

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: January 9, 1987
CASE NO. 85-JTP-13

In the Matter of

NATIONAL URBAN INDIAN COUNCIL, d/b/a
OHIO INDIAN JOB TRAINING PARTNERSHIP AGENCY,
Complainant,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

NORTH AMERICAN INDIAN CULTURAL CENTER,
Intervenor.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

BACKGROUND

This case arises under the Job Training Partnership Act (**JTPA**), 29 U.S.C. §§ 1501-1781 (**1982**), the regulations thereunder at 20 C.F.R. Parts 632 and 636 (**1986**), and related procedures at 49 Fed. Reg. 42,559 (**1984**), for designating Native American grantees. Complainant National Urban Indian Council, d/b/a Ohio Job Training Partnership Agency (NUIC), challenges the Grant Officer's final determination designating the North American Indian Cultural Center (NAICC), rather than the incumbent NUIC, as the Ohio Native American grantee for Program Years 1985 and 1986 (July 1, 1985 through June 30, 1987) under Section 401 of JTPA, 29 U.S.C. § 1671 (**1982**).

The grant award process began with the publication in the Federal Register on October 23, 1984,^{1/} of a Notice containing designation procedures by which the Department of Labor would designate grantees for Indian and Native American Employment and Training Programs. Principle No. 5 in Part I of the Notice announces a preference for Native American organizations with an existing capability to deliver employment and training services within an established service area, subject to the following procedures and standards:

Such preference will be exercised through the recommendations on designation made by the Chief of **DOL's** Division of Indian and Native American Programs (DINAP) and the Director of **DOL's** Office of Special Targeted Programs (OSTP) and through the use of the rating system described in this notice. Unless a non-incumbent applicant in the same preferential hierarchy as an incumbent grantee can demonstrate that it is significantly superior overall to the incumbent, the incumbent will be designated if it otherwise meets all of the requirements for redesignation.

D-1 at 148. Hence, the preference accorded incumbents is not absolute, and can be overcome by an applicant in the same hierarchical classification if it can demonstrate that it is "significantly superior overall" to the incumbent.

Part IV of the Notice contains a preferential hierarchy premised on preference for Indian and Native American-controlled organizations for off-reservation areas. **D-1** at 149-50. See also 20 C.F.R. § 632.10(f) (1986), reflecting such preference. The

^{1/} 49 Fed. Reg. 42,559 (1984). Department's Exhibit (D)-1 at 147.

competing organization which falls into the highest category of preference will be designated, assuming all other regulatory and procurement requirements are met. Under the second category, the highest for nonreservation areas, preference is accorded to:

Native American-controlled, community-based organizations (with significant local Native American community support) for their existing DOL designated service area--unless a non-incumbent applicant qualified for this hierarchical group can demonstrate in its application, by verifiable information, that it is significantly superior overall to the incumbent grantees.

D-1 at **149**. A Native American-controlled organization is defined in Part VIII of the Notice as one "with a governing board, more than 50 percent of whose members are Indian or Native American people." D-1 at **151**.

Under the concluding paragraph in Part IV of the Notice, the Chief of DINAP is to advise the Grant Officer as to the position an applicant organization holds in the hierarchy as follows:

The Chief, DINAP, will advise the Grant Officer as to which position or [sic] organization holds in the hierarchy. The Chief, DINAP, may employ personal knowledge, reference checks or **onsite** reviews to make the determination. It is incumbent on the applying organization to supply sufficient information upon which the determination can be made. Organizations are encouraged to indicate the category into which they believe they fall and must adequately support that assertion. As indicated earlier, applicants will not be able to provide any information past the January 1 postmark deadline and no information will be solicited by DINAP.

D-1 at 150. The first paragraph in Part VI of the Notice establishes the following procedures for the Grant Officer's decision:

The Grant Officer will make the final designation decision based on the review panel's recommendation, in those instances where a panel is convened; DINAP, OSTP, Office of Program and Fiscal Integrity, and Office of the Inspector General recommendations; and other available information regarding the organization's responsibility.

D-1 at 150.

