U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: December 18, 2000

CASE NO.: 2000-WIA-00003

In the Matter of

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

v.

UNITED STATES DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION (ETA),
Respondent

And

WYANDOTTE TRIBE OF OKLAHOMA,
Party-in-Interest

Appearances:

Scott W. Williams, Esq.,
For the Complainant

Stephen R. Jones, Esq.,
For the Respondent

BEFORE:
Richard A. Morgan

DECISION AND ORDER DENYING RELIEF

This matter arises under the provisions of the Workforce Investment Act, 29 U.S.C. § 2911, et seq., ("WIA" or "the Act") and the regulations thereunder at 20 C.F.R. § 626-668. In the WIA, the United States Congress announced it had found that: serious unemployment and economic disadvantages existed among members of Indian communities; there was a compelling

need to establish comprehensive training and employment programs for them; and, that such programs are essential to the reduction of economic disadvantages and to the advancement of economic and social development of those communities consistent with their goals and lifestyles. 29 U.S.C. § 1671(a).

The Congress required that the WIA training and employment programs be administered at the national level. 29 U.S.C. § 1671(b). The United States Department of Labor ("DOL") has the primary responsibility for administration under the Act. 29 U.S.C. § 2911(h). To implement the program, the Secretary of Labor promulgated the regulations at 20 C.F.R. Parts 626-668. Unless competition is waived, under 29 U.S.C. § 1671(l), the Employment and Training Administration ("ETA") of the United States Department of Labor solicits applications every two years from the Native American community for grant funds which are used by the latter to further the goals of the WIA.

In the case *sub judice*, the former long term incumbent tribe grant recipient, the United Tribes of Kansas and Southeast Nebraska, Inc., ("United Tribes") challenged the award of a WIA grant, involving an area of southeastern Kansas and southwestern Missouri, which the former had previously administered, to the Wyandotte Tribe of Oklahoma ("Wyandottes").

PROCEDURAL HISTORY

On September 13, 1999, the ETA properly published a Notice of Final Designation Procedures for Grantees in 64 Federal Register, pages 49522-49528, soliciting grant applications for Program Years 2000-2001. (Joint Exhibit ("JX") 1). Both the incumbent United Tribes and non-incumbent Wyandotte Tribe of Oklahoma submitted applications (Notices of Intent or "NOI"), dated October 1, 1999 and October 5, 1999 respectively. (JX 1). Since the Secretary of Labor had determined, in implementing the new WIA, that there would be no waivers of competition, and two entities applied, the ETA utilized a competitive selection process for the nine-county service area in contention and awarded a grant for the area in contention to the Wyandottes for Program Years 2000-2001. The United Tribes, which had been the grant recipient for the area for the past twenty-four years, challenged that award.

On March 21, 2000, the United Tribes of Kansas and Southeast Nebraska, Inc., requested a hearing before an administrative law judge, pursuant to 20 C.F.R. § 627.801. I was assigned the case on June 20, 2000.

A hearing was held on August 29-30, 2000, in Kansas City, Kansas.[1] The parties were

[1] The Workforce Investment Act of 1998, P.L. 105-220 ("WIA"), 29 U.S.C. § 2801, *et seq*., enacted August 7, 1998, consolidates several job skills programs, including the JTPA. Section 190 (WIA) provides that until July 1, 2000, all references, in other provisions of law, to the JTPA shall be deemed to refer to that provision or the corresponding provision of the Workforce Investment Act of 1998. 29 U.S.C. § 2940(b). However, section 199(c)(2) provides the JTPA is not repealed until July 1, 2000. Section 507 provides, unless otherwise provided in the Act, the Act and amendments to the Act take effect upon enactment.

afforded the opportunity to call and cross-examine witnesses and present evidence.[2] The Grant Officer's Administrative File ("AF") was admitted into evidence as Respondent Exhibit ("RX") 1, as well as Respondent Exhibits 2- 4 and Complainant Exhibits ("CX") 1 - 4. A Joint Stipulation of Fact was admitted as Joint Exhibit ("JX") 1. The parties submitted their arguments in September and October 2000.

The final resolution of this matter was delayed substantially in order to resolve a collateral dispute concerning the ETA's assertion of the deliberative process privilege with respect to information related to the review panel used to score the WIA grant applications. After I issued several lengthy orders dealing with the applicability of the privilege, the ETA chose to disclose limited information. The United Tribes was given the opportunity to develop evidence concerning the panel and on December 7, 2000, informed me it had no further evidence to submit.

ISSUES

The fundamental issue in this matter is whether the Grant Officer's decision and actions were arbitrary and capricious, an abuse of discretion, or not in accordance with law?[3]

The following sub-issues apply:

I. Should the United Tribes and or the Wyandottes have been designated with the "highest priority", under 20 C.F.R. § 668.210(a) and (c), as a federally-recognized Indian tribe or consortia that includes a tribe or entity, and were they so designated? Specifically:

A. First, was a priority determination made, in accordance with the Solicitation for Grant Applications "SGA" General Designation Principle ("GDP") I(6), by input and recommendations from the Chief of DOL's Division of Indian and Native American Programs (DINAP) and the Director of DOL's Office of National Programs (ONP) with the concurrence of the Grant Officer?

B. Were either the United Tribes or the Wyandottes "federally-recognized Indian tribes or consortia" having "legal jurisdiction" over the nine-county area in contention and thus entitled to the highest priority for designation? (20 C.F.R. § 668.210(a); SGA GDP I(6).

What is the area over which each "priority" designate has legal jurisdiction, under WIA § 166? (Priority, as a federally-recognized tribe or consortium, applies only to areas over which the priority organization has legal jurisdiction).

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[2] The United Tribes objected to participation by the Wyandottes in the hearing as they had not provided any notice of such intent although named as a party-in-interest. (Transcript of Hearing ("TR") 13-14).

[3] Whether there is a basis in the record to support the Department's decision? 20 C.F.R. § 667.825(a).

C. If the nine-county geographic area in contention was not served by Indian tribes, did either the United Tribes or the Wyandottes constitute entities with a Native American-controlled governing body and were either or both representative of the Native American communities involved such that either or both would have priority for designation? (20 C.F.R. § 668.210(c); SGA GDP I(6)).

D. If such a priority determination was made, was priority given to the Native American organization with "an existing demonstrated capability to deliver employment and training services within an established geographic service area and/or an organization which directly represents the recipients of WIA services"? (SGA GDP I(6)).

II. Were the due process rights of the United Tribes violated by the Department of Labor letter, dated November 12, 1999, advising them of competition for the grant because:[4]

A. The letter did not advise them of the possibility the named counties (areas in contention here) might be severed from the historical United Tribes geographic service area? and/or

B. The letter did not inform the United Tribes of the factors which might be considered in the decision to sever those counties from its service area?

III. Did the ETA violate the criteria of its Solicitation for Grant Applications in its selection of the Wyandottes to serve the nine county area in contention?

