**  
Complainant,

v.

**UNITED STATES DEPARTMENT OF LABOR,**  
Respondent.

Before: John P. Sellers, III  
Administrative Law Judge

**DECISION AND ORDER GRANTING**  
**RESPONDENT'S MOTION FOR SUMMARY DECISION**  
**AND ORDER CANCELLING HEARING**

This matter arises under § 166 of the Workforce Investment Act (“WIA”), 29 U.S.C. § 2911, and the implementing regulations, 20 C.F.R. § 667.100-667.860. The purpose of this section is to support employment and training activities for Native American Indians, Alaskan Natives, and Hawaiian Natives. 29 U.S.C. § 2911(a)(1). Section 166 of the WIA gives the United States Department of Labor the responsibility for administering funding for these services by awarding grants through a competitive selection process. *Id.* § 2911(c). This litigation began when the Native American Indian Association was selected over the Complainant, the American Indian Center of Arkansas, for Program Year(s) 2010-2012 grant funds. The Complainant objected and requested a hearing. The Department now argues that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.

**Background and Procedural History**

The Complainant, the American Indian Center of Arkansas, and the Native American Indian Association were the only two competing applicants for Program Year(s) 2010-2012 grant funds available to administer a Native American work placement program in Tennessee. Both had administered the funds before. The Native American Indian Association administered the grant until it was terminated in 1999 after an audit revealed financial irregularities. The Department contacted the Complainant to

offer the remaining grant funds. The Complainant accepted the offer and administered the underlying grant until the most recent grant award process.

The Solicitation for Grant Applications for Program Year(s) 2010-2012 was published in the Federal Register on March 12, 2010. 75 Fed. Reg. 11,733, 11,926. Both the Complainant and the Native American Indian Association submitted applications for the grant. The grant officer convened a review panel to rate the applications based on four specific criteria. The Complainant received a score of 74, while the Native American Indian Association received a score of 81. After the grant officer selected the Native American Indian Association over the Complainant, the Complainant was notified that it had not been selected as the grant recipient. The Complainant objected and requested a hearing, arguing that the grant officer failed to conduct a responsibility review as required by 20 C.F.R. § 667.170. A hearing is currently scheduled for July 26, 2011.

### **Standard of Review**

The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. § 18.40(d). The determination of whether a fact is material is based on the substantive law upon which the claim is based. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is one that might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine if the evidence is such that a reasonable factfinder could return a verdict for either party. *Id.*

When a motion for summary decision is made and supported, a party opposing the motion may not rest upon the mere allegations or denials of the pleadings. 29 C.F.R. § 18.40(c). The nonmoving party must present affirmative evidence showing that there is a genuine issue of fact for the hearing in order to defeat a properly supported motion for summary decision. *Id.*; *Anderson*, 477 U.S. at 247; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

### **Law and Analysis**

Each organization applying for a WIA Section 166 grant for the same service area is given an opportunity to describe its service plan and submit additional information. 20 C.F.R. § 668.250(b)(3). The grant officer selects the entity “that demonstrates the ability to produce the best outcomes for its customers.” *Id.* § 668.250(b)(4). Grant applicants are rated based on the following four criteria as applied to Native American, Alaskan Native, Hawaiian Native adults and youth:

1. Demonstrated understanding of the employment, training, and educational barriers. (30 Points).
2. Experience in programs that provide education, training, or placement services. (10 Points).
3. Capability to staff the proposed initiative and maximize service. (30 Points).

4. Completeness and clarity of the proposed strategy and its implementation plans. (30 Points).

75 Fed. Reg. at 11,931-32.

Before final selection as a potential grantee, a review of the available records to assess the organization's overall responsibility to administer federal funds is considered:

As part of this review, we may consider any information that has come to our attention and will consider the organization's history with regard to the management of other grants, including DOL grants. The failure to meet any one responsibility test, except for those listed in paragraphs (a)(1) and (a)(2) of this section, does not establish that the organization is not responsible unless the failure is substantial or persistent (for two or more consecutive years).

