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U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

INDIAN HUMAN RESOURCE CENTER, INC.

Case No. 83-JTP-4

James W. Aiken, Esq.
Aetna Plaza
Suite 1001
Seattle, Washington 98121
For the Complainant

Harriet A. Gilliam, Esq.
u. s. Department of Labor
200 Constitution Ave., N. W.
Washington, D. C. 20210
For the Respondent

Refore: E. EARL THOMAS
Deputy Chief Judge

DECISION AND ORDER

This proceeding arises under the Job Training Partnership Act (JTPA), 29 U.S.C. § 501 et seq., and the Rules and Regulations issued thereunder, found at Title 20 of the Code of Federal Regulations.

Statement of the Case

Indian Human Resource Center, Inc. (or IHRC), the Complainant, initiated this proceeding by filing a request for hearing with the Office of Administrative Law Judges on September 12, 1983. Complainant made this request in order to appeal the Grant Officer's final determination to award California Indian Manpower Consortium (or CIMC), and not IHRC, a Section 401 JTPA grant for the County of San Diego, California for fiscal year 1984.

A hearing on this matter was held on February 6 and 8, 1984, at which time the parties were afforded full opportunity to present evidence and argument.

The findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis

of the entire record, arguments of the parties, and applicable statutes, regulations and case law. 1/

Issues

Whether the Grant Officer's non-selection of IHRC was arbitrary and capricious or an abuse of his discretion, constituting a violation of JTPA. This issue involves the following sub-issues:

(a) Whether the Department of Labor (DOL) followed the Solicitation for Notices of Intent:

(h) Whether CIMC was afforded an unfair advantage when it was given an opportunity to supplement its application for funding;

(c) Whether DOL's decision to convene a panel to review competing applications violated JTPA;

(d) Whether DOL was required to notify applicants of its intent to use a panel review process;

(e) Whether DOL was required to follow Employment and Training Order Number 3-82, and if so, did DOL violate some of its provisions; and

(f) If the panel process was valid, whether the Grant Officer was required by JTPA to ensure that all panel members had competence in Native American Programs.

Findinss of Fact

1. The Indian Human Resource Center, Inc. is a non-profit organization which provides services to Native American Indians in San Diego, California. (DOL #1, page 50)

1/ The following abbreviations will be used in citations to the record: DOL # - Department of Labor's Exhibits: CX # - Complainant's Exhibits; TR - Transcript of Hearing.

2. The Indian Human Resource Center, Inc. operated a manpower and training program in San Diego County under the Comprehensive Employment and Training Act (CETA) for four years from 1979 to 1983. (DOL #1, page 53)

3. On May 20, 1983, the Division of Indian and Native American Programs, Employment and Training Administration, United States Department of Labor (DINAP), sent to all current Native American grantees and other interested organizations an advanced copy of the Solicitation for Notices of Intent (SNOI) for Program Year 1984 Native American grantees under JTPA. (DOL #1, pages 59-73)

4. On May 27, 1983, the SNOI was published in the Federal Register. 48 F.R. 23937 et seq. (DOL #1, pages 56-58)

5. The SNOI notified interested organizations of the requirements and procedures to be followed in order to submit a Notice of Intent and the process by which applicants would be selected and designated as potential grantees. Notices of Intent were to be postmarked no later than 20 calendar days following the date of publication of the SNOI unless a waiver of up to 10 calendar days was granted. (DOL #1, pages 56-58)

6. By letter dated June 13, 1983, IHRC submitted its Notice of Intent (NOI) for fiscal year 1984 for the County of San Diego, California. (DOL #1, pages 50-55)

7. It was DINAP policy to review all NOI's for completeness (CX 12) and to notify organizations which had submitted deficient applications of the deficiencies and give them an opportunity to correct the problems after being notified by telephone. (TR 109, Testimony of Margaret Crosby)

8. Mrs. Margaret Crosby, a field supervisor in DINAP, with supervisory responsibility, testified that IHRC's NO1 was complete except for missing the articles of incorporation. (TR 101) She further testified that IHRC was not notified of this deficiency because the articles of incorporation were "something DOL could obtain quickly."

