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Issue Date: 16 July 2014

Case Number: 2014-WIA-00001

In the Matter of:

INSTITUTE FOR INDIAN DEVELOPMENT, INC.,

Complainant

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

**DECISION GRANTING RESPONDENT’S MOTION FOR
SUMMARY DECISION AND ORDER OF DIMISSAL**

This matter purportedly arises under the provisions of the Senior Community Service Employment Program (“SCSEP”), authorized by the Older Americans Act, as amended, 42 U.S.C. § 3056, *et seq.* and the applicable regulations found at 20 C.F.R. Part 641, 20 C.F.R. § 641.100 *et seq.*

On December 26, 2013, the Grant Officer of the Employment and Training Administration, United States Department of Labor (“Respondent”) issued a Final Determination selecting an applicant other than the Institute for Indian Development, Inc. (“Complainant”) for an Indian and Native American set-aside grant under the SCSEP. Respondent completed the selection as part of a reevaluation process in which, according to Complainant, the “Grant Officer did not following the regulations set forth in 20 CFR 641.900 and the remedies set forth in 20 CFR 641.470.”

In this matter, the Employment and Training Administration (“ETA”) informed potential applicants that \$346,000,000 in grant funds were available for national grantees. Administrative File (“AF”) at F1. Subsequent to its receipt of various grant applications, an initial determination was made awarding funding to applicant National Indian Council on Aging (“NICOA”),

Complainant appealed this first Final Determination. This Office issued a decision ordering a reevaluation in accordance with the Administrative Law Judge's findings. *Institute for Indian Development, Inc. v. Dept. of Labor*, 2012-WIA-00010 (ALJ Sept. 16, 2013). During the reevaluation, the Grant Officer rescored Complainant and again concluded that NICOA should receive the grant. AF at B20. NICOA received an average score of 83.22; Complainant received an average score of 72.42. *Ibid.* Complainant argued during the post-determination feedback process its score should have been above 75, highlighting several alleged errors in the Grant Officer's determination. AF at B3-B4.

On January 28, 2014, Complainant filed an appeal with the Office of Administrative Law Judges ("Office" or "OALJ") seeking review of the second Final Determination.

On February 4, 2014, I issued a Notice of Receipt of Request for Hearing and Prehearing Order. According to my Prehearing Order, within thirty (30) days, Complainant was to submit copies of the administrative file to this Office and to the Office of the Solicitor for Employment and Training Legal Services. Both parties were directed to thereafter file a Notice of Intent to Participate. The Notice also directed that within forty-five (45) days of the issuance of my Prehearing Order, both parties were to file a Prehearing Exchange, with information about the issues in dispute, the suggested location and time of a hearing, and other information.

After the issuance of my Notice of Docketing, Complainant filed a Notice of Intent to Participate on March 7, 2014. On March 10, 2014, I granted Respondent's motion to extend the deadline by which the Grant Officer must submit the administrative file in this case to March 20, 2014. Respondent thereafter filed a Notice of Intent to Participate on March 21, 2014 and the administrative file on March 26, 2014. On March 27, 2014, I granted a joint motion to extend the deadline to file and exchange prehearing information to April 4, 2014. On April 10, 2014, Respondent filed its Prehearing Exchange information.

On April 25, 2014, Respondent filed the "Grant Officer's Motion for Summary Decision" on the grounds that "there is no genuine issue of material fact." Respondent cites 20 C.F.R. § 641.900(c) which requires an aggrieved contractor to "state specifically those issues in the Grant Officer's notification upon which review is requested. Those provisions of the Grant Officer's review not specified for review are considered resolved and not subject to further review." Respondent argues that Complainant's appeal expresses general feelings of unhappiness with the selection of NICOA, and that "dissatisfaction and non-specific critique do not comprise an acceptable substitute for compliance with the SCSEP regulations." Respondent also argues that Complainant misperceives the applicable regulations and that examples provided by Complainant do not support its allegations. As required by §18.40(a), Respondent's Motion was timely submitted more than twenty days before the hearing.

On May 30, 2014, this Office received a letter from Respondent in which Respondent “requests that the Administrative Law Judge (ALJ) grant the unopposed Motion for Summary Decision or, in the alternative, issue an order requiring Complainant to show cause why the ALJ should not find IID in default and enter summary judgment for the Grant Officer.” On June 6, 2014, I issued an Order to Show Cause ordering Complainant to show cause within thirty (30) days of the date of this order why an order dismissing its appeal for failure to prosecute should not be entered into this matter.