20 C.F.R. § 667.170(a).

Ultimately, the grant officer selects the entity that demonstrates the ability to produce "the best outcomes for its customers." 20 C.F.R. § 668.250(b)(4). Significantly, my review of the grant officer's determination is not *de novo*; in other words, even if this case were to go to hearing, it would not be a question of substituting my judgment for that of the grant officer. Rather, my review is confined to determining whether the grant officer's decision was in accordance with the governing statutes, rules, and regulations. *County of Los Angeles Community and Senior Citizen Services v. U.S. Dep't. of Labor*, 87-JTP-17 at 4 (ALJ June 24, 1988), cited in *Edna Mills Restoration Project*, 2005-WIA-5 (Oct. 5, 2005), and *Our Savior's Business*, 2010-WIA-3 (June 23, 2010). In *United Urban Indian Council, Inc. v. U.S. Dep't. of Labor*, ARB Case No. 01-025, 2000-WIA-4 (ARB, May 18, 2001), the ARB stated that it was a well-settled principle of administrative law that an agency's construction of its own regulations is entitled to "substantial deference." As a result, the Administrative Review Board ("ARB") held that the grant officer has "wide latitude in effectuating the purposes of the WIA INA regulations" and it would "not substitute our judgment for that of the agency which wrote the regulations at issue and must apply them in sometimes widely different circumstances." *See also Commonwealth of Puerto Rico v. U.S. Dep't. of Labor*, 2007-WIA-10 (ALJ, Nov. 13, 2007), *appeal dismissed*, ARB No. 08-019 (ARB, Feb. 6, 2008) (a decision by the grant officer "must be affirmed unless the party challenging the decision can demonstrate that the decision lacked any rational basis"); *United Tribes of Kansas and Southeast Nebraska, Inc. v. U.S. Dep't. of Labor*, ARB Case No. 01-026 (ARB, Aug. 6, 2001).

The Complainant has objected to the award of the grant to its competitor, the Native American Indian Association, on several grounds. The Complainant's primary argument, however, is that the selection occurred prior, rather than before, the Department conducted a responsibility review required by 20 C.F.R. § 667.170. Subsection (a) of that regulation specifically states that "[b]efore final selection as a potential grantee, we conduct a review of the available records to assess the organization's responsibility to

administer federal funds.” Here, the Department does not dispute that it failed to conduct the responsibility review before the final selection. However, the Department argues that its failure in this regard constitutes harmless procedural error, because it subsequently conducted the required responsibility review and found no information regarding the Native American Indian Association’s history with regard to other grants which would cause it to conclude that the group is not responsible.

Although § 667.170 lists several criteria that it refers to as “responsibility tests,” the regulation expressly states that failure to meet any one of the tests does not establish that the organization is not responsible. The only exceptions are where the failure to meet one of the tests is “substantial or persistent,” meaning that it lasted for two or more years, or where two particular tests are not met. The two tests which automatically make an organization not responsible are: 1) where the organization has failed to recover debts or comply with an approved repayment schedule, § 667.170(a)(1), or (2) where the organization has been involved in fraud or criminal activity of a significant nature. § 667.170(a)(2).

As noted, the Department concedes that the responsibility review was not conducted prior to awarding the grant. Still, it maintains that it subsequently conducted the review according to its usual practices and has discovered no information concerning the Native American Indian Association that would cause it to fail any of the responsibility tests. Specifically, the Department has stated that it is aware that the organization had a previous grant terminated in 1999 due to financial irregularities, but this information has not led it to conclude that the organization fails any of the applicable responsibility tests, including the two that result in automatic disqualification. According to the statement of the grant officer, that termination resulted in settlement agreement, with certain monies being repaid, and there is no evidence of the organization being in breach of that settlement or having any outstanding debts to the Department. Nor, according to the grant officer, did the financial irregularities which led to the termination of the grant reveal any evidence of fraud. According to the grant officer, it remains her considered opinion that the Native American Indian Association is a responsible grantee under § 667.170(a)(1). (Declaration of B. Jai Johnson (June 28, 2011)).