9. Mrs. Crosby further testified that CIMC's NO1 was defective. (TR 127) By telephone call on July 8, 1983, Mrs. Crosby notified CIMC of the deficiencies in its application and that the missing information had to be received by DINAP by July 13, 1983. (CX 16)

10. The deficiencies in CIMC's NO1 were (1) there was no consultation with Indian tribes; (2) CIMC failed to provide any substantative plans for showing what is required by law

to replace approximately 82 grantees for Fiscal Year (FY) 84; (3) there was no commitment from any organization outside CIMC's current area. (CX 16) For FY 84, CIMC had requested funding for territories held by approximately 82 other grantees in Regions 8, 9 and 10. (CX 16; TR 112)

11. On July 12, 1983, the executive director of CIMC told Mrs. Crosby by telephone conversation that CIMC would submit an amended NO1 in which it would apply only for the State of California. (CX 16) Mrs. Crosby informed CIMC that a change in territory might not be accepted since the deadline for accepting NOI's had passed and she would have to check with her superior. (TR 112; CX 16) Mr. Paul Mayrand, Acting Director of the Office of Specially Targeted Programs (OSTP), and Mrs. Crosby's supervisor, said that this new information would be considered. Id. CIMC was informed of this by Mrs. Crosby on July 13, 1983. (CX 16)

12. On June 16, 1983, CIMC submitted its Notice of Intent. (CX 13) On July 11, 1983, CIMC submitted its first amendment to its NO1 and on July 13, 1983, it submitted a second amendment. (CX 13) At all times, CIMC's NO1 included a request for funding for San Diego County, California.

13. The Division of Indian and Native American Programs (DINAP) set up competitive review panels to review, rate and recommend NOI's for funding. The panel consisted of three members, only one of whom could work in DINAP. The panel members who reviewed both IHRC's and CIMC's NOI's were Pete Homer, the chairman and employed by DINAP, Patrick Skees and James Wright. (TR 21) A meeting was held with all panel members where everyone was informed of the procedures to follow and given the necessary forms. (TR 25-33)

14. The Homer panel used the following procedure: (a) all NOI's were rated via an individual panel rating sheet (DOL #1, page 91) and by a point system for each criteria which was developed by the panel (CX 10); (b) all competing NOI's were categorized: (c) the panel met and negotiated a panel score for each NO1 via a Summary Panel Rating Sheet (DOL #1, page 89); (d) the panel chairman then completed a Selection Summary Report (DOL #1, page 87) and panel recommendations.

15. The panel gave CIMC a score of 78 and IHRC a 34. In the panel meeting, Pete Homer lowered his score for IHRC because he could not make specific reference to its NO1 for information to substantiate his scores. (TR 208; CX 3) The panel made no recommendation to the Grant Officer with regard to funding IHRC because IHRC had submitted insufficient documentation on all criteria, and two of the three criteria were rated technically

unacceptable. Id. CMIC was recommended for designation in all areas requested except those areas given to others. Id.

16. Margaret Crosby, supervisor of the region, and Herb Fellman, Director of DINAP, both recommended IHRC for funding. (TR 79-30, 83, Testimony of Pete Homer; TR 107, Testimony of Margaret Crosby; CX 15)

17. The Grant Officer, Edward Tomchick, asked the panel for a clarification of its recommendation regarding IHRC, among others. The panel responded by saying that IHRC's application did not contain sufficient documentation to merit a panel recommendation for designation and since the panel could not rate two of the three criteria, they were rated technically unacceptable. The panel recommended, however, that since IHRC had been a CETA grantee for the past four years, that the Grant Officer contact the program supervisor and the government authorized representative for input in a decision. (CX 4) The Grant Officer declined to do so.

18. The Grant Officer awarded CIMC the grant for San Diego County based on the panel's rating. (CX 18)

19. By letter dated August 30, 1983, the Grant Officer notified IHRC that it was not the successful applicant for the competition in its area but that it had the right to petition for reconsideration. (DOL #1, pages 34, 35)

20. On September 14, 1983, IHRC filed its Petition for Reconsideration with supporting documentation with the Grant Officer. (DOL #1, pages 5-33)

21. By letter dated October 14, 1983, the Grant Officer notified IHRC that its Petition for Reconsideration was denied. IHRC was informed that it could file an appeal to the Office of Administrative Law Judges. (DOL #1, page 4)

22. On September 12, 1983 and October 31, 1983, IHRC filed its request for hearing with the Office of Administrative Law Judges.

Conclusions of Law

I

The basic issue to be decided in this case is whether the Grant Officer was correct in not designating IHRC for funding under Section 401 of JTPA. 29 U.S.C. § 1671.

