



In the Matter of:

**UNITED TRIBES OF KANSAS,  
AND SOUTHEAST NEBRASKA, INC.,**

**ARB CASE NO. 01-026**

**ALJ CASE NO. 00-WIA-3**

**COMPLAINANT,**

**DATE: August 6, 2001**

**v.**

**UNITED STATES DEPARTMENT OF LABOR,  
EMPLOYMENT AND TRAINING ADMINISTRATION,**

**RESPONDENT,**

**and**

**WYANDOTTE TRIBE OF OKLAHOMA,**

**PARTY-in-INTEREST.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

Scott W. Williams, Esq., *Alexander and Karshmer, Berkeley, California*

*For the Respondent:*

Stephen R. Jones, Esq., Harry L. Sheinfeld, Esq., Charles D. Raymond, Esq., *U.S. Department of Labor, Washington, D.C.*

### **FINAL DECISION AND ORDER**

This case arises under the Workforce Investment Act of 1998 (WIA), as amended, 29 U.S.C.A. §§2801-2945 (West 1999 & Supp. 2000) and implementing regulations at 20 C.F.R. §§660-671 (2001). The case involves WIA section 166, 29 U.S.C.A. §2911, which supports employment and training programs for Native Americans. The solicitation for the grant

applications at issue appears at 64 Fed. Reg. 49,522-49,528 (Sept. 13, 1999). It contains the procedures by which the Department of Labor Employment and Training Administration (ETA) stated that it would designate grant recipients for fiscal years 2000 and 2001.

Complainant United Tribes of Kansas and Southeast Nebraska, Inc. (United Tribes), a consortium of the Sac and Fox Tribe of Missouri and the Iowa Tribe of Kansas and Nebraska, complains that Respondent Department of Labor (DOL) Employment and Training Administration (ETA) wrongfully awarded a WIA section 166 grant to the Party-in-Interest, the Wyandotte Tribe of Oklahoma (Wyandottes). The Administrative Law Judge (ALJ) assigned to hear the case upheld the decision of the ETA Grant Officer. We affirm the decision of the ALJ.

## I. BACKGROUND

### *Statutory and Regulatory Scheme*

In enacting WIA section 166, Congress sought to support employment and training activities for Indian, Alaska Native and Native Hawaiian individuals for purposes of “develop[ing] more fully the academic, occupational, and literacy skills of such individuals; ... mak[ing] such individuals more competitive in the workforce; and . . . promot[ing] the economic and social development of Indian, Alaska Native, and Native Hawaiian communities in accordance with the goals and values of such communities.” 29 U.S.C.A. §2911(a)(1). An additional object was to “[h]elp [these individuals] achieve personal and economic self-sufficiency.” 20 C.F.R. §668.100(a)(4). The regulations state that “[t]he principal means of accomplishing these purposes is to enable tribes and Native American organizations to provide employment and training services to Native American peoples and their communities” specifically “in a culturally appropriate manner, consistent with the principles of Indian self-determination.” 20 C.F.R. §668.100(b). Pursuant to WIA section 166(h)(1), the Secretary designated ETA as responsible for awarding grants to “Indian tribes, tribal organizations” and “Indian-controlled organizations serving Indians” to carry out authorized activities. 29 U.S.C.A. §2911(c)(1).<sup>1/</sup>

ETA may award grants competitively in the event that two or more INA-controlled organizations, none of which is accorded “highest” priority, apply to provide employment and training services in a particular geographic area.<sup>2/</sup> ETA may utilize a “formal panel review

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<sup>1/</sup> See 20 C.F.R. §668.300 for a description of individuals eligible to receive services under the Indian and Native American (INA) program; see 20 C.F.R. §668.340 for enumerated INA grantee allowable activities; see 20 C.F.R. §668.500 and §668.510 for enumerated INA grantee services to communities.