In its final application (Notice of Intent) of December 20, 1984, which it certified as true and correct, NAICC listed the twenty members of its Board of Directors and indicated whether each was a Native American. Complainant's Exhibit(C)-12, at 1 and 8. Eleven of the twenty members were so listed. NUIC was informed in a November 9, 1984 letter that NAICC was seeking the same grant. September 24, 1985 Hearing Transcript (Tr.) at 154; September 26, 1985 Tr. at 173; D-1 at 127-28.

Because NUIC and NAICC competed for the same grant, their applications were referred to the hierarchy task force established by the Chief of DINAP to assist him in advising the Grant Officer on hierarchical status. Sept. 24 Tr. at 155-58; Sept. 26 Tr. at 174-82. The advisory task force recommended that NUIC and NAICC be treated as in the same hierarchical classification. Sept. 26 Tr. at 182. The Chief of DINAP and his superior, the Director of OSTP, concurred **and so recommended to the** Grant Officer. Id. at 182-83.

The recommendation on hierarchical classification was communicated in a memorandum from Paul A. **Mayrand**, Director of OSTP, to Robert D. Parker, Grant Officer, dated February 11, 1985. The memorandum states:

The final designation procedures for grantees funded pursuant to Section 401 of the Job Training Partnership Act (JTPA) published on October 23, 1984, require me to advise you of the hierarchy position of each organization in cases when two or more organizations apply for the same or an overlapping area.

To assist me in making my hierarchy decisions, Herb **Fellman** [Chief of DINAP] established a task force comprised of Mr. William McVeigh and Mr. **Lambert** of DINAP and Ms. Lois **Engel**, Ms. Jan Perry and Mr. Jim Deluca of the Office of Acquisition and Assistance. Mr. McVeigh was designated task force chairman. Mr. **Lambert** is a Native American.

The task-force reviewed all Notices of Intent to determine which were in apparent competition for the same or overlapping geographic areas. It then reviewed all apparent competitors and applied the hierarchy level definitions to each applicant. Mr. **Fellman** also ensured that the task force also interviewed DINAP Federal Representatives assigned to incumbent grantees who were in apparent competition for the purpose of obtaining an overall assessment of their grantees' performance. The task force submitted a hierarchy recommendation for each applicant and recommendations as to which applicants should be referred to a review panel convened by you.

Each recommendation was supported by written justification. Herb **Fellman** met with the task force on the morning of January 24, 1985, and carefully reviewed and discussed each recommendation with it. I met with Mr. **Fellman** and the task force in the afternoon of January 24 to review and discuss at length, each recommendation. Herb **Fellman's** recommendations are attached. Sixteen applications are recommended for panel review.

I concur with the recommendations.

Attachments.

C-11.

Attached to the memorandum of February 11, 1985, to the Grant Officer is the task force recommendation for Ohio, which states:

P. 10. Ohio

- a. (Ohio ES) v. (Ohio Employment Asst Center) v. NAICC of Ohio v. Ohio JTPA (incumbent) for the entire State.
Outcome: Ohio E.S. does not document even an active advisory process, and is a #5. Ohio Employment Asst. Center is a #3 but does not document significant superiority over incumbent. NAICC has come in with a strong application and lots of community support. Incumbent has a single community support letter; application consists of 2 program evaluations. Fed rep states that incumbent is not a good performer and that actual falls short of plan. Since incumbent is weak, and challenger shows potential for significant superiority, this becomes a competition between #2's.

c-11. The Grant Officer subsequently convened a review panel to score the information submitted on the competing Notices of Intent by NUIC and NAICC. Sept. 26 Tr. at 37-54.

Initially the Grant Officer did not award the grant to NAICC. In determining that NAICC was not "significantly superior overall" ^{2/} under Part IV(2) of the Notice, the Grant Officer assessed: (1) whether there was evidence of weakness or deficiency

^{2/} The term is not found in the implementing regulations at 20 C.F.R. Part 632 (1986).

in an incumbent's operation and administration of the **program;** (2) whether the challenger was an Indian-controlled community based organization that had submitted a superior Notice of Intent, highly responsive to the published criteria; and (3) whether the challenger had documented significant support from the Indian community. All three "factors" or "tests" had to be met. Sept. 26 Tr. at 87-90. Although the Grant Officer found that NAICC satisfied the first two factors, he believed that it had not met the third test, involving Indian community support. Id. at 92-93. Accordingly, on March 1, 1985, the Grant Officer notified NUIC of its redesignation for Program Years 1985 and 1986. D-1 at 68.