The standard of review by which this issue shall be determined is whether the Grant Officer's decision was arbitrary or capricious, an abuse of discretion or was not in accordance with 1aw. See Tackett and Schaffner, Inc. v. United States, 663 F.2d 940 (Ct. Cl. 1980). See also Urbina v. U. S., 530 F.2d 1387, 209 Ct. Cl. 192 (1976). In making this determination, an administrative law judge may not substitute his/her judgment for that of the Grant Officer. See Simeon Management Corp. v. Federal Trade Commission, 579 F.2d 1137, 1142 (1978). Such a standard of review is necessary because of the considerable amount of discretion that is accorded to administrative agencies in the awarding of grants of federal funds. See Northwest Rural Opportunities, Inc., 84-JTP-3 (January 26, 1984); Farmworkers Corporation of New Jersey, 82-CET-62 (December 31, 1980).

This citation is incorrect.

Under the JTPA regulations, the Department of Labor has the burden of production to support the Grant Officer's decision. 20 C.F.R. § 636.10(g). The burden of persuasion is on IHRC, however, since it is the party which is seeking to overturn the decision of the Grant Officer. Id.

Pursuant to these standards, I make the following conclusions of law with regard to whether the Grant Officer was correct in his decision to not select IHRC for Section 401 funding for Fiscal Year (FY) 1984.

II

Section 401 of JTPA directs the Secretary of Labor to establish administrative procedures and machinery for the selection, administration, monitoring and evaluation of Native American employment and training programs. 29 U.S.C. § 1671(e). This provision further specifies that the administrative procedures and machinery are to include "personnel having particular competence in this field." Id. Section 401 also specifies that, whenever possible, the Secretary shall utilize Indian tribes, bands or groups which have governing bodies for the provision of employment and training programs. 29 U.S.C. § 1671(c)(l)(A). The Secretary is to require such groups to submit a comprehensive plan once he determines that each has demonstrated the capability to effectively administer a comprehensive employment and training program. Id.

Pursuant to these provisions, the Secretary developed and published the Solicitation for Notices of Intent. 48 Federal Register 23937-9. The SNOI stated that it sets forth the process by which applicants would be selected and designated as potential grantees. The SNOI required applicants to submit a Notice of Intent to apply for funds on Standard Form 424 and

submit additional information, including articles of incorporation by private non-profit organizations and a consortium agreement by consortiums. Id. Applicants were encouraged to submit documents related to their administrative responsibility. Id. The SNOI also informed potential applicants that they had to pass a responsibility review and that they would not be designated if DOL's efforts to recover unappealed debts have been unsuccessful or fraud or criminal activity has been proven to exist within the organization.

The SNOI did not specify the procedures that would be followed if more than one organization submitted a Notice of Intent for a geographic area. The procedure DOL established was to have applications, where there was an overlap in geographic coverage, reviewed and rated by a panel. (TR 158, Testimony of Melvin Goldberg) The panel consisted of three members, only one of whom was permitted to have experience in Native American Indian programs. (TR 21, 22, Testimony of Pete Homer) Based upon its consensus numerical scores, the panel then made recommendations to the Grant Officer as to which organizations should be funded via a selection summary report. (CX 3)

The issues in this case all revolve around the selection process itself. The responsibility review process is not at issue.

III

The first issue to be decided is whether the Department of Labor followed the Solicitation for Notices of Intent. This issue goes hand-in-hand with whether CIMC was offered an unfair advantage when it was given an opportunity to supplement its application for funding.

Once NOI's were submitted to DINAP, they were reviewed for compliance with the SNOI by either the federal representative or the supervisor. (TR 142, Testimony of Margaret Crosby; cx 12) If an NO1 was found to be defective, the DINAP federal representative or supervisor contacted the organization by telephone. Id.

The review of IHRC's application revealed that IHRC had not submitted a copy of its articles of incorporation. (TR 101) The Indian Human Resource Center, Inc. was not notified of this deficiency, however, since DOL could obtain a copy quickly and the lack of this was not considered a defect. (TR 125)

On the other hand, CIMC was notified by Mrs. Crosby that some information was missing from its application. (TR 109) CIMC's NO1 was deficient because a consortium agreement was not submitted (TR 71, Stipulation of Counsel); there was no consultation with Indian tribes; CIMC failed to provide any substantive plans showing how it would replace approximately 82 grantees; and there was no commitment from any organization outside CIMC's current area. (CX 16) By telephone call on July 8, 1983, CIMC was notified of these deficiencies. Instead of just submitting this missing information, CIMC submitted an amended NO1 on July 11 and 13, 1983. (TR 113, Testimony of Margaret Crosby) This amended NO1 was given to the panel. (TR 130) In its original NOI, CIMC had requested funding not only for the territories it had served in the past but new ones as well. (TR 112; CX 16) In its amended NOI, CIMC applied only for the State of California. (CX 16)