A. Did the United Tribes, as an Indian tribe or tribal organization, submit a request for a waiver of the statutory requirements of the Act or regulatory requirements, under 29 U.S.C. § 2911(h)(3) and 20 C.F.R. § 668.910, by submitting a satisfactory 2-year program plan, for the two-year grant period in contention, indicating how the waiver will improve the grantee's WIA activities?[5]

1. If such a request was submitted, did the Secretary, through the Grant Officer, exercise her discretion to waive the requirements for competition?

2. If such a waiver was considered and declined, did the Grant Officer then follow the procedure for priority designation, under 20 C.F.R. § 668.250(b)(1)?

B. Was the review panel process properly used, in accordance with the SGA?

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[4] Although initially an issue, the Complainant withdrew it at the hearing after evidence had been developed. (TR 246).

[5] The parties stipulated there was no waiver of competition for the incumbent grantee, under the WIA section 166(c)(2), for the service areas in question, which were the subjects of the SGAs. I also find none was requested, thus making this issue moot.

That is did one of the following two criteria apply:
1. One or more of the applicants, none qualifying for the highest priority for the requested area, demonstrated the potential for superiority over the incumbent organization? or
2. Two or more applicants, none qualifying for the highest priority, requested an area and the incumbent organization failed to apply for designation?

C. Was the review panel properly constituted in that it was required to have included individuals with knowledge of or expertise in programs dealing with Indians and Native Americans?

D. Did DOL violate SGA General Designation Principle (5) because the Wyandottes (a non-incumbent seeking additional areas) did not "clearly demonstrate a working knowledge of the community they plan to serve, including available resources, resource utilization and acceptance by the service population"?

E. Did DOL violate SGA General Designation Principle (6) by failing to "preserve the continuity" of services and by failing to "prevent undue fragmentation" of established service areas?

STIPULATIONS

The parties agreed to the following Stipulations of Fact (JX 1):

1. The United Tribes and Wyandottes are: "federally recognized Indian tribes"; "Indian or Native American-Controlled Organizations"serving Indians; "Tribal organizations", as defined in 25 U.S.C. 450; or consortia of eligible entities meeting the requirements of 20 C.F.R. § 668.200(c).

2. The United Tribes became an eligible consortium by an Agreement, dated October 1, 1999, and incorporated by Articles of Incorporation, dated July 19, 1972. (AF E-89 & E-87).

3. Federal Register, Vol. 63, No. 250, at 71945, December 30, 1998, lists the following Indian Tribal entities within the contiguous 48 states that are recognized as eligible to receive services from the U.S. Bureau of Indian Affairs:

The Iowa Tribe of Kansas and Nebraska;
The Sac and Fox Nation of Missouri in Kansas and Nebraska;[6] and,
The Wyandotte Tribe of Oklahoma. (AF at E-121-126).

[6] The United Tribes is a consortium of the two sovereign tribes. (TR 140).

4. The nine-county area of contention is not within the boundaries of the reservations of the constituent members of the United Tribes or their Congressionally-mandated or Federally-established service areas.

5. The nine-county area of contention is not within the boundaries of the reservations of the Wyandotte Tribe or their Congressionally-mandated or Federally-established service areas.

6. According to the 1990 U.S. Census, the following Indian and Native American populations existed in the nine counties:

State/County	Cherokee		Crawford				
Kansas	839		364				
Missouri	Barry	Barton	Dade	Jasper	Lawrence	McDonald	Newton
	293	68	56	1613	270	681	997

(AF at E-75-E-79).

7. In order for a "non-incumbent entity" to qualify for designation as an Indian or Native-American (INA) grantee, under 20 C.F.R. § 668.200(b), the Wyandottes identified an Indian or Native-American population, within the nine-county disputed geographic service area, of sufficient size to justify funding under the funding formula of 20 C.F.R. § 668.296(b), in the amount of at least $100,000, including any amounts received for supplemental youth services, under the funding formula of § 668.440(a).

8. The ETA properly published a Notice of Final Designation Procedures for Grantees or Solicitations for Grant Applications (SGAs) for Grants, on September 13, 1999, in the Federal Register, Vol. 64, pages 49523-49528, September 13, 1999, covering the service areas in question.

9. There was no waiver of competition for the incumbent grantee, under the WIA section 166(c)(2), for the service areas in question, which were the subjects of the SGAs.

10. The United Tribes and Wyandottes submitted applications, dated, October 1, 1999 and October 5, 1999, respectively, in the form of Notices of Intent, and those applications were evaluated by the ETA. (AF at E 73-E-90 & E -91-E-159).

11. The United Tribes are and were considered an "incumbent entity."

12. The United Tribes served the nine counties in contention for the previous twenty-four years.

13. The Wyandottes were a "non-incumbent" entity.

14. As both the United Tribes and Wyandottes had submitted Notices of Intent, the ETA reviewed both applications utilizing a competitive selection process.

15. Both of the competing entities were informed of the competition, not later than November 15, 1999, and were permitted to submit Final Notices of Intent by January 5, 2000.

16. The Notice of Competition did not specifically inform the applicants of the contents of the SGA, but referred to an attached copy of the SGA "for additional details on the information required to be included in a full Final Notice of Intent." (AF at F-1).

17. Both parties submitted full Notices of Intent on or before January 5, 2000.

18. The Department utilized a review panel process to score the Notices of Intent. (AF at H-5).

19. The review panel gave the United Tribes a score of 61 out of a possible 100 points. (AF at D-3).

20. The review panel gave the Wyandotte's a score of 84 out of a possible 100 points. (AF at B-2).

21. On March 1, 2000, the Grant Officer designated the Wyandottes as the WIA section 166 grantee for the nine counties for the period beginning July 1, 2000 and ending June 30, 2002. (AF at B-1-3, 4/27/00 letter; C-1).

22. The nine counties in contention are: Cherokee and Crawford Counties in Kansas; Barry, Barton, Dade, Jasper, Lawrence, McDonald and Newton Counties in Missouri. (These areas were designated by the Department to be serviced by the Wyandottes).

23. The Grant Officer and the United Tribes signed a written grant agreement on June 30, 2000.

24. The Grant Officer and the Wyandotte Tribe signed a written grant agreement on June 30, 2000.

25. The ETA has provided the United Tribes with WIA section 166 grants in the amount of $288,459 ($273,814 for adults and $14,645 for youth) for Program Years ("PY") 2000 and 2001.

26. The ETA has provided the Wyandotte Tribe with WIA section 166 grants in the amount of $101,600 for PY 2000 and 2001.

27. On March 21, 2000, the United Tribes submitted a timely appeal, with regard to its non-selection as PY 2000-2001 grantee for the nine counties, to the Office of Administrative Law Judges. (A-6).

FACTS

DOL ETA Evidence

Administrative File

The Administrative File establishes that the ETA properly published a Notice of Final Designation Procedures for Grantees or Solicitations for Grant Applications (SGAs) for Grants. Applications, in the form of Notices of Intent, were received from both the United Tribes and the Wyandottes. There was no challenge to the legality or correctness of the SGA and I find it in proper form.