On March 1, 1985, the Grant Officer also notified NAICC of its nondesignation. The Grant Officer's letter stated that the organization could file a Petition for Reconsideration under 20 C.F.R. § 632.13(a) by registered mail, postmarked no later than fourteen days from receipt of his letter: and that the organization could request a debriefing, although such a request would not serve to extend the fourteen-day requirement for a Petition for Reconsideration. C-16. NAICC received the Grant Officer's letter on March 7, 1985. Sept. 26 Tr. at 73-74; c-17.

In a letter dated March 20, 1985, NAICC submitted a Petition for Reconsideration, which clarified the nature of its Indian community support. The Petition bears a date stamp of March 27,

1985. Sept.. 26 Tr. at 63-68, 81-82: C-15.3' The timeliness of **NAICC's** Petition was governed by 20 C.F.R. § 632.13(a) (1984),^{4/} which provides:

An applicant for designation as a Native American grantee which is refused such designation in whole or in part may file a Petition for Reconsideration with the Grant Officer within 14 days of receipt of a letter from the Department indicating its failure to be designated as a Native American grantee.

The Grant Officer, treating **NAICC's** Petition as timely filed, considered its clarifying information and subsequently reversed his initial designation decision favoring NUIC.

The Grant Officer's designation letter of April 16, 1985, to NAICC stated, in part:

In the debriefing of March 15, 1985, I specified that, although your organization submitted a strong application, you did not demonstrate significant superiority overall to the incumbent grantee. As noted, based on the documentation submitted with organization's application, it appeared that Indian and Native American community support for NAICC was minimal.

Your Petition for Reconsideration contains numerous letters of individual Indian and Native American support. However, as indicated earlier, the Petition process was not intended to permit the introduction of new documentation that was not available

3/ The lower left corner of **NAICC's** letter of March 20, 1985 (C-15), to the Grant Officer is stamped "27 MAR 1985." Below this stamped date is the handwritten notation "**3-29/Grant.**"

4/ The language of the current regulation at 20 C.F.R. § 632.13(a) (1986) is identical to the quoted provision.

to the Grant Officer at the time the original decision was made. Therefore, this additional evidence cannot be considered.

Elsewhere in the Petition, however, your organization does provide clarification regarding the extent of **NAICC's** support from Indian or Native American controlled organizations within the State of Ohio. I was not aware, at the time that I made my initial decision, of how few such organizations there were within the State.

As your Petition indicates, there are only three major Indian and Native American controlled organizations in the State, including your own, and your competition's. This has been verified by our Division of Native American and Indian Programs (DINAP). Therefore, your organization's endorsement by Cleveland AIC, the only other major Indian and Native American controlled organization in the State, establishes that there is substantial community support.

The Federal Register procedures cited in the October 23, 1984, notice specify that unless a non-incumbent applicant in the same preferential hierarchy as an incumbent grantee "can demonstrate that it is significantly superior overall to the incumbent, the incumbent will be designated if it otherwise meets all of the requirements for redesignation". Prior to the receipt of your organization's clarifying information, I could not make such a determination.

Since your organization's apparent minimal community support was the major deficiency in an otherwise strong application, I have now reviewed the submission including the **clarifying** information. My determination is that your organization has demonstrated significant superiority overall to the incumbent.

Accordingly, I have reversed my initial designation decision and now designate NAICC as the JTPA, Title IV, Section 401

grantee for the State of Ohio for Program Years 1985 and 1986. Ohio JTPA, the initial designee, has been advised of this decision and of its appeal rights. A copy of my letter to Ohio JTPA is enclosed.

D-1 at 65-66. Since NAICC had already received a pre-award clearance, it was awarded the Ohio grant. Sept. 26 Tr. at 34-36; C-13.