When CIMC had originally told Mrs. Crosby of its wish to amend its NOI, Mrs. Crosby told CIMC's executive director that she would have to consult with higher authority since the deadline for filing NOI's had passed. (CX 16) Mrs. Crosby then informed CIMC that it could submit the revision but she would not promise any action on it. (CX 16)

The SNOI provided that all NOI's had to be postmarked no later than 20 calendar days following the date of publication of the SNOI; that a waiver of up to 10 calendar days could be granted; and that NOI's submitted under a waiver must be postmarked no later than 30 calendar days following the publication of the SNOI. 48 F.R. 23937 and 23938. The SNOI was published on May 27, 1983. I take judicial notice of the fact that 20 days later was June 16, 1983 and 30 days later was June 26, 1983. No waiver was granted to CIMC; yet CIMC submitted its amended NO1 more than 14 days past the latest possible deadline. Mrs. Crosby testified that the SNOI deadline had not expired for this type of additional information. (TR 128) Mr. Melvin Goldberg, a supervisory contract specialist and a grant officer for JTPA, also testified that the contact with CIMC was appropriate because it was done in the context of an initial review and clarification. (TR 169)

I disagree with DOL's interpretation of the nature of CIMC's amended NOI. If CIMC had simply supplied the missing information, then there would be no problem. But in this case, CIMC went further than submitting the additional information required by the SNOI. It materially changed its application so as to be an amended or revised NO1 and not merely a complete NOI. And it did so beyond the date permitted by the SNOI. The Department of Labor should not have permitted such an amended NO1 to be presented to the panel when the deadline

for submission of NOI's had passed and when other organizations were not given the opportunity to so amend and revise their NOI's. Mr. Goldberg testified that it would have been bad procurement policy to go back and offer an applicant a chance to "beef up" its proposal after the initial review for completeness. (TR 168) While Mr. Goldberg was speaking in the context of the panel's recommendation to the Grant Officer that he go back to IHRC for additional information, I find his comment equally pertinent to the opportunity given to CIMC. The Department of Labor should not have permitted an organization notified of the deficiencies in its NOI to submit more than the missing information, particularly when the deadline for submission of NOI's had passed. Thus, I find DOL violated the directives of the SNOI and of its own internal policy by permitting CIMC to revise its NO1 and then by submitting the amended NO1 to the panel. One can only surmise as to what the panel rating of CIMC's original SNOI or of a complete NO1 without the change in territory would have been. See infra for a discussion of the remedy for this error.

IV

The next issue is whether DOL's decision to convene a panel to review competing applications violated JTPA.

Section 401 0f JTPA does not specify the procedure to be followed by DOL in designating Native American grantees. It simply authorizes the Secretary to establish administrative procedures and machinery, including personnel with particular competence in the field, for the selection of programs, among other things. 29 U.S.C. § 1671(e). The other relevant directive in JTPA is that the Secretary determine that applicants have demonstrated the capability to effectively administer a comprehensive employment and training program. 29 U.S.C. § 1671(c)(1)(A).

As I stated supra, DOL instituted a panel process to review those applications where an overlap of geographic territories was requested.

IHRC's argument is mainly concerned with the composition of the panel and not on the use of a panel per se. But before we can even reach the question of the composition of the panel, the legality of the panel process itself must first be decided.

Section 401(e) of JTPA gives the Secretary great latitude in setting up the procedure to be followed in selecting Native American grantees. 29 U.S.C. § 1671(c). The only limitation this section actually provides is that the administrative procedures and machinery include personnel having particular competence in the field. Id.

