



In the Matter of:

CHEROKEE NATION OF OKLAHOMA

ARB CASE NO. 98-031

COMPLAINANT,

ALJ CASE NO. 97-JTP-12

v.

DATE: May 7, 1998

UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT,

and

DELAWARE TRIBE OF INDIANS,

PARTY-IN-INTEREST.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER

This case arises under the Job Training Partnership Act (JTPA), 29 U.S.C. §§1501-1791 (1988), and the regulations issued thereunder at 20 C.F.R. Parts 626-638 (1997). The Administrative Law Judge (ALJ) issued an Order Granting Stay (Stay Order) on November 14, 1997, pending a decision by the United States District Court for the District of Columbia in *Cherokee Nation of Oklahoma v. Babbitt*, Civ. No. 96-2284(TFH). That case concerns whether the Delaware Tribe of Indians (Delawares) was properly placed on the list of federally recognized Indian tribes by the Secretary of Interior.

The issue before the ALJ is whether the U.S. Department of Labor (DOL) Grant Officer properly granted JTPA funds to the Delawares. The Grant Officer's award of JTPA funds was predicated on the Secretary of Interior's official recognition of the Delawares as a tribal entity, rather than as a result of a determination regarding the language in the 1992 Department of the Interior (DOI) Appropriations Act, which pertained to funding restrictions within the Cherokee Nation geographic service area jurisdiction.

The ALJ's Stay Order is reversed for the reasons stated below.

BACKGROUND

It is important to distinguish the proceeding in the District Court from this proceeding. The primary issue before the U.S. District Court is whether the Department of the Interior properly revived the legal tribal identity of the Delawares. The resolution of that issue will establish legal bases for the Delawares' relationships with the Cherokee Nation, the DOI and its related agencies, as well as other federal agencies.

The immediate issue before this Board is different. Our concern is the legal result of the substantive legislation embedded in the 1992 Department of the Interior and Related Agencies Appropriations Act, which appears to restrict any federal funding within the Cherokee Nation jurisdictional service area solely to the Cherokee Nation.^{1/}

DISCUSSION

The presiding ALJ stayed the proceeding before him which concerned JTPA program funding, pending the District Court's decision regarding the legality of DOI's Notice of Final Agency Action (Final Notice) acknowledging the Delawares' tribal identity and its eligibility for federal funding by virtue of its status as an Indian tribe.^{2/} The ALJ reasoned that if the District Court determines that the Secretary of Interior had not properly recognized the Delawares, the funding issue before the OALJ will be moot; and only if the court finds that the Final Notice had properly established the Delawares as a tribal entity would it then be necessary to have a hearing on the merits. Stay Order at 2.

Ordinarily, the Board would not review an interlocutory order such as a Stay Order, however, in this case, the practical impact of the Stay Order is the equivalent of a final order with regard to the funding of the JTPA program for Program Year 1998, which starts on July 1, 1998. For this reason we accepted the Cherokee Nation of Oklahoma's petition for review.

^{1/} The Appropriations Act provides:

[U]ntil such time as legislation is enacted to the contrary, none of the funds appropriated in this or any other Act for the benefit of Indians residing within the jurisdictional service area of the Cherokee Nation of Oklahoma shall be expended by other than the Cherokee Nation, .

. . .

Pub.L. 102-154, Stat. 990, 1004 (Nov. 13, 1991).

^{2/} See Final Decision to Retract 1979 Decision of the Deputy Commissioner of Indian Affairs Regarding the Delaware Tribe of Indians, 61 Fed. Reg. 50,862, 50,863 (Sept. 27, 1996).

We note that the legal memorandum of the Associate Solicitor of DOI, dated June 19, 1996,^{3/} referenced and relied upon in the issuance of the Final Notice (at 50,863), does not address the issue of the restrictive language of the 1992 Appropriations Act. We further note that the Department of Justice Memorandum before the District Court in Opposition to Plaintiff's Motion for Injunction Pending Appeal states that the Solicitor of the Department of the Interior had not taken a position whether the 1992 appropriations rider was valid in funding years after fiscal 1992.^{4/} Therefore, there is no legal analysis in the record concerning the impact of the restrictive language in the 1992 Appropriations Act.

Our concern is whether the language of the 1992 Appropriations Act binds DOL's Grant Officer. The funding in question is from a DOL appropriation, and therefore it is our responsibility under these circumstances to ensure that the DOL Grant Officer properly awards such grant monies. The issue of the legal effect of the 1992 Appropriations Act restriction on the activities of DOL must be addressed by this agency, even if the District Court finds for the Delawares with regard to its tribal status on the merits.

We are cognizant of the short time frame remaining for the award of JTPA grants for Program Year 1998, and urge the presiding ALJ to expedite the briefing and hearing schedule with regard to the specific issue of the legal effect of the restrictive appropriations language. Resolution of this issue is critical to the timely instruction of the Grant Officer.

ORDER

The ALJ's Order Granting Stay issued November 14, 1997, **IS REVERSED AND THE ALJ IS DIRECTED TO CONDUCT FURTHER PROCEEDINGS CONSISTENT WITH THIS ORDER.**

SO ORDERED.

KARL J. SANDSTROM

Chair

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member

^{3/} Administrative File (A.F.) at F5-30.

^{4/} A.F. at B11, B17.