On April 24, 1985, NUIC submitted a Petition for Reconsideration. D-1 at 12-57. On May 29, 1985, the Grant Officer denied **NUIC's** Petition. The Grant Officer's letter to NUIC stated, in part:

As indicated in my letter of April 16, 1985, the North American Indian Cultural Center (NAICC) was designated to serve the State when it established, through the submission of clarifying information in the reconsideration process, that it was significantly superior overall to your organization. The clarifying information related to **NAICC's** provision of evidence of community support from Indian and Native American controlled organizations within the State. Apparent minimal community support had been the major deficiency in **NAICC's** otherwise strong application. Once the extent of its community support was clarified, I determined that NAICC was significantly superior **in all** respects to your organization.

You assert in your Petition that incumbents were not required to submit any additional documentation with their applications. However, your organization was notified of potential competition in Mr. Herbert Fellman's letter of November 9, 1984, and you were advised at that time to ensure that your final application was fully responsive to the rating systems cited in the Federal Register notice of October 23, 1984. Your organization elected not to submit such documentation with your final Notice of Intent. New Information submitted

with your Petition cannot be accepted for reconsideration purposes.

Community support was not the sole factor in establishing the significant superiority of NAICC over your organization. **NAICC's** superiority in other respects was established at the onset of the designation review process. As indicated, the verification of **NAICC's** community support was the final **indice** in concluding that it was significantly superior in all respects to your organization. Your organization's enumeration of additional community support, even if acceptable for reconsideration, is not sufficient to overcome your other deficiencies as a grantee.

In your organization's Petition, you assert that your performance under CETA, and as a JTPA, Section 401 grantee in Utah has been outstanding. The fact that your organization may have exceeded performance expectations for these grants does not mitigate your poor performance for Transition Year (TY) in Ohio. This poor performance was verified through consultations with staff members of the Division of Indian and Native American Programs (DINAP).

As specified in my debriefing of April 22, 1985, your organization had negative variances at or in excess of 50% in all five out of your five planned TY performance goals. It should be noted that the monitoring visit that your Federal Representative, Scott **McLemore**, made in September of 1984 addressed administrative systems and financial procedures.

In your organization's Petition, you assert that your poor TY performance was largely attributable to the problems you experienced with a subcontractor. As specified at **20 CFR 632.125(a)**, Section 401 grantees are responsible for establishing and using internal management procedures sufficient to prevent subgrantee and contractor fraud and program abuse. Therefore, deficient performance on the part of a subgrantee does not relieve a Section 401 grantee from its responsibility to achieve planned program goals.

I have reviewed the issues raised in your organization's Petition and I have determined that my designation of NAICC was correct. Accordingly, your organization's Petition for Reconsideration is hereby denied.

D-1 at 10-11. On June 5, 1985, NUIC requested a hearing before the Office of Administrative Law Judges. D-1 at 4-6.

A hearing was held before Administrative Law Judge (ALJ) Glenn Robert Lawrence from September 24 through September 27, **1985**. At the hearing, NUIC did not contest the Grant Officer's characterization of its past Ohio performance as "**poor**",^{5/} nor the quality of NAICC's application. Rather, NUIC challenged the Grant Officer's compliance with the procedures set forth in the published Notice.

On May 27, 1986, the ALJ issued a Decision and Order (ALJ Decision), which concluded:

In sum, I find that DOL has not come forward with evidence showing NAICC's Petition for Reconsideration was timely filed. Further, the Grant Officer did not follow the proper procedures in placing NAICC in Category 2 as equal competitor with incumbent NUIC, specifically by failing to verify **NAICC's** claim of Indian control. Finally, in making the designation decision, the Grant Officer did not obtain recommendations from DINAP, OSTP, Office of Program and Fiscal Integrity, and Office of Inspector General, as **contemplated** [sic] by the Regulations.

ALJ Decision at 11. The ALJ ordered the termination of the grant to NAICC and the reinstatement of **NUIC** as grantee. Id.

^{5/} Grant Officer's denial of **NUIC's** Petition for Reconsideration, D-1 at 11, supra p.11.

On June 18, 1986, counsel for the Grant Officer filed exceptions to the ALJ Decision. On July 18, 1986, I issued an Order Asserting Jurisdiction and Notice of Briefing Schedule, which stayed the ALJ Decision pending my final determination. The matter is now before me for decision.