On the other hand, it is clear that Congress did not intend the selection of Native American grantees under JTPA to be a competitive process just as it did not so envision this program under the Comprehensive Employment and Training Act (CETA). A comparison of Section 401 of JTPA with Section 402, which concerns migrant and seasonal farmworker programs, makes it clear that a competitive process was not intended. Section 402 specifically provides that the Secretary shall use procedures consistent with standard competitive Government procurement policies in awarding any grant or contract. 29 U.S.C. § 1672(c)(l). No such provision is found in Section 401. See also TR. 180-181, Testimony of Melvin Goldberg. These differences are consistent with the different view Congress holds toward Native American grantees. Section 401 speaks of the special relationship between the Federal Government and most of the individuals served by these programs. 29 U.S.C. § 1674(b). Also, Melvin Goldberg testified that the Native American program is not designed to be competitive. (TR 180-181)

That the selection process for Native American programs is not intended to be competitive is also shown by the fact that a Solicitation for Notices of Intent was published and not a Solicitation for Grant Applications (SGA) which is used when DOL is seeking competition for grants (as in the migrant and seasonal farmworker programs). Also, if the Native American program was truly intended to be competitive, then Employment and Training Order No. 3-82 (ET 3-82) (CX 11) would have to be followed. (TR 161, 179-181, Testimony of Melvin Goldberg) In this case, ET 3-82 was not followed in its totality. Mr. Goldberg testified that it was only referenced to the panel as representing overall ETA policy on procurements and so that its general policies could provide guidance to the panel. (TR 161)

Apparently, only "relevant" portions of ET 3-82 were followed in this selection process. (TR 187) For example, ET 3-82 provides that the SGA shall include the panel review and award process to be used. (CX 11, page 10, paragraph 7(d)(l)(b)) This was not done here; for while the SNOI states that it sets forth the process by which applicants will be selected and designated, it does not mention the use of the panel process. 48 F.R. 23937. Secondly, ET 3-82 requires the Employment and Training Administration to make available to rating panels available summaries or actual copies of all reports and other pertinent information on the operations and performance of applicants. (CX 11, page 11, paragraph 7d(2)(d)) Here, the panel was specifically told not to consider any evidence outside the documentation submitted by the applicants in the NOI's. (TR 52, Testimony of Pete Homer)

It is true that overlaps in requested geographic territories can be expected and that a way must be developed to handle these situations. In the past, under CETA, the Department did not use the panel process in this situation. (TR 52, Testimony of Pete Homer; TR **182,** Testimony of Melvin Goldberg) There is also no guarantee the Department will do so in the future since the JTPA regulations, which became effective after this selection process was completed, only specify that a review process will be followed, not that any particular one will be used. 20 C.F.R. § 632.11(b).

It can be argued that the fact that DOL did not use a competitive panel process under CETA has no bearing since JTPA is the act at issue in this case and so there was no right to be notified of a change in policy. But on the other hand, it can be argued, more effectively, that since JTPA is a new act, and Fiscal Year 1984 was the first time it was followed, applicants should have been fully informed of the selection process. Indeed, in the future, the Regulations require the Department to notify all applicants with requests for overlapping territories of this fact, of any additional information required and of the review process to be followed. 20 C.F.R. § 632.11(b). Note, however, that the Regulations do not bar DOL from using a panel process in the future, but DOL must notify applicants in advance of whatever process it will use.

The Grant Officer may be correct in arguing that the convening of a panel merely responded to a need to set up an orderly and objective selection procedure, particularly for competing applicants. But it seems that, at the least, if DOL was going to use the panel process for applicants who requested overlapping geographic territories, it should follow its own usual procedures for competitive grants as outlined in ET 3-82. And ET 3-82 required DOL to notify applicants of the panel review and award process and required ETA to furnish panel members available summaries or actual copies of all reports and other pertinent information that it had on each applicant. I find the failure to do both of these things crucial. Perhaps IHRC should have submitted a more detailed NOI. But I cannot agree with the Grant Officer that IHRC's failure to submit a better proposal does not discredit the panel process under the circumstances of this case.

I do not decide that DOL may never use the panel process in cases where applicants request overlapping geographic territories. And, in the future if DOL does do so, it will have to notify the affected applicants pursuant to the Regulations. 20 C.F.R. § 632.11(b). The Department of Labor should have done as much for Fiscal Year 1984. As I stated above, if an SGA had been used here, DOL would have had to notify the applicants of the review process and provided the panel with

additional information on the applicants under ET 3-82, if nothing else. It should have done the same in the instant case where, based on past history and on the legislative intent and language of Section 401, grantees rightly did not expect that a competitive panel process would be used and that only the NOI would be considered. Even without the notice to applicants, if the panel had been given additional information on the competing applicants, then the lack of information in IHRC's NO1 would not have been so crucial and perhaps its NO1 would not have been rated technically unacceptable in two of the three criteria. (CX 3) DOL should do at least as much in situations not designed to be competitive, which it treats as competitive nonetheless, as it does in cases specifically authorized as competitive.