As required by regulations, the Notice of Intent filed by each applicant includes: (1) documentation of the applying entity's legal status; (2) an application for Federal Assistance; (3) a specific description of the geographic area for which the entity wishes to be designated; (4) a summary of the entity's employment and training resource development programs serving Native Americans; (5) a description of the entity's planning process, including the involvement of its governing body and local employers; and (6) evidence to establish its ability to administer funds.

Both competing entities were informed of the competition, not later than November 15, 1999, and were permitted to submit Final Notices of Intent by January 5, 2000. Both parties submitted full Notices of Intent on or before January 5, 2000. The United Tribes submitted a "Part B", on December 30, 1999, as required by the SGA, the Wyandottes did not.

The Administrative File establishes both entities had appropriate legal status as Indian or Native American grantees. Since both entities were entitled to the highest priority for designation, but neither had jurisdiction over the area in contention, the ETA found neither absolutely entitled to designation for the contested area.

In accordance with the SGA, a review panel process was permitted, but not required, to be used, when either:

> 1. One or more new applicants, none qualifying for the highest priority for the requested area, demonstrated the potential for superiority over the incumbent organization, or
>
> 2. Two or more applicants, none qualifying for the highest priority, requested an area and the incumbent organization failed to apply for designation.

Item "2", above, was not applicable since the incumbent United Tribes had applied for the grant in the contested area. Since neither entity was designated and there was no application for or waiver of competition, the ETA properly chose to follow a competitive procedure for selection of the grantee involving a review panel. (AF F-1 & H-5; SGA III).

The Department utilized a "review panel" process to score the information submitted with the Notices of Intent, and supplemental input, in accordance with the Solicitations for Grant Applications (SGAs) for Grants, under the Native American Programs, on September 13, 1999, in the Federal Register, pages 49522-49528, covering the areas in question. The three panel

members were advised of their ethical obligations under the process and each was required to sign a "Conflict of Interest/Non-Disclosure Statement." They were advised to report "any" such conflicts. No evidence was submitted suggesting any potential conflict of interest.

The review panel utilized the five rating criteria set forth in the SGA and scored the two applications utilizing the point system set forth in the SGA. The review panel gave the United tribes a score of **61** out of a possible 100 points. (AF at D-3). The review panel gave the Wyandotte's a score of **84** out of a possible 100 points. (AF at B-2). The panel provided a summary of the strengths and weaknesses of each proposal.

The five rating criteria and maximum points allowed for each set forth in the SGA were:

1. (a) Previous experience in successfully operating an employment and training program serving Indians and Native Americans; or
(b) Previous experience in operating other human resources development programs serving Indians and Native Americans or coordinating employment and training services. (Maximum of 20 points).

2. Approach to providing services including: Identification of the training and employment problems and needs in the requested area and approach to addressing such needs and demonstration of the ability to maintain continuity of services to Indian or Native American participants consistent with those previously provided in the community. (Maximum of 40 points).

3. Description of the planning process including involvement of community leaders, involvement with local Workforce Investment Boards and Youth Councils, etc.. (Maximum of 15 points).

4. Coordination, linkages and the ability to utilize existing resources within the community, including one-stop systems (as applicable), to eliminate duplication of effort. (Maximum of 15 points).

5. Demonstration of support and recognition of the Native American community and service population. (Maximum of 10 points).

For ease of analysis, the results of the scoring from RX 2 and 3 are set forth in tabular form:[7]

SGA Points & Criteria	Panelist A	Panelist B	Panelist C	Total Score

[7] I overruled the Complainant's objection to the admission of RX 2 and 3, notwithstanding 20 C.F.R. § 667.810(d). A summarized version of the exhibits had been provided prior to the hearing (AF §D) and RX 2 and 3 merely provided the bases for what was already contained in the Administrative File. (TR 129).

	United Tribes	**Wyan-dotte**	United Tribes	**Wyan-dotte**	United Tribes	**Wyan-dotte**	United Tribes	**Wyan-dotte**
1. 20 points	17	20	15	18	12	19	14.67	19
2. 40 points	20	35	25	35	20	37	21.67	35.67
3. 15 points	10	10	9	12	10	12	9.67	11.33
4. 15 points	10	12	8	13	9	12	9	12.33
5. 10 points	5	5	7	8	5	5	5.67	6
Total 100 points	62	82	64	86	56	85	60.67	84.33

With the exception of a few tied scores, as noted in the table above, the panelists scored the Wyandotte proposal higher across the board. In its report, dated February 24, 1999, the panel listed the strengths and weaknesses of each entity, did not recommend the United Tribes for funding and did recommend the Wyandottes for funding. The summary of the strengths and weakness of each entities' proposal, at AF Tab D, accurately reflects the panel's reports.

Other Documentary Evidence

The ETA submitted facsimiles of two unredacted "Conflict of Interest/Non-Disclosure Statements" each signed and dated by a technical review panel member.[8] The members acknowledge therein that they have read the "Procedural Guidance for Panel Review for Solicitation for Grant Applications." The form lists five conflict of interest/ethics laws. The panelists acknowledge the criminal sanctions available for noncompliance with the standards of conduct and conflict of interest.

ETA Witnesses

Two witnesses testified on behalf of the ETA: James C. DeLuca, Acting Director, Office of National Programs, U.S. Department of Labor ("DINAP"); and, Lorraine H. Saunders, the Grant Officer.

Mr. DeLuca testified that prior to his present position he was the Chief of DINAP. (Hearing Transcript ("TR") 29). He had previously served as a procurement analyst and grant officer for the INA program since 1986. He explained DINAP's role is to get the best possible candidate within the competitive process. He explained DINAP worked with the grant officer and consulted with the Native American Advisory Council in developing the SGA here. (TR 31). He, Mr. Tello, the original grant officer, and Ms. Goddard, the Director, Office of National Programs ("ONP") signed the original SGA. (TR 50). DINAP has two roles, post-SGA, that is to sort out the proposals to determine where competition is needed and to review the grant officer's tentative decision and discuss the implications. (TR 31-32). In this case, DINAP did both. For the

[8] Only the redacted versions will be made available.

program year in issue, DOL did not consider waivers for any entity. (TR 37).

Mr. DeLuca testified, in evaluating the need for competition, in a perfunctory review, he looked for a reason to deny the Wyandottes' application, but found none. (TR 32, 57). He did not consider the issue of fragmenting the area at all. (TR 33). However, it was determined the nine-county area just met the minimum threshold for selection of a grantee, i.e., a $100,000. (TR 33, 59). The fragmentation principle does not supercede the competitive process. (TR 60). The Wyandottes submitted a proposal establishing they had linkages to the community, they had a structure to provide services, and had administered programs over several years involving human resource programs. (TR 38). He believed the selection process was in accordance with procedures. (TR 40). They could not designate the United Tribes (merely) because they were an incumbent and had done a good job. (TR 61).