DISCUSSION

The ALJ held that under 20 C.F.R. § 632.13(a), the fourteen-day filing requirement for a Petition for Reconsideration is satisfied when the Petition is mailed within fourteen days of actual receipt of the Grant Officer's nondesignation letter. ALJ Decision at 7. Such an interpretation is certainly reasonable. Cf. Santee Sioux Tribe of Nebraska v. United States Department of Labor, 780 F.2d 1356 (8th Cir. 1985). However, the ALJ found in favor of NUIC on this issue because the Department of Labor "has not satisfied its burden of justifying its acceptance of this petition, which on its face, appears to have been filed late. Because there is no presumption that a letter dated March 20, 1985, and because DOL has not produced any evidence of mailing, was mailed on March 20, 1985, such as a postmarked envelope, there is no way to determine whether the petition was mailed let alone received, within the proper time frame." ALJ Decision at 7. See also id. at 10.

If NAICC mailed its Petition dated March 20, 1985, on that date it would have satisfied the fourteen-day filing requirement because NAICC received the Grant Officer's nondesignation letter

on March 7, 1985.^{6/} I agree with the Grant Officer's exception that the ALJ improperly applied the full burden of proof to the Grant Officer to justify his acceptance of **NAICC's** Petition as timely filed.

The pertinent regulation at 20 C.F.R. **§ 636.10(g) (1986)**, provides that the "Department shall have the burden of production to support the Grant Officer's decision. ... Thereafter, the party or parties seeking to overturn the Grant Officer's decision shall have the burden of persuasion." Although no postmarked envelope was offered in evidence, ^{7/} a strong inference can be made that **NAICC's** Petition for Reconsideration was mailed on March 20, 1985. The Grant Officer's nondesignation letter of March 1, 1985, stated that NAICC could file a Petition by registered mail, postmarked no later than fourteen days from receipt of the nondesignation letter. C-16. Since his March 1 letter specified no other means of filing a Petition, it is certainly reasonable to assume that NAICC used the specified

^{6/} The first paragraph of **NAICC's** Petition states that it received the nondesignation letter on March 8, 1985. c-15. However, the Department's certified mail receipt signed by Peggy Gibson for NAICC indicates a delivery date of March 7, 1985. c-17.

^{7/} There is nothing in the record to indicate whether NAICC's envelope containing its Petition existed at the time of the hearing and, if so, why it was not offered in evidence by counsel for the Grant Officer. See Sept. 26 Tr. at 69-71, 81-82; Grant Officer's Proposed **Findings** of Fact, Conclusions of Law, and Order, January 27, 1986, at 12-14; Brief of the Grant Officer, August 18, 1986, at 8-10.

means. Further, it is reasonable to assume a mailing by NAICC on March 20, 1985, in view of the similar number of days (seven days for the Grant Officer's nondesignation letter, eight days for **NAICC's** Petition) involved in the correspondence of each to reach the other. See nn.3&6, supra; ALJ Decision at 5. Cf. Madewell v. Salvation Army, 49 Or.App. 713, 716, **n.1**, 620 **P.2d** 953, 954 **n.1** (1980). The additional day involved in **NAICC's** Petition may be based upon time of mailing, postal processing, the vagaries of the mail, and/or mail processing within the Department of Labor itself.

The rule at 20 C.F.R. **§ 636.10(g)** should be read in light of the strong presumption of regularity attached to the official acts of public officials. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926) (emphasis added). See also Wilson v. Hodel, 758 **F.2d** 1369, 1374 (10th Cir. 1985); Brewer v. United States, 353 **F.2d** 260, 263 (8th Cir. 1965); Nolan v. Rhodes, 251 **F.Supp.** 584, 587 (S.D. Ohio **1965**), aff'd, 383 U.S. 104 (1966); American Science and Engineering, Inc. v. United States, 8 **Cl.Ct.** 129, 142 (1985). As a corollary to this general rule, "all necessary prerequisites to the validity of official action are presumed to have been complied with, and ... where the contrary is asserted it must be affirmatively shown." Lewis v. United

States, 279 U.S. 63, 73 (1929) (emphasis added), citing United States v. Royer, 268 U.S. 394, 398 (1925); Nofire v. United States, 164 U.S. 657, 667 (1897): and cases cited therein. See also R.H. Stearns Co. v. United States, 291 U.S. 54, 63 (1934), and cases cited; United States v. Ahrens, 530 F.2d 781, 785-87 (8th Cir. 1976); United States v. Norman, 413 F.2d 789, 791-92 (6th Cir. 1969).