<sup>2/</sup> Federally-recognized tribes or other enumerated organizations receive the “highest priority” over any other organization if they possess the capability to administer the program and to meet eligibility and regulatory requirements; the priority extends only to areas over which the organizations exercise  
(continued...)

process” when one or more new applicants, none qualifying for the highest priority, can demonstrate the “potential for superiority” over the incumbent. 64 Fed. Reg. at 49,523-49,524. The Solicitation for Grant Applications stated, “[t]he purpose of the panel is to review and evaluate an organization’s potential, based on its application (including the required supplemental information), to provide services to a specific Native American community, to rate the proposals in accordance with the rating criteria and to make recommendations to the Grant Officer . . .” and listed “factors” which “will be considered in evaluating the applicants [sic] approach to providing services.” *Id.* at 49,524. The Solicitation also specifically provided that “[p]anel recommendations are advisory to the Grant Officer.” *Id.* The panel recommendation is not the end of the matter, however. The WIA regulations require the ETA Grant Officer to make the ultimate selection of the section 166 grantee “that demonstrates the ability to produce the best outcomes for its customers.” 20 C.F.R. §668.250 (b)(4). In making that determination the Solicitation states that the Grant Officer will give consideration to the following factors:

[T]he review panel’s recommendation, in those instances where a panel is convened; input from DINAP [the ETA Division of Indian and Native American Programs], the Office of National Programs, other offices within [ETA], and the DOL Office of the Inspector General; and any other available information regarding the organization’s financial and operational capability, and responsibility.

64 Fed. Reg. at 49,524.

Native American entities designated grantees for program years “must ensure and provide evidence to DOL that a system is in place to afford all members of the eligible population within their service area an equitable opportunity to receive employment and training activities and services.” 20 C.F.R. §668.260(b). ETA determines the amount of any grant awarded pursuant to a formula. 20 C.F.R. §668.296. “Each grantee receiving funds under WIA section 166 must submit to DINAP a comprehensive services plan and a projection of participant services and expenditures” for the planning cycle. 20 C.F.R. §668.710.

An applicant whose application is denied may request administrative review of the Grant Officer’s decision by an ALJ. 20 C.F.R. §667.800(a). Review of the Grant Officer’s determination is expressly limited to determining “whether there is a basis in the record to support the decision.” 20 C.F.R. §667.825(a)

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<sup>2</sup>(...continued)

“legal jurisdiction,” such as their reservations. 20 C.F.R. §668.210. *See United Urban Indian Council, Inc. v. U.S. Dep’t of Labor*, ARB No. 01-025, ALJ No. 2000-WIA-4 (ARB May 18, 2001).

### *Facts and Procedural History*

On September 13, 1999, DOL solicited grant applications for purposes of selecting and designating service providers for INA employment and training programs under the WIA during program years 2000 and 2001. 64 Fed.Reg. 49,522. United Tribes timely complied with section II 2 Part A of the solicitation by filing a Notice of Intent to service numerous counties in the States of Kansas and Missouri, a single county in the State of Nebraska and four reservations. The Wyandottes also filed a timely Notice of Intent proposing to provide services to the Native American community within a nine-county area of southeastern Kansas and southwestern Missouri – an area for which United Tribes was the incumbent grantee and which was included in United Tribes’ Notice of Intent.<sup>3/</sup> The ETA grant officer thereafter served both applicants with a notification of competition requesting that they file a “full” Notice of Intent, specifically requesting that they provide the information described in section II 2 Part B of the Solicitation. United Tribes submitted the “Part B” information. Because they believed that their original Notice of Intent contained all of the information requested, the Wyandottes declined to submit additional information.

DINAP, with the concurrence of the grant officer, determined that neither United Tribes nor the Wyandottes should be accorded “highest priority” under the WIA regulation’s mechanism for establishing priority for designation. 64 Fed. Reg. at 49,524. Having determined that the Wyandottes, as the new applicant, had “demonstrat[ed] the potential for superiority over” the incumbent United Tribes, in accordance with section III of the Solicitation, ETA then convened a review panel as permitted under section III.

The review panel scored the information submitted by United Tribes and the Wyandottes and recommended to the Grant Officer that the Wyandottes be awarded the grant for the nine-county service area subject to the competition. After reviewing the applications and conferring with DINAP and the ETA office of internal review, the Grant Officer accepted the panel’s recommendation and designated the Wyandottes as the WIA section 166 grantee for the period July 1, 2000, through June 30, 2002, on condition that the Wyandottes submit a CPA financial attestation and an acceptable two-year service plan. United Tribes petitioned the Grant Officer to reconsider the decision and to provide a “debriefing.” The Grant Officer declined to reconsider but told United Tribes that the review panel had given their application a score of 61 out of a possible 100 points compared to a score of 84 for the Wyandottes’ application and provided a summary of “strengths and weaknesses” manifest in United Tribes’ application.