According to Mr. DeLuca, Mr. Fred Tello was the grant officer at the beginning of the selection process here until near the end. (TR 30). However, the ETA has separate grant officers for selection and administration, closeout and audit resolution. (TR 34). The grant officer, in consultation with DINAP made the decision to compete the nine-county area. (TR 39).

ETA uses and DINAP identified outside Native American consultants for the panel which reviews NOIs. (TR 40). The original Grant Officer and staff selected the panel members here. (TR 85). The three panel members here were very experienced. (TR 40, 72). One was a federal employee with over twenty-five years experience in employment and training under native-American programs. (TR 41). The second, was a former director of native-American programs. The third, had over ten years experience writing grants and running Native American programs under the JTPA. (TR 41). While none of the panel members were members of or affiliated with either the United Tribes or Wyandottes, Mr. DeLuca did not recall their tribal affiliations. (TR 72-73). He did not know whether any panel members had had any prior dealings with the United Tribes in the preceding twenty-four years.[9] (TR 73).

Mr. DeLuca met with the Grant Officer again after the panel had made its recommendations. (TR 41). He informed her the United Tribes was a good grantee. (TR 42). He observed the Wyandottes had not supplemented their original NOI with a SGA Part B submission. However, he said Part B is unnecessary if the initial NOI is complete. (TR 42). While he applies the SGA General Designation Principles in his initial review, the grant officer makes the ultimate determination. (TR 43). ETA's preference is to keep existing organizations and the SGA is heavily weighted toward incumbents. (TR 43). He knew the United Tribes had been a good operator and had done a good job. (TR 45). He admitted the United Tribes was a native-American entity with a demonstrated ability to deliver. They were given preference twice, at the beginning and at the end of the process. There was no separate input from the ONP because DINAP represents ONP. (TR 64-65).

In this process he had no knowledge of the Wyandotte's ability to provide services or

[9] Panelist resumes were submitted post hearing but not admitted in evidence.

experience in providing services, under the JTPA, other than their NOI. (TR 54-55). Mr. DeLuca testified that while the Wyandottes had originally applied to serve only their own tribal members, that could not be done pursuant to the regulations. (TR 55).

Ms. Lorraine Saunders was the Grant Officer in this matter and has been a grant officer for five years. (TR 89). She explained her duties as a grant officer and previous duties. (TR 90-94). In this matter, the bases for designation were the panel recommendations, DINAP recommendations, and the results of an internal "clearance" review for the applicant. (TR 95, 118). She testified the ONP gave no input. (TR 118).

She reviewed both applications, not thoroughly, but also not perfunctorily. Ms. Saunders testified that the Wyandottes did not submit an SGA "Part B" package. She found their "Part A" submission included the necessary "Part B" information.

Here, the grant management specialist, Phyllis Mahan, who works under her supervision, screened the panel members, convened and ran the review panel, and gave her a recommendation regarding an award. (TR 95, 97). She is knowledgeable. Ms. Saunders did not become involved in this matter until after the review panel had made its recommendations. (TR 103). Her predecessor Grant Officer, Mr. Tello, made the final selection of panel members.[10] (TR 105).

Ms. Saunders testified to prevent conflicts of interest, each panel member must sign and date a "conflict of interest" form.[11] (TR 96). She said DINAP advises the grant officers of priorities and, at the end of the selection process, of the history of any applicant. (TR 96-97). She received DINAP's advice at the end of the process. She knew the United Tribes had previously served the nine-county area and the ETA had not had any problems with them. (TR 97). General Designation Principles are incorporated in the SGA and the panel determines whether they are met. (TR 98). Panel scoring is per the SGA criteria. (TR 99). [The most significant differences in the scores here, i.e., 14 points, was in the area of "approach", criterion #2. The panel indicated United Tribe weaknesses in this area.][12] (TR 99-100). The panel recommended designation of the Wyandottes and their report was the main part of her decision. (TR 100). There was an overall 23-point difference between the two applicants' panel scores. (TR 100). She reviewed the panel report, the SGA criteria, and the entities' applications. (TR 101).

While she was aware the United Tribes was the incumbent and considered their experience, she did not prioritize that over the large point spread difference in the panel ratings. (TR 102). She admitted the panel report constituted the main part of her decision to designate the Wyandottes for the area. (TR 110).

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[10] Since the ETA did not oppose the Complainant's motion to strike Mr. Saunder's testimony regarding criterion #2 before the panel, I granted the motion. (TR 108). I do not consider the stricken testimony.

[11] Under the JTPA conflicts of interest were prohibited. See, 20 C.F.R. § 632.116.

[12] While I had stricken similar testimony before on this issue, the Complainant elicited it on cross-examination.

Ms. Saunders testified about the extent to which the Wyandotte satisfied each of the SGA criteria at section I(2)-(6). She believed the original Wyandotte NOI satisfied the criteria of Part B of the SGA. (TR 101). She looked to determine whether the Wyandottes had "verifiable" or documented information, pursuant to SGA criterion II but, for the most part, relied on the technical panel experts. (TR 117). The Wyandottes did not adequately address SGA General Designation Principle ("GDP") I(2) and the panel gave them a reduced score. (TR 111). Concerning SGA GDP criterion I(3), the Wyandottes had not previously administered a federal program and there are differences between state and federal programs. (TR 112). The Wyandottes did demonstrate a working knowledge of the community to be served, but not clearly or fully, under I(5). (TR 113). They described how they planned to use existing resources in the community. (TR 113). They also provided information regarding their acceptance in the native-American community. (TR 113).

Ms. Saunders received advice from DINAP concerning "fragmentation", but did not consider it an issue. (TR 114). Moreover, she considered "continuity" of service, SGA GDP criterion I(6), in making her decision. She testified the United Tribes did not clearly demonstrate "continuity" and the panel scoring indicated an inadequate demonstration of continuity. (TR 114). However, the United Tribes' incumbency and demonstration of continuity did not overpower the wide point spread in the panel scoring to her. (TR 115). There was no question the United Tribes could deliver services and she had been informed by Mr. DeLuca the former had never had any problems with the program.

Ms. Saunders confirmed my belief that both tribes had met the basic SGA criteria, but she believed the Wyandottes had the better proposed program. (TR 126).

United Tribes' Evidence

Documentary Evidence

The United Tribes submitted a chart entitled "Summary of Performance measures" for the years 1995 to the present. (CX 2). The chart illustrates that the United Tribes had, in most instances, consistently met and/or exceeded the Department of Labor's goals and its own goals in each of the categories listed for 1995 through Program Year 1998.

The United Tribes adopted the portions of the Administrative File pertaining to their application. CX 3 is a color-coded map of Kansas and Missouri with the area in contention depicted, in blue. CX 4 is the United Tribes' Request for Production of Documents and the ETA's response. The United Tribes did not submit a service plan with either Part A or B of their NOI.