In United States v. Ahrens, 530 F.2d 781, the Government brought suit to reduce to judgment certain unpaid tax assessments. The United States Court of Appeals for the Eighth Circuit held that the fact that all copies of the statutory notice of deficiency had been lost by the parties and could not be furnished to the court did not bar the Government's claim under the statute of limitations. In its view, the presumption of official regularity controlled the question of the validity of the notice. 530 F.2d at 785. Finding support in the Supreme Court's holdings in United States v. Chemical Foundation, Inc., 272 U.S. 1, Lewis v. United States, 279 U.S. 63, and R.H. Stearns Co. v. United States, 291 U.S. 54, the court held "it would be unreasonable to presume that the IRS employee who drafted the statutory notice failed to perform the ministerial function of properly recording the assessed amount and the taxable *year* involved. . . . In the absence of any rebuttal proof, we are bound to presume the validity of the contents of the statutory notice of deficiency." Id. at 786-87.

Similarly, in this proceeding, the presumption of official regularity attaches to the Grant Officer's acceptance of NAICC's Petition as timely filed, notwithstanding the absence of NAICC's postmarked envelope from the record. In the absence of clear evidence to the contrary, it **must** be assumed that in processing NAICC's Petition, the Department of Labor examined NAICC's postmarked envelope for timeliness against the Department's certified mail receipt (C-17) for NAICC's nondesignation letter and found it to be timely filed. See 291 U.S. at 63, 279 U.S. at 73, 272 U.S. at 14-15, Wilson v. Hodel, 758 **F.2d** at 1374, United States v. Ahrens, 530 **F.2d** at 785-87. Thus I find that that the Grant Officer's treatment of NAICC's Petition as timely filed was reasonable.

I also agree with the Grant Officer's exception to the ALJ's holding that NAICC should not have been placed in the second hierarchical category without further investigation of its claim of Indian control beyond the face of the Notice of Intent. ALJ Decision at 8-9, 11. It was neither arbitrary nor capricious for the Chief of DINAP and the Grant Officer to accept NAICC's assertion of Indian control without verifying that the majority of its Board of Directors was Indian.

The concluding paragraph in Part IV of the Notice states that in making hierarchical determinations, the Chief of DINAP "may employ personal knowledge, reference checks or **onsite** reviews to make the determination." Thus, although he "may" investigate an organization's board of directors to determine

whether it is Indian-controlled, there is no requirement that he must investigate prior to making each and every hierarchical determination. Cf. City of Bedford v. Federal Energy Regulatory Commission, 718 **F.2d** 1164 (D.C. Cir. 1983); General Motors Corp. v. Federal Energy Regulatory Commission, 613 **F.2d** 939 (D.C. Cir. 1979); Andrews v. Conrail and United States Department of Labor, 40 Fair Empl. **Prac. Cas.** (BNA) 492 (S.D. Ind. 1986); Solomon v. National Office-Office of Federal Contract Compliance Programs, 627 **F.Supp.** 222 (W.D. Tex. 1985).

Although situations may arise when investigation is appropriate, the ALJ's rigid and inflexible requirement places an unreasonable burden on the grant application and designation procedure.

I agree with the Grant Officer's view that:

[T]he ALJ has placed an insurmountable burden on the existing grant application and designation procedure. There are nearly two-hundred (200) grantees in the Indian and Native American Employment and Training Programs: approximately two-hundred-fifty (250) applications are processed biannually. In addition there are several hundred more applications to be processed for the remaining JTPA programs. The funding and manpower does not exist to independently investigate the Native American status of perhaps thousands of members of the boards of directors; to independently verify the corporate status of each entity; and to certify the claimed non-profit status of hundreds of organizations, to name only a few of the massive investigative and research tasks which the DOL must now undertake if the position of NUIC and the ALJ is allowed to stand.