I find, then, that due to the above-stated reasons, DOL's decision to convene a panel to review competing applications violated JTPA. Under this finding it is not necessary to decide whether ET 3-82 applies to the SNOI or to the Native American program in general. It is also not necessary to decide whether the panel as constituted (with two members lacking competence in Native American programs) violated JTPA. But because of this finding and my finding that DOL improperly gave CIMC's revised NO1 to the panel, I find the Grant Officer's non-selection of IHRC to be arbitrary and capricious and an abuse of his discretion, which constitutes a violation of JTPA. Further, I note that the Grant Officer only considered the panel scores despite the fact that the panel said it could not make a recommendation of either IHRC or CIMC for funding for San Diego County because more information was needed and despite the fact that DINAP personnel, Margaret Crosby, supervisor of the subject region, and Herb Fellman, the Director of DINAP, both recommended the designation of IHRC.

V

The issue now is the remedy to DOL's permitting CIMC to amend its NO1 and to DOL's improper use of the panel process in this case. The remedy is limited to the present case since IHRC has shown that it has been prejudiced by DOL's actions. The Indian Human Resource Center, Inc. was prejudiced by the submission of CIMC's revised NOI to the panel because IHRC was not given the same opportunity, and perhaps if it had been given that opportunity, it would have supplied more information so that its application would not have been rated technically unacceptable. The Indian Human Resource Center, Inc. was also prejudiced by the use of the panel process since if it had known a panel was going to be used it would have submitted a more thorough NOI, or even if IHRC had not been notified, if the panel had simply been given additional information on competing applicants by DINAP, the

panel would have had greater knowledge of IHRC's program and perhaps would have rated it higher. For example, Pete Homer, the panel member who had knowledge of IHRC because he is a member of the DINAP staff, had originally rated IHRC higher than the other panel members, based on his other knowledge of IHRC. The problem, of course, is that one can only surmise as to what effect the original CIMC application would have had on the panel or what effect applicants' knowledge of the panel process or additional information to the panel would have had on the panel's rating of IHRC. Perhaps also DOL could have corrected these problems by considering more than just the panel scores in finally selecting a grantee for San Diego County. 2/

I find the only remedy fair to both parties is to remand this case back to the Grant Officer. Upon receipt, the Grant Officer shall reconsider the applications of both IHRC and CIMC for funding in San Diego County. Because only the CIMC funding for San Diego County, California is at issue here, the Grant Officer need only consider CIMC's NO1 as it relates to this County; however, the Grant Officer must use CIMC's original NOI, although any missing information later submitted as part of CIMC's two amendments to its NO1 may be considered, but any amendments which materially revise that NOI may not be considered. If the Grant Officer again decides to use a panel process, he shall so notify IHRC and CIMC or notify them of whatever review process is used and of any additional information required. The Grant Officer shall give equal consideration to both applicants and in this respect consider not only the parties' respective NOI's but all additional information on file in the Department on each applicant.

E. EARL THOMAS
Deputy Chief Judge

Dated: MAY 14 1984
Washington, D. C.

EET:PCW:tt

2/ Melvin Goldberg testified that the final deciding factor was CIMC's higher panel score. (TR 196)

SERVICE SHEET

Case No.: 83-JTP-4

Case Name: Indian Human Resource Center, Inc.

A copy of the foregoing **was** sent to the following parties:

Larry Long, Chairman
Indian Human Resource Center, Inc.
2223 El Cajon Blvd., Suite 227
San Diego, California 92104

James W. Aiken, Esquire
Aiken & Fine
2201 Sixth Avenue, Aetna Plaza,
Suite 1001
Seattle, Washington 98121

Edward A. Tomchick
Grant Officer
Office of Contracting
Employment and Training Admin.
601 D Street, N. W.
Washington, D. C. 20213

Harriet A. Gilliam
U. S. Department of Labor
200 Constitution Ave., N. W.
Room N2101
Washington, D. C. 20210

David 0. Williams
Office of the Special Counsel
Employment and Training Admin.,
Room 5100
601 D Street, N. W.
Washington, D. C. 20213

Douglas Cochennour, Director
Division of Financial Policy,
Audit and Closeout
U. S. Department of Labor
601 D Street, N. W.
Washington, D. C. 20213