United Tribes' Witnesses

Five witnesses testified on behalf of the United Tribes: Sheldon Taylor; James DeRoin, Chairman of the United Tribes' Board of Directors; Ida Nadeau; Janet Barwick; and, Brad

Hamilton, by means of a stipulation of expected testimony.[13] I found all theses witnesses very credible.

Mr. Sheldon Taylor, a long time resident of Baxter Springs, Kansas, where the United Tribes maintain an office to administer their WIA grants, testified about the nature of the portions of the nine-county area which with he was familiar. (TR 131-139). While he kindly testified that he would like to see the United Tribes' local employee, who was actively involved in the community, remain, that is not relevant to my determination. (TR 132).

Mr. James DeRoin, the Chair of the United Tribes' Board, testified. (TR 139). He served on the Board since 1992. He testified about the many programs the United Tribes conduct of which WIA is the largest. (TR 145-146). Mr. DeRoin explained the map entered into evidence by the Complainant. (CX 3). The blue area is the nine-county area in contention. The purple area is the geographic service area they presently serve under the WIA program. The red stars show where they have working offices. (TR 149). Their Baxter Springs office remains open staffed by Clara Stands. (TR 149). The greatest native-American poverty is in the Kansas City and Joplin areas. (TR 150). Mr. DeRoin testified about Ida Nadeau. (TR 151-152). The loss of the nine-county area amounts to about a one-third cut in their WIA grant funding. He questioned the Wyandottes' ability in the nine-county area but was not familiar with their programs. (TR 153).

Ms. Ida Nadeau, the director of the United Tribes' WIA programs for the past fifteen years, testified at length. (TR 160). She described the makeup and history of the United Tribes, as well as programs they operated. She prepared the United Tribes' NOI and "Part B" input. (TR 199). Ms. Nadeau explained the numbers on CX 3 represent the 1990 native-American population. The white areas depict areas served by other grantees. (TR 165). From 1975 through July 1, 2000, the United Tribes serviced the entire area colored blue and purple except for three months when they did not serve the Kickapoo reservation. (TR 169). She explained their Baxter Springs office now serves about forty counties, under their WIA grant, with the exception of the nine-county area now served by the Wyandottes. Ms. Nadeau explained there had been a "gentlemens' agreement" between the various tribes not to seek to infringe on other tribe's service areas. (TR 173).

Ms. Nadeau believed the United Tribes remains eligible to serve the nine-county area. She explained CX 2 is a summary of the United Tribes' performance measures, which is part of the information submitted with their NOI. (TR 186-190). She testified regarding her outstanding record administering the United Tribes' WIA/JTPA/CETA programs and about why their NOI is well-written. (TR 208-212). She admitted the Wyandotte NOI was very well-written. (TR 205). She was not familiar with a Wyandotte office in the nine-county area, but rather only their office 30-40 miles away in Wyandotte, Oklahoma. (TR 212-213). She was not familiar with Wyandotte

[13] I was extremely liberal in the admission of testimony, particularly concerning matters which were either not before the ETA or post-application, but only consider that which is directly relevant to the issues herein.

employment and training efforts in the nine-county area. (TR 219).

Ms. Janet Barwick, a former recipient of the United Tribes' JTPA program funds and present WIA applicant, testified about how well the United Tribes had served her and the difficulties and funding shortfalls she has had during the transition to the Wyandotte administration of the program. (TR 225-241).

Mr. Brad Hamilton's testimony was presented by means of a stipulation of expected testimony. He would have testified that he is the director of the Native American Affairs Office for the State of Kansas. According to Mr. Hamilton, the only connection the Wyandottes have with Kansas is a two-acre cemetery and adjacent land in Kansas City. (TR 243-245).

Wyandotte's Evidence[14]

Two witnesses testified on behalf of the Wyandottes: Ron Kaiser and Billy Friend. Mr. Ron Kaiser, the Director of Planning for the Wyandotte Nation, testified about the tribe and its geographic concentration. (TR 251). He explained the majority of the Wyandotte's live in the nine-county area in contention. (TR 252). None of the nine-county is part of or subject to Wyandotte legal jurisdiction. (TR 263). They have been successfully providing employment and training, under various programs, since at least 1991. (TR 253). He testified that the 1990 census data did not accurately reflect the Wyandotte population and its distribution. (TR 255). Their NOI reflected the nine-county area had a Wyandotte population. (TR 264). The nine-county service area is the first such WIA award the Wyandottes have had. (TR 262). Mr. Kaiser prepared the Wyandotte NOI and did not submit a Part B because he believed the initial submission encompassed the Part B information. (TR 263). He admitted that the service plan required by Part B was not submitted with the NOI Part A, but rather after the Wyandottes had been designated. (TR 263).

Mr. Billy Friend is the Director of Human Resources for the Wyandotte Nation, as well as a tribal member. (TR 266). He discussed his familiarity with the nine-county service area and its proximity to the Wyandotte Nation. He discussed their arrangement with the states and with the Kansas Employment Security Office, in Pittsburgh, Kansas, to provide core services in Crawford County and discussions with the Missouri Employment Security Office. (TR 267-268). He testified about the WIA applicants, the travails of being a new grantee, and the successful history of the Wyandottes in handling grants. (TR 268-271).

THE LAW

The fundamental issue in this matter is whether the Grant Officer's decision and actions

[14] The Complainant's objection to the admission of testimony of the Wyandotte's, a party-in-interest, based upon their lack of pre-hearing participation, was overruled. (TR 246-250). The Complainant's counsel is correct in his argument that the Wyandotte testimony concerning post-application matters was largely irrelevant and I thus do not consider those portions of their testimony.

were arbitrary and capricious, an abuse of discretion, or not in accordance with law. Review is not *de novo*, but is limited to determining whether relevant factors were considered by the Grant Officer in making her decision and whether the ultimate decision reflects reasoned decision-making in accordance with the governing rules and regulations. *Senior Citizens Serv. v. DOL*, 87 JTP 17 at 3-4 (Department of Labor, June 29, 1988); 20 C.F.R. § 667.825. The Supreme Court, in addressing this standard, stated ". . . the scope of review is a narrow one. . . [T]he court is not empowered to substitute its judgment for that of the agency. . . [W]e will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc., v. Arkansas- Best Freight System, Inc.*, 419 U.S. 281, 285-286 (1974) *cited in North Dakota Rural Development Corp. v. U.S. Department of Labor*, 85-JTP-4 (Sec'y 1986). This standard of review "sets a high threshold for a party to overcome, and occurs only when a decision is based on an erroneous view of the law, or a clearly erroneous assessment of the evidence. . ." *MaChis Lower Creek Indian Tribe of Alabama (MLCITA) v. U. S. Department of Labor*, 2000-WIA-2 (ALJ, October 5, 2000).

The Grant Officer had the burden of production, under 20 C.F.R. § 667.819(e) and is required to submit an Administrative File into evidence. Under 20 C.F.R. § 667.819(e), the Complainant thereafter had the burden of persuasion to establish that the Grant Officer's decision should be overturned in whole or in part. The administrative law judge is not empowered to substitute his judgment for the judgment of the agency. 20 C.F.R. § 667.825.