Brief of the Grant Officer, August 18, 1986, at 11. Cf. Navajo Nation v. Hodel, 645 **F.Supp.** 825 (D. Ariz. 1986).^{8/}

There was nothing in NAICC's application of December 20, 1984, which reasonably suggested that verification efforts should be undertaken on **NAICC's** claim of Indian control during the hierarchical determination process. NAICC had listed the name and Indian status of each of its Board members and certified that the information was true and correct. C-12 at 1. NUIC had been informed on November 9, 1984 of NAICC's preliminary application. D-1 at 127-28. The record does not indicate that NUIC raised any objections to NAICC's assertion during the designation process. Thus, it was certainly reasonable for the Department of Labor to proceed without initiating an investigation when none seemed warranted. The Department acted reasonably in conserving its limited staff and financial resources by not investigating an issue which was more theoretical than real at the time.^{9/}

^{8/} A logical consequence of the ALJ's holding would require verification of the Indian status of NUIC. However, no such investigation was made for the grant at issue. See Sept. 27 Tr. at 233. Even assuming, arguendo, that such **an investigation** of NUIC had been made for the preceding designation period, it is theoretically possible that **NUIC's** status as an Indian-controlled organization might have changed since that time, thereby subjecting it to a different hierarchical classification.

^{9/} The Grant Officer testified that in considering NAICC's **Petition** for Reconsideration, he requested and obtained **DINAP's** verification, through consultation with various Indian organization that NAICC was a "major organization," which was "Indian-controlled See Sept. 26 Tr. at 104-07; D-1 at 66; C-22.

NUIC has not met its ultimate burden of persuasion under 20 C.F.R. § 636.10(g) that NAICC should not have been placed in the second hierarchical category because it was not Native American-controlled. See Alameda County Training and Employment Board v. Donovan, 743 F.2d 1267, 1269 (9th Cir. 1984); State of Maine v. United States Department of Labor, 669 F.2d 827, 829-31 (1st Cir. 1982). At the hearing below, NUIC challenged whether NAICC Board Member Hugh Clark Hosick was a Native American, claiming that if he was not, NAICC was not a Native American-controlled organization. NUIC did not challenge the Native American status of other NAICC Board members. Although the ALJ declined to find that Mr. Hosick was not a Native American, he stated that Mr. Hosick's status was less important than the fact that the Department never attempted "to ascertain whether the Board members claiming to be Indian were in fact Indian," and thus he found that the Grant Officer's acceptance of the hierarchical determination without verification was arbitrary and capricious. See ALJ Decision at 9.

As the above discussion demonstrates, it was entirely reasonable for the Grant Officer to accept NAICC's statements of its Board's Indian status, just as he did the asserted status for NUIC. Based upon review of the full record, I do not find that NUIC has met its burden of persuasion on the issue of NAICC's status as a Native American-controlled organization.

Accordingly, I reverse the ALJ's finding that the lack of inquiry at that point by the Grant Officer was arbitrary and capricious.

I agree with the Grant Officer's exception to the ALJ's holding that the recommendations by the Chief of DINAP and the Director of OSTP, that NAICC "shows potential for significant superiority," reflected in their endorsement of the hierarchy task force's recommendation containing this terminology at C-11, quoted supra p.6, was insufficient to qualify NAICC for the second hierarchical category. See ALJ Decision at 9-10 and 11. The ALJ is confusing and merging two separate issues: (1) placement of NUIC and NAICC in the same hierarchical category and (2) based upon such placement, determining that NAICC is significantly superior overall to incumbent NAICC.