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<sup>3/</sup> The nine counties subject to competition were Crawford and Cherokee Counties in the State of Kansas and Barton, Jasper, Newton, McDonald, Dade, Lawrence and Barry Counties in the State of Missouri. See Complainant’s Exhibit (CX) 3. United Tribes maintains an office in Baxter Springs, Cherokee County, Kansas, for purposes of servicing not only the nine-county area subject to competition but also additional counties in eastern Kansas and western Missouri. The Wyandottes found the nine-county area attractive because of the high concentration of INA individuals residing there within a 100-mile radius of its Tribal Complex located in Ottawa County, Oklahoma. Many of these INA individuals are Wyandotte. Administrative File (AF) at E 97-98, 111.

Administrative File (AF) at B 1-4. The Grant Officer refused to provide information regarding the composition of the review panel.

United Tribes requested review before the ALJ, charging that the Grant Officer unreasonably designated the Wyandottes as the grant recipient based on the Wyandottes' incomplete and unsubstantiated application, that the Grant Officer erroneously ignored the Solicitation's "general designation principles" in making the designation and that ETA's refusal to disclose information about the review panel violated United Tribes' due process rights. The ALJ upheld the Grant Officer's decision as "based on reasoned decision-making in accordance with the law," agreeing with ETA that although "the grantee selection process was not 'perfect,' the selection process was fundamentally fair." Decision and Order Denying Relief (D.O.) at 25. This appeal followed.

## II. JURISDICTION

We have jurisdiction pursuant to 20 C.F.R. §667.830.

## III. STANDARD OF REVIEW

By regulation, our review is limited to a determination of "whether there is a basis in the record to support the decision" to deny United Tribes' application for funding and award the grant to the Wyandottes. 20 C.F.R. §667.825(a). This standard is highly deferential and is akin to the "arbitrary and capricious" standard used by the federal courts. Under this standard, the Grant Officer's decision must be affirmed unless the party challenging the decision can demonstrate that the decision lacked any rational basis. See *North Dakota Rural Development Corp. v. U.S. Dep't of Labor*, 85-JTP-4 (Sec'y Mar. 26, 1986).<sup>4/</sup>

## IV. DISCUSSION

### A. Use of the Review Panel

United Tribes argues that ETA erred in referring the grant applications to a review panel because, in its judgment, the Wyandottes had not "demonstrated superiority" over United Tribes. This argument is based on a mischaracterization of the language of the Solicitation, which provides that ETA may convene a review panel "[w]hen one or more new applicants, none qualifying for the highest priority for the requested area, can demonstrate *the potential for superiority* over the incumbent organization . . . ." 64 Fed. Reg. at 49,524 (emphasis added).

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<sup>4/</sup> As the Secretary noted in *North Dakota Rural Development*, "this is- a difficult standard and properly so, because there must be considerable discretion exercised in determining the award of Department funds among multiple grant applicants. When there is a basis in the record for a Grant Officer's . . . determination, neither an ALJ nor the Secretary may reverse the determination merely because he might weigh the same information and call the balance differently."

ETA's use of the term "potential" makes it abundantly clear that ETA intended that it could resort to a review panel whenever an applicant had made a colorable showing that its provision of services would be superior to that of the incumbent. Given that the Wyandottes filed a substantial Notice of Intent, which ETA ultimately found superior to United Tribes' amended and enhanced application, there exists a basis in the record for ETA's decision to convene the review panel.

## **B. Admissibility of evidence at hearing**

Prior to the hearing in this case, United Tribes sought through discovery to obtain the identity of the review panelists and information regarding their purported expertise, the documents on which the panel members relied in making their recommendation, the analysis and deliberations of the panel, and the panelists' scores and recommendations. ETA refused to disclose the information, asserting the "deliberative process" privilege.<sup>5/</sup> At the hearing, the United Tribes challenged ETA's refusal to comply with discovery. Notwithstanding its refusal to disclose this information in discovery, at the hearing ETA introduced into evidence, over United Tribes' objection, certain of the information which had been previously withheld

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<sup>5/</sup> While not dispositive of the evidentiary issues now before the Board, we nevertheless question ETA's reliance upon the claim of privilege in refusing to divulge information about the advisory panel. The deliberative process privilege is qualified; it balances a party's need for the information against the government's interest in confidentiality, frank discussion of legal and policy matters being essential to the decision-making process. The privilege contemplates a particular means of assertion. Three requirements must be met:

First, there must be a formal claim of privilege lodged by the head of the department that has control over the matter, after actual consideration by that officer. Second, the responsible agency official must provide precise and certain reasons for asserting the confidentiality over the information or documents. Third, the government information or documents sought to be shielded must be identified and described.