In authorizing the WIA, the Congress appeared to make competition among tribal organizations, the rule rather than the exception. 29 U.S.C. § 2911(c)(1).

The regulations establish procedures when, as here, two or more entities apply for grants for the same service area, or overlapping service areas, and a waiver of competition, under WIA section 166(c)(2), is not granted to the incumbent. 20 C.F.R. § 668.250(b). Specifically, the Grant Officer is to: (1) follow the regulations for priority designation at § 668.210; (2) if no applicant is entitled to priority designation, DINAP will inform each entity which submitted a Notice of Intent ("NOI") of all competing Notices of Intent by November 15 of the year in which the NOIs are received; (3) each applicant has the opportunity to describe its service plan and may submit additional information addressing § 668.240(c) requirements (the original NOI requirements) or other information; and, (4) the Grant Officer "selects the entity that demonstrates the ability to produce the best outcomes for its customers." 20 C.F.R. § 668.250.

Under the regulations and the SGA, NOI's were to include: (1) documentation of the applying entity's legal status, under 20 C.F.R. § 668.200(a)(1); (2) an application for Federal Assistance, Standard Form 424; (3) a specific description of the geographic area for which the entity wishes to be designated; (4) a summary of the entity's employment and training resource development programs serving Native Americans; (5) a description of the entity's planning process, including the involvement of its governing body and local employers; and (6) evidence to establish its ability to administer funds, under §§ 668.220-668.230. 20 C.F.R. § 668.240(c).

To be designated as an INA grantee for PY 2000 and beyond, an entity must have: (1) legal status; (2) the ability to administer INA funds; and, (3) a non-incumbent "must have a population within the designated geographic service area which would provide funding under the funding formula found at § 668.296(b) in the amount of at least $100,000, including any amounts received for supplemental youth services under § 668.440(a)." 20 C.F.R. 668.200(b).

The regulation for "priority designation", found at 20 C.F.R. § 668.210, specifies: "Federally-recognized Indian tribes. . . or consortia will have the highest priority for designation." Further, "[T]hese organizations will be designated for those geographic areas over which they have legal jurisdiction. (WIA section 166(c)(1))." 20 C.F.R. § 668.210(a). "In geographic areas not served by Indian tribes. . . entities with a Native American-controlled governing body and which are representative of the Native American community or communities involved will have priority for designation." 20 C.F.R. § 668.210(c).

Potential Remedies

The Administrative Law Judge has the full authority of the Secretary of Labor, under the Act. Any organization selected and/or funded as a WIA, INA or MSFW grantee is subject to being removed as grantee in the event my final decision so orders. 20 C.F.R. § 667.825(c). If it prevails in its appeal, a complainant may be designated as the WIA grantee for only the remainder of the current grant cycle. 20 C.F.R. § 667.825. The ETA has 90 days in which to implement a judge's decision.

ARGUMENTS OF THE PARTIES

United Tribes

The Complainant argues the Grant Officer lacked any rational basis to designate the Wyandottes as the WIA grant recipient. The United Tribes had submitted a fully-verified and complete application reflecting documented superior service for a quarter century. The Wyandotte's application was incomplete, entirely lacked corroboration or any evidence of a concrete ability to expend WIA funds for the benefit of Indian people in the service area. The Complainant accuses the ETA of a "cavalier" attitude toward the grant process and a refusal to engage in a fair hearing process, by ignoring its own General Designation Principles and withholding all but selected information about the review panel.

ETA

The ETA argued the entire designation process had been properly conducted and that the Grant Officer properly exercised her discretion, weighing the relevant facts and following applicable law, in designating the Wyandottes for the award of the WIA grant for the nine-county area in contention. Since neither applicant had "legal" jurisdiction over the area in contention and neither were entitled to priority over the other in the selection process, the ETA argues it was proper for the Grant Officer to choose to utilize a competitive selection process. It argues the Wyandotte NOI was complete and met the criteria of SGA Part B. (Brief at 18-20).

The ETA observes that the SGA does not state the review panel must or will consider the applicant's satisfaction of the GDPs. The ETA finds the Complainant's argument concerning GDP 6 (priorities and preferences) to be "in effect, that anything short of designating the United Tribes as grantee was a failure to comply with GDP 6." GDP 6, it says, allows the Grant Officer, in consultation with DINAP, to decide close cases, but this selection was not close considering the 23-point difference in the panel's scoring of the two applications. As far as the criteria before the panel, the assignment of 40 points to "service approach" clearly made it a more important factor than the 20-point "experience" criterion.

The ETA argues, " instead of raising substantive objections to the Panel's scoring of the five factors, the United Tribes raises specious objections to the Panel itself, based upon the Department's assertion of the deliberative process privilege to protect the identity of the Panel members." (Brief at 16). Since the Complainant already had the panel report materials (AF Tab D), their assertion that the ETA was trying to have it "both ways" by asserting a privilege and then waiving it to introduce evidence "is flat wrong."[15]

The ETA states, "[T]he United Tribes do not appear to argue that their application is superior to that submitted by the Wyandottes" and asked no questions focusing directly on the SGA's five rating factors. The United Tribes "have not effectively disputed the reasonableness of either the Panel, in scoring the applications, or the Grant Officer, in adopting the Panel's recommendations." (Brief at 18).

Wyandottes

The Wyandottes submitted a summary of their viewpoint concerning two issues raised at the hearing, i.e., their familiarity with the community to be served and the reason they did not submit a supplemental Part B to their NOI. They pointed out that both Mr. Friend's and Mr. Kaiser's testimony illustrated the tribe's intimate familiarity with the area. Further, they say there is a high concentration of Wyandottes in that area. Their typical tribal service area would normally include much of the disputed area. They have been providing services, such as housing, health care, day care, social services, vocational training, educational services, and scholarships, in the area for some twenty years. Some services were provided to non-tribal members. Mr. Kaiser avers he has a thorough background in employment and training matters. Based on Mr. Kaiser's grant-writing background, the Wyandottes determined there was no need to submit the optional Part B, because the required information was submitted in connection with the original grant application.

DISCUSSION OF FACTS AND LAW

In the matter *sub judice*, there was no waiver of competition for the area in contention, nine counties in Kansas and Missouri, set forth in the stipulation. Moreover, there was no request for a waiver. The ETA properly issued an SGA soliciting WIA grant applications. Both the

[15] This argument was made before the ETA disclosed limited materials related to the review panel.

incumbent United Tribes and non-incumbent Wyandottes submitted applications (NOIs) which encompassed the area in contention. Both the United Tribes and Wyandottes were and are federally recognized Indian tribes"; "Indian or Native American-Controlled Organizations" serving Indians; "Tribal organizations", as defined in 25 U.S.C. 450; or consortia of eligible entities meeting the requirements of 20 C.F.R. § 668.200(c). The evidence of record establishes a basis for the Grant Officer's determination that both applicants had the ability to administer INA funds and had the requisite populations in the service areas to meet the mandatory funding formulae. Thus, both entities were both eligible to apply for the grant and eligible to be subsequently designated, under 20 C.F.R. § 668.200(b).