The recommendations were reasonable and proper applications of Principle No. 5 of Part I and the first paragraph of Part VI of the Notice, concerning recommendations on designation from DINAP and OSTP, and the final paragraph in Part IV of the Notice, for DINAP advice on hierarchical position. By qualifying their recommendations that NAICC was potentially significantly superior, the Chief of DINAP and the Director of OSTP were merely acknowledging that their recommendations did not constitute a final determination that NAICC was definitively Significantly superior since the Grant Officer retained final decisionmaking

authority to assess significant **superiority.**^{10/}

I agree with the Grant Officer's exception that the ALJ improperly invalidated the Grant Officer's designation of **NAICC** by finding that the Grant Officer did not obtain "recommendations" from DINAP, OSTP, the Office of Program and Fiscal Integrity, and the Office of the Inspector General under the first paragraph in Part VI of the Notice. The ALJ found that while the Grant Officer did consider "information" from these offices, he did not obtain "recommendations" from them. ALJ Decision at 10-11.

In so ruling, the ALJ cited the following testimony of the Grant Officer:

Q. Prior to issuing your letter of April 16th did you obtain a recommendation from DINAP as to who to designate?

A. A recommendation as to who to designate?

Q. Right, for Program Year 1985-86, for the State of Ohio.

A. Who to give the work to?
No.

Q. You didn't?

A. No.

^{10/} This terminology simply replicated similar language in a form used by the task force throughout its various deliberations in addition to the designation at issue. See C-21, a form captioned "FINDINGS OF OSTP/OAA JOINT **TASK FORCE** ON APPLICANTS FOR PY **85/86** JTPA INDIAN GRANTS," containing the item "POTENTIAL OVERALL SUPERIORITY SHOWN YES NO"; Sept. 27 Tr. at 178. The task force checked **this item "YES"** with regard to NAICC. The form was attached to the task force's one paragraph summary for the grant at issue. See Memorandum of February 11, **1985**, from Paul A. **Mayrand, Director** of OSTP, to Robert D. Parker, Grant Officer, supra pp. 5-6, at C-11.

Q. And prior to issuing your letter of April 16th, did you obtain a recommendation from OSTP with respect to who to designate from the State of Ohio for Program Year 1985-863

A. Who to award the grant to?
No.

Q. And prior to issuance of your letter of April 16th, 1985, did you obtain a recommendation from the Office of Program and Fiscal Integrity as to who to designate for Program Year 1985-86 in Ohio?

A. Mr. Aiken, I received no recommendations on who to award the grant to from anyone. What I did receive during the designation process was information on --

MR. AIKEN: No, this is, your Honor --

THE WITNESS: -- certain responsibilities. I was trying to explain that. A pre-award clearance from OPFI, I did get that. Okay, you can award the grant to them if they weren't in competition and there's no debt problems.

BY MR. AIKEN:

Q. Prior to your April 16th letter, did you receive a recommendation as to who to designate for the State of Ohio Program Year 1985-86, from the Office of the Inspector General?

A. Recommendation on who to award the grant to?

Q. Right.


A. No.

Sept. 26 Tr. at 126-27; ALJ Decision at 10.

The Grant Officer mischaracterized some of the submissions which he considered in making his final designation. In fact, he did receive "recommendations" from DINAP and OSTP. See C-11, quoted memorandum from **Mayrand** to Parker, supra pp. 5-6, containing that terminology.

Ohio Native American grantee for Program Year 1986.^{12/}

SO ORDERED.


Secretary of Labor

Washington, D.C.

12/ In deciding this case, I have considered **NUIC's** request for **immediate** consideration. NUIC Affidavit Re: Expedited Consideration, August 15, 1986; NUIC Reply Memorandum, September 18, 1986, at 11. Section 166(c) of JTPA, 29 U.S.C. § 1576(c) **(1982)**, provides that any case accepted for review by the Secretary shall be decided within 180 days of such acceptance. I have met this statutory requirement for expedited consideration in this Decision. Further expedition was precluded by the need to decide additional cases under JTPA and other statutes containing mandatory timeframes for Secretarial action and the need to decide other cases which are significantly older.

CERTIFICATE OF SERVICE

Case Name: National Urban Indian Council, d/b/a Ohio Indian
Job Training Partnership Agency, Complainant, v.
United States Department of Labor, Respondent,
and North American Indian Cultural Center,
Intervenor.

Case No. : **85-JTP-13**

Document : Final Decision and Order of the Secretary of
Labor

A copy of ~~the above-referenced document~~ was sent to the following
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