Given the substantial degree of deference required to be shown to the grant officer’s determination, it would seem that the only successful argument the Complainant could make that would alter the result in this case would be that the Native American Indian Association was, by law, not a responsible party, and therefore ineligible to receive the grant. As noted, however, the regulations only provide that a party is by law not responsible in rather limited instances: if it is established that the organization has failed to recover debts or comply with an approved repayment schedule, 20 C.F.R. § 667.170(a)(1), or that the organization has been involved in fraud or criminal activity of a significant nature, *id.* § 667.170(a)(2), or where the party’s failure of any of the other responsibility tests is “substantial and persistent (for two or more consecutive years).” *Id.* at §667.170(a) Counsel for the Complainant, realizing this, had made a laudable attempt to create a question of material fact whether the Native American Indian Association failed to comply with an earlier repayment arising out of the termination of its grant in 1999. In this effort, the Complainant relies on AF Supp. 17 and 18 to demonstrate that

the grantee owes ten thousand dollars on the previous grant. However, the Department has provided authoritative evidence that this interpretation of AF Supp. 17 and 18 is incorrect and that there is, in fact, no debt currently owed as a result of the grant's termination in 1999. (Declaration of B. Jai Johnson (June 28, 2011)). The record does not reveal any evidence which would create an issue of fact concerning past fraud or criminal activity on behalf of the grantee, nor is there any evidence that the Native American Indian Association substantially or persistently failed any of the other responsibility tests for a period of two or more consecutive years. In sum, there is no evidence presently of record that would create a factual issue for hearing as to whether the grantee was not a responsible party under the criteria set forth in the regulations.

The Complainant also argues that the competitive selection process was not properly conducted. Assuming, *arguendo*, that Complainant did not waive any objections to the competitive selection process, I find that this argument is without merit. The Complainant maintains that the panel did not consider the grantee's failure to properly administer the funds during the selection process. However, the Complainant has offered only speculation that this past history would have in any way affected the selection process or even been made known as part of the selection process, which is separate from the responsibility review.

It is axiomatic that the law does not require the doing of a vain thing. As I have noted, the role of an administrative law judge is not to select a grantee. It is the Department's responsibility to select the entity that can provide "the best outcomes for its customers." § 668.250(b)(4). Here, even though the grant officer admits procedural error in not performing the responsibility review before the awarding of the grant, it is clear that if the matter were sent back to repeat the process in correct order, the result would be exactly the same—the grant officer would still award the grant to the Native American Indian Association. As noted, the grant officer has stated that, upon completion of the responsibility review, it remains her opinion that the grantee is a responsible grantee. (Declaration of B. Jai Johnson (June 28, 2011)). I cannot say that this decision lacks any rational basis, or that it was arbitrary or capricious. More to the point given the procedural posture of the case, the Complainant has not raised any argument or demonstrated any factual issue for hearing that would provide a basis for countermanding the "wide latitude" the grant officer is given in effectuating the purposes of the WIA. I cannot find any abuse of discretion or irrationality in the grant officer's decision or decision making process, without substituting my own judgment, nor, based upon the record presently before me, can I discern any issue for hearing which would preclude judgment in the Department's favor or result in any other outcome other than the selection of the Native American Indian Association as grantee. *See Commonwealth of Puerto Rico v. U.S. Dep't. of Labor and Rural Opportunities*, Case Nos. 09-011, 09-013 (Apr. 10, 2009).

## **ORDER**

For all of the above reasons, I find no genuine issue of material fact or law to be addressed at hearing. The grant officer's decision was rational, within her discretion, and

in accordance with the law. The Department's motion for summary decision is **GRANTED** and the hearing scheduled for July 26, 2011, is **CANCELLED**.

**A**

JOHN P. SELLERS, III  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file exceptions ("Exception") with the Administrative Review Board ("Board") within twenty (20) days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 667.830. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Exception must specifically identify the procedure, fact, law, or policy to which exception is taken. You waive any exceptions that are not specifically stated. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. *See* 20 C.F.R. § 667.830; Secretary's Order 1-2002, ¶4.c.(42), 67 Fed. Reg. 64272 (2002).

A copy of the Exception must be served on the opposing party. *See* 20 C.F.R. § 667.830(b). Within forty-five (45) days of the date of an Exception by a party, the opposing party may submit a reply to the Exception with the Board. Any request for an extension of time to file a reply to the Exception must be filed with the Board, and a copy served on the other party, no later than three (3) days before the reply is due. *See* 20 C.F.R. § 667.830(b).

If no Exception is timely filed, the administrative law judge's decision becomes the Final Decision and Order of the Secretary of Labor pursuant to 20 C.F.R. § 667.830(b) unless the Board notifies the parties within thirty (30) days of the date of issuance of the administrative law judge's decision that it will review the decision. Even if an Exception is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the filing of the Petition notifying the parties that it has accepted the case for review. *See* 20 C.F.R. § 667.830(b).