To date, no Prehearing Exchange has been received from Complainant. Instead, on July 7, 2014, this Office received a letter from Complainant in which it states it “believes that once again its application was not graded fairly.” Complainant references the earlier proceeding before this Office, in which the ALJ ruled in favor of Complainant and ordered a reevaluation of Complainant’s grant application. Complainant states, “This form of remedy did not remove the Department of Labor’s bias from the court acknowledged faulty scoring system in this case. The [administrative law] judge also chose not to provide IID any other remedy that is listed under 20 C.F.R. 641.470.” Complainant argues:

During the initial hearing, the grant officer stated that all applications that scored 75 points and above were funded. During the second scoring of IID application, the grant officer informed IID that the other Native American set-aside grantee scored higher as the justification for not selecting IID as a grantee. IID only wish to be held to the same standard that all other applicants were held to.

In conclusion, Complainant postulates that “it appears that only an independent outside scoring panel that does not have a vested interest in the Department of Labor’s operations can score IID application without obvious bias.” Complainant closes its letter by stating it no longer has the resources to continue the litigation and that “by not providing timey [sic] remedies to complainants, Department of Labor has made it extremely difficult for those to have suffered to pursue justice.”

In response, Respondent submitted a letter on July 8, 2014 in which Respondent states that it “again, comprehensively denies the Complainant’s allegations.” And “[a]ny procedural defects identified in the initial procurement were corrected in the re-evaluation. The Grant Officer has responded to IID’s complaint in compliance with the pertinent regulations and ALJ orders.” Respondent reaffirmed its request to dismiss the complaint with prejudice.

The regulations at 29 C.F.R. § 18.6(d)(2)(v) provide that:

If a party or an officer or agent of a party fails to comply with a subpoena or with an order, . . . the administrative law judge, for the purpose of permitting resolution

of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may . . . [r]ule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

In light of the foregoing, there are two bases for dismissing Complainant's appeal, *i.e.*, its failure to comply with my February 4, 2014 Prehearing Order and June 6, 2014 Order to Show Cause and its failure to establish the existence of a genuine issue of material fact that would preclude summary judgment.

Complainant has failed to respond to both my February 4, 2014 Prehearing Order and my June 6, 2014 Order to Show Cause. As noted above, in my February 4, 2014 Prehearing Order, I ordered the parties to exchange within forty-five (45) days information related to the case. In my June 6, 2014 Order to Show Cause, I ordered Complainant to show cause why an order dismissing its appeal for failure to prosecute should not be entered in this matter.

While Complainant's July 7, 2014 letter reasserts earlier allegations, it does not provide any information requested regarding witnesses and evidence. It additionally fails to adequately respond to Respondents' Motion for Summary Decision.

Summary judgment or summary decision is appropriate when it has been established by pleadings, affidavits, other evidence, or matters officially noticed that there is no genuine issue of material fact and the moving party is entitled to decision or judgment as a matter of law. 29 C.F.R. § 18.40. When the moving party has made an affirmative showing of facts through affidavits, the party opposing the motion may not rest upon mere allegations or denials but must set forth specific facts showing that there is a genuine issue of fact for the hearing. 29 C.F.R. § 18.40(c).

Complainant's June 5, 2014 letter fails to adequately address Respondent's Motion for Summary Decision. The two arguments presented by Complainant only restate facts presented on the record that their total score increased by 14.58 points and the reevaluation's unfavorable result was determined because Complainant scored lower than the only other applicant for funding, rather than automatic funding if an applicant scored above 75 points. The reevaluation resulted in a more favorable score for Complainant; the score was not higher than the only other applicant and recipient of funding and the score was not above 75 points.

The Administrative Review Board ("ARB") has stated that a material fact is "one whose existence affects the outcome of the case," and that a genuine issue exists when "the nonmoving party produces sufficient evidence of a material fact so that the fact-finder is required to resolve the parties' different versions at trial." *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ 2004-SOX-35 (Sept. 30, 2005), slip op. at 4.

The undisputed evidence of record demonstrates that the Grant Officer's decision to not select Complainant as a grantee was reasonable. Without Complainant having raised a genuine issue of material fact regarding the award determination, Respondent is entitled as a judgment as a matter of law.

In addition, Complainant's failure to respond to my Prehearing Order and Order to Show Cause warrants dismissal of his complaint pursuant to § 18.6(d)(2)(v).

Based on the foregoing, Respondent's Motion for Summary Decision is **GRANTED** and this matter is **DISMISSED**.

SO ORDERED.

STEPHEN L. PURCELL
Chief Administrative Law Judge