6 James Wm. Moore *et al.*, Moore's Federal Practice §26.52[5] (3d ed. 2001).

In support of its claim of deliberative process privilege ETA merely asserted that, "Any documents which reflect the identity, analysis, discussion or deliberations of the panel have been withheld, because they are properly protected from disclosure under the deliberative process privilege." This claim, without more, was clearly inadequate. *See, e.g., United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *United States v. O'Neill*, 619 F.2d 222, 226 (3d Cir. 1980); *EEOC v. Airborne Express*, No. CIV.A.98-1471, 1999 WL 124380 at \*1 (E.D. Pa. Feb. 23, 1999); *United States v. Ernstoff*, 183 F.R.D. 148, 152 (D.N.J. 1998); *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752 (E.D. Pa. 1983); *Midwest Farmworker v. U.S. Dep't of Labor*, ARB Case No. 98-144, ALJ Case Nos. 97-JTP-20/21/22, slip. op. at 2 (ARB Jul. 23, 1998).

pertaining to the review panel's findings.<sup>6/</sup> United Tribes objected to introduction of the evidence because it had not been previously disclosed, citing 20 C.F.R. §667.810(d).<sup>7/</sup> In response, the ALJ ordered ETA to disclose the qualifications of the panelists. However, the ALJ refused to strike the evidence pertaining to the panel's findings or order further disclosure because United Tribes had not filed a timely motion to compel discovery prior to the hearing.

On appeal, United Tribes argues that its failure to submit a timely motion to compel discovery is irrelevant; that the documents in question were barred from introduction into evidence by 20 C.F.R. §667.810(d).<sup>8/</sup> We agree. Whether or not United Tribes timely moved to compel the production of evidence sought during discovery is irrelevant to a proper invocation of the governing evidentiary rule. 20 C.F.R. §667.810(d) is clear: unless the documentation sought to be introduced at hearing has been made available to the opposing party for review pursuant to the procedures set forth therein, its use at hearing is barred.

However, we do not agree with United Tribes' further assertion that because the ALJ improperly allowed the introduction into evidence of the disputed documents, United Tribes' right to due process was violated. The record demonstrates that United Tribes was already aware of virtually all of the information that ETA introduced during the hearing over United Tribes' objection. As early as the April 2000 debriefing, ETA provided United Tribes with summaries of the review panel's comments pertaining to their application and their total score. AF at B1-

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<sup>6/</sup> The information in question consisted of review panel summary technical rating forms developed from panel scoring of solicitation Parts A and B submissions, Respondent's Exhibits (RXX) 2 and 3. The panel focused on the five solicitation rating criteria referenced above, *i.e.*, previous experience; approach to providing services; description of the planning process; coordination, linkages and ability to utilize existing community resources; and demonstrated support and recognition of the INA community and service population. 64 Fed. Reg. at 49,524. These criteria carry maximum possible rating points of 20, 40, 15, 15 and ten, respectively, for a maximum total of 100 points. United Tribes received a total of 61 points whereas the Wyandottes received a total of 84 points.

<sup>7/</sup> 20 C.F.R. §667.810(d) states:

The ALJ must not permit the introduction at the hearing of any documentation if it has not been made available for review by the other parties to the proceeding either at the time ordered for any prehearing conference, or, in the absence of such an order, at least three weeks prior to the hearing date.

<sup>8/</sup> United Tribes also contends that it was improperly denied the opportunity to cross-examine the members of the review panel. However, although the panel advised the Grant Officer, it was the Grant Officer who actually made the decision under review in this appeal. The Grant Officer was available for cross-examination at the hearing and United Tribes, in fact, cross-examined her. Therefore, United Tribes had a full and fair opportunity to expose what it believed were fatal errors in the award of this grant.