Both entities had the "highest priority for designation", under 20 C.F.R. § 668.210(a). However, since neither had "legal jurisdiction" over the nine-county geographic service area in contention, neither was absolutely entitled to be designated for that area under 20 C.F.R. § 668.210(a).[16] The ETA properly interpreted this provision to mean neither was entitled to priority designation for the area. Both entities had Native American-controlled governing bodies and thus both had priority for designation in the area in contention which was not served by Indian tribes. 20 C.F.R. § 668.210(c). This latter qualification did not "entitle" either to the designation. Since through their NOI the Wyandottes demonstrated a "potential" for superiority over the United Tribes, the Grant Officer had a basis to exercise her discretion to utilize the review panel process. (TR 38-39; AF F-1 & H-5). Thus, the Grant Officer's decision to follow competitive procedures was not inappropriate. 20 C.F.R. § 668.250(b).

The testimony of the Grant Officer and Mr. DeLuca make it clear that the United Tribes qualified for the priority designation although it appears the informal word of mouth communication of that qualification was disturbingly rather casually made. However, I find this communication was sufficient to satisfy SGA GDP requirement I(6), i.e., the determination of preferences through input and recommendations from the Chief of DOL's Division of Indian and Native American Programs ("DINAP") and the Director of DOL's Office of National Programs. Further, Mr. DeLuca testified that he applied the SGA General Designation Principles in his initial review. (TR 43).

There is no contest that both entities had the appropriate legal status, under 20 C.F.R. § 668.200(b)(1). The Administrative File establishes both entities had the ability to administer INA program funds. However, the Wyandottes, as a new (non-incumbent) did not "have a (Wyandotte) population" in the geographic service area which would provide the appropriate funding, under § 668.200(b)(3). According to the 1990 census, the Wyandotte had eight members in Kansas, none in Missouri, and 142 in Oklahoma. (AF Tab E).

The ETA argued that the § 668.200(b)(3) population requirement merely means the new, non-incumbent must show an INA population in the designated geographic service area which meets the funding requirement. (TR 26-27). If that interpretation is correct, then the Wyandottes would qualify for designation. However, the actual Wyandotte population, in the area in

[16] This "legal jurisdiction" does not exist, as the Complainant suggests, merely because a tribe has previously served a particularly non-reservation area under a prior grant.

contention, is de minimus and well below that required to meet the funding formula. This requirement is "grand fathered" for incumbents, such as the United Tribes, and thus not applicable. Admittedly, the regulations under the predecessor Joint Partnership Training Act ("JTPA") required a non-incumbent or new entity to merely show an INA population within its designated service area of at least 1,000 and that the amount under funding formulas will total at least $120,000 in all JTPA funds for the first Program Year. 20 C.F.R. § 632.10(b)(2) and (c)(3). Although contrary to the specific wording of § 668.200(b)(3), the ETA interpretation is reasonable and I accept it. Thus, the Wyandottes qualified for designation.

Both of the competing entities were informed of the competition, not later than November 15, 1999, and were permitted to submit Final Notices of Intent by January 5, 2000. The Notice of Competition did not specifically inform the applicants of the contents of the SGA, but referred to an attached copy of the SGA "for additional details on the information required to be included in a full Final Notice of Intent. (AF at F-1). Neither parties due process rights were infringed on in this process. Both parties submitted full Notices of Intent on or before January 5, 2000. (JX 1). However, while the United Tribes submitted a "Part B", on December 30, 1999, as required by the SGA, the Wyandotte chose not to relying instead on their initial NOI.

According to the SGA, Part B was to include the following information:

> (1) Evidence that the entity represents the community proposed for services such as: Demonstration of support from Native American-controlled organizations, State agencies, or individuals in a position to speak to the employment and training competence of the entity in the specific area applied for; and,
>
> (2) Submission of a service plan and other information expanding on the information required in Part A which the applicant feels can strengthen its case, including information on any unresolved or outstanding administrative problems.[17]

There was no issue concerning whether the Wyandottes met the initial NOI requirement for: (1) documentation of the applying entity's legal status, under 20 C.F.R. § 668.200(a)(1); (2) an application for Federal Assistance, Standard Form 424; and, (3) a specific description of the geographic area for which the entity wishes to be designated. The United Tribes did not challenge whether the Wyandotte NOI met or included the additional requirements, i.e.,

[17] The term "service plan" is not defined. The JTPA defined a "comprehensive annual plan" and a "master plan". 20 C.F.R. § 632.4. See also 20 C.F.R. § 632.19. 20 C.F.R. § 668.250 merely requires submission of a "description" of the service plan, not actual submission of a plan as the SGA requires. In this respect, it appears the SGA Part B goes too far. 20 C.F.R. § 668.710 requires grantees to submit a comprehensive services plan and section 668.720 describes the contents of such a plan.

information: (4) a summary of the entity's employment and training resource development programs serving Native Americans; (5) a description of the entity's planning process, including the involvement of its governing body and local employers; and (6) evidence to establish its ability to administer funds, under §§ 668.220-668.230. Neither applicant submitted a service plan during the application stage.[18]

The United Tribes' NOI not only met the criteria for the initial NOI, but its supplemental submission satisfied the SGA Part B requirements. I find both applications well written. Further, having reviewed the Wyandotte NOI, and finding a lack of persuasive arguments by the Complainant that it did not, I find it met the requirements of the initial NOI and Part B.

The Department, in its discretion, utilized an optional "review panel" process to score the information submitted with the Notices of Intent, and supplemental input, in accordance with the Solicitations for Grant Applications (SGAs) for Grants, under the Native American Programs, on September 13, 1999, in the Federal Register, pages 49522-49528, covering the areas in question.

The terms in the SGA, "[A] formal review panel process may be utilized. . ." clearly provided that use of the review panel was discretionary. The second criterion for use of the review panel was not applicable in this case because the incumbent had applied for the grant. The first criterion applied for use of the review panel did apply because the Wyandottes were a new applicant not entitled to the highest priority and both the Grant Officer and DINAP believed it demonstrated the "potential" for superiority over the incumbent.

The testimony of Mr. DeLuca and the Grant Officer establishes the review panel membership included individuals with knowledge of or expertise in programs dealing with Indians and Native Americans, as required by the SGA. The review panel utilized the five rating criteria set forth in the SGA and scored the applications utilizing the point system set forth in the SGA. The review panel gave the United Tribes a score of **61** out of a possible 100 points. (AF at D-3). The review panel gave the Wyandotte's a score of **84** out of a possible 100 points. (AF at B-2).