B3. Additionally, ETA released summaries of the panel's comments pertaining to United Tribes' and Wyandottes' applications and their total scores upon submission of the administrative file in May 2000. *See* AF at D3-D4. These summaries comprise the majority of the challenged exhibits (RXX 2 and 3) and correspond to the rating criteria set out in the Solicitation. *See* D.O. at 10 n.7 ("summarized version of exhibits had been provided prior to the hearing (AF §D) and [exhibits] merely provided the bases for what was already contained in the Administrative File"). The only information that United Tribes was unable to obtain prior to the hearing were the numerical scores given by the panel for each criterion. As to this information, United Tribes has not argued, nor is it otherwise evident from the record, how the inability to obtain these scores prejudiced United Tribes' case.<sup>9/</sup> Thus, we conclude that the ALJ's admission into evidence of the disputed documents was harmless error.

### **C. Basis for the award**

The Solicitation sets forth seven General Designation Principles ("GDPs") to be considered by DINAP and the Grant Officer in the grant selection process. Among the GDPs to be considered were the following:

(2) High unemployment, lack of training, lack of employment opportunity, societal and other barriers exist within predominantly INA communities and among INA groups residing in other communities. The nature of this [grantee designation] program is such that Indians and Native Americans are best served by a responsible Indian and Native American organization directly representing them, with the demonstrated knowledge and ability to coordinate resources with the respective communities. . . .

(5) Incumbent and non-incumbent applicants seeking additional areas are expected to clearly demonstrate a working knowledge of the community that they plan to serve, including available resources, resource utilization and acceptance by the service population.

(6) Special employment and training services for Indian and Native American people have been provided through an established service delivery network for the past 24 years . . . . The DOL intends to exercise its designation authority to both preserve the continuity of such services and to prevent the undue fragmentation of existing geographic service areas. [T]his will include priority for those Native American organizations with an existing

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<sup>9/</sup> If United Tribes believed that it was unfairly surprised by ETA's introduction of evidence, it could have requested a continuance. It did not do so.



demonstrated capability to deliver employment and training services within an established geographic service area and for organizations which directly represent the recipients of WIA services.

64 Fed. Reg. at 49,522-49,523.

United Tribes contends that the Grant Officer improperly overlooked deficiencies in Wyandottes' application. Specifically, United Tribes argues that with regard to principle 2, the Wyandottes' claims were unverified and barely mentioned the nine-county community they proposed to serve; with regard to principle 5, the Wyandottes neither asserted that they had a working knowledge of the community nor identified their available resources; with regard to principle 6, the Wyandottes did not address the issue of continuity of services. Additionally, United Tribes asserts that the Grant Officer approved the Wyandottes' application without giving any consideration to the fact that the award would fragment service areas. Finally, United Tribes complains that the Grant Officer approved the Wyandottes' application even though the Wyandottes submitted it without completing Part B of the application. We evaluate these claims in light of the highly deferential standard of review applicable in this case.

With regard to continuity of service, the Grant Officer explained that she considered the question of continuity of service and fragmentation of service areas, but declined to re-designate an incumbent simply to avoid service disruptions, especially given the fact that the Wyandottes' application outscored United Tribes' application by 23 points. The Grant Officer's reasoning makes sense. The stated purpose of the grant competition is to assure that grants are awarded to those who are most likely to provide the best services. Award of grants to incumbents does not necessarily assure that outcome.

With regard to United Tribes' assertion that the Wyandottes failed to complete Part B of the application, the Grant Officer explained that failure to submit Part B is not fatal and is interpreted as the applicant's intent to be rated solely on the basis of Part A. Thus, according to the Grant Officer, the crucial consideration is whether the information provided is adequate, not whether it is contained in any particular part of the form. We find this explanation reasonable and conclude that the Grant Officer had a rational basis in accepting the Wyandottes' application.

In considering the relative merits of the two applications, the reviewing panel considered the strengths and weaknesses of both applicants. United Tribes attempts to undermine the Grant Officer's decision by further highlighting weaknesses in the Wyandottes' application. However, after reading both applications, we are not persuaded that these perceived weaknesses, even if true, are so significant that it compels us to conclude that there is no reasonable basis to support the Grant Officer's decision. The record clearly demonstrates that the review panel and the Grant Officer considered the relevant factors in awarding the grant and engaged in reasoned application of those factors. Therefore, we find "a basis in the record" to support the Grant

Officer's decision. Accordingly, we **DENY** United Tribes' petition and **AFFIRM** the order of the ALJ.

**SO ORDERED.**

**CYNTHIA L. ATTWOOD**

Member

**E. COOPER BROWN**

Member

**RICHARD A. BEVERLY**

Alternate Member