I was initially concerned about the assignment of points to each of the five criteria. For instance, had criterion "5" been given a maximum of 30 versus 10 points and criterion "2" given a maximum of 20 versus 40 points, would the overall scoring have put the United Tribes ahead. My concern arose because of the emphasis of the General Designation Principles appeared to lie in past experience and continuity of services. However, recalculating the table, set forth above, giving various different maximum weights to each of the criteria, still yielded the result of the Wyandottes having a higher overall score than the United Tribes. Thus, while reasonable minds could differ on the maximum scores to be allowed for each criteria, I find no error in the assignment of the maximum possible scores for each criteria. Further, I find the five scoring criteria consistent with the General Designation Principles of the SGA. Likewise, while reasonable minds might differ regarding the various points one might assign to each applicant's satisfaction of each of the criteria based upon a review of their applications, I find the review

[18] *Id.*

panel's assessments of the strengths and weaknesses of each application and the panel's scoring of the same to not be arbitrary, capricious, an abuse of discretion or not in accordance with the law.[19]

It bears repeating that the General Designation Principles ("GDPs") of the SGA are just that "general" principles. Those "intrinsic" general principles are incorporated into the more specific requirements for designation eligibility and the scoring criteria used by the review panel. Unfortunately, the Complainant has a somewhat myopic perspective of some of the GDPs. For instance, the GDPs indicate the DOL wishes to preserve the continuity of CETA/JTPA services and avoid "undue" fragmentation of existing geographic service areas. By selecting the Wyandottes, WIA services in the area will be continued and the "continuity" GDP met. By creating the nine-county service area, the ETA has avoided "undue" fragmentation of the existing geographic service area, formerly held by the United Tribes. By ensuring the Wyandottes met the $100,000 eligibility requirement, the ETA further avoided undue fragmentation. Naturally, the United Tribes believes its knowledge and ability to directly represent Native Americans in the service area surpasses the Wyandottes. The Wyandottes understandably disagree. If the ETA accepted the Complainant's view of this entire matter, few, if any, new WIA grantees would ever be selected when competing against well-performing incumbents.

The Grant Officer testified that her designation of the Wyandottes was based upon DINAP, i.e., Mr. DeLuca, recommendations, an internal "clearance" review, and primarily on the panel recommendations, with its 23-point difference between the scores of the two competitors. She was aware of the United Tribes' lengthy and very good history of service. Ms. Saunders reviewed both applications herself, although not word-for-word, and was satisfied the Wyandottes met the SGA requirements. I find she could and did reasonably rely on the review panel's assessment of the strengths and weaknesses of each application as well as the scores the panel awarded. She had considered continuity of service and recalled discussing the matter of fragmentation with Mr. DeLuca, but did not consider fragmentation an issue. I take this to mean she determined that the area would not be unduly fragmented. In the end, she essentially believed the Wyandottes would better serve the Native American population in the service area.

Counsel for the United Tribes waited until the hearing date to challenge the ETA's claim of deliberative process privilege in response to his discovery request for detailed information concerning the panel constitution and process.[20] (TR 74-84, 119). I conditionally denied the

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[19] RX 2 and RX 3, Summary Technical Rating Forms, contain unexplained references to states, such as Missouri, Oklahoma, and Iowa. It appears this refers to the home of the applicants rather than the service area applied for. In either event, the form reflects errors of insignificant meaning, as the panel reviewed the entire NOIs.

[20] The procedural rules applicable to administrative proceedings provide that if a party either objects to or adequately respond to discovery, the discovering party may move for an order compelling discovery. 29 C.F.R. § 18.21(a). Here, discovery was to end well before the hearing, pursuant to my prehearing order and no such motion was made. Had the appropriate motion been made prior to the hearing, I may have required ETA to disclose at least some of the requested information. *See, e.g., Narragansett Indian Adult Vocational Training Program v. DOL*. 93-JTP-19 (ALJ, April 29, 1994). Whether the deliberative process or attorney client privileges apply to particular witnesses or documents is a mixed question of fact and law. For neither privilege is it enough simply to assert that disclosure may have "chilling effects" on agency personnel or attorneys and their clients. *Midwest Farmworker v. United States Department Of Labor*, ARB Case No. 98-144 (July 23,

Complainant's motion to strike all evidence related to the review panel from the record because it had come too late and it had not made an earlier motion to compel the discovery of the material. (TR 84, 125, 278).

The constitution of the review panel was a proper subject for inquiry in this proceeding. 20 C.F.R. § 667.800(a) permits challenges for "alleged violations of the Act, its regulations, grant or other agreement under the Act fairly raised in the determination . . ." The SGA itself specifies the requisite qualifications panel members. While the United Tribe's hearing request challenged the constitution of the review panel, it lacked sufficient facts to support such an allegation at the time of requesting the hearing and thus sought discovery on the matter. The ETA, relying on the deliberative process privilege, consistently refused to identify the panel members, both during discovery and at the hearing. Absent, identifying information, the Complainant could not have proven its allegation. At the hearing, the ETA then provided testimony concerning the review panel's qualifications, but the ETA could answer few, if any questions, on cross-examination about those individuals.

The ETA released information related to the panel members qualifications. The United Tribes was given the opportunity to challenge the panelist's qualifications and submitted no evidence.

In response to the United Tribes' concern that the possibility existed that panel members, which the ETA had refused to identify, might possibly have conflicts of interest, the Grant Officer testified about the extensive briefing the panel members received concerning potential conflicts and the fact each signed and submitted a statement attesting he or she had no such conflict.[21] Two of three of these statements were submitted post-hearing, reviewed in camera, and the panel members' names subsequently redacted. The record reflects no conflicts of interest.[22] The Grant Officer testified that the grant specialist had "screened" the panelists and the former Grant Officer, Mr. Tello, actually selected them. Further, the Complainant provided no suggestion of any potential conflict on the part of the panel members nor was "conflict of interest" of panel members ever specifically an issue.[23] Given the tardiness of the motion, the fact that "conflict of interest" was never a specific issue, and the fact the Complainant submitted no evidence of any potential conflict once the panelist identities were disclosed, I now unconditionally deny the Complainant's

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1998).

[21] Mr. Williams accepted the representation the panel members had in fact signed these forms. (TR 81).

[22] On September 19, 2000, the Respondent submitted a letter explaining the third form had been misplaced probably during an office move. Despite their best efforts the form could not be located.

[23] The Complainant's appeal of March 24, 2000, merely raises two panel issues: first, was the decision to use a panel proper and secondly, was it composed of individuals with the required expertise. The Complainant's August 7, 2000 Pre-hearing Exchange merely raises the issue "whether DOL's decision to use the panel process was proper, and if so, whether the manner in which the panel proceeded was lawful." My statement of issues, to which the Complainant agreed, was whether the panel was properly constituted. In its August 21, 2000, letter concerning trial issues, it again agreed with my proposed statement of issues. (Aug. 21, 2000, letter, page 6).

motion to strike all evidence related to the review panel from the record.[24] Further, even had I stricken the evidence concerning the review panel as requested, the Grant Officer's testimony that she relied upon the panel's report, as one factor in her designation decision, would, among other matters developed at the hearing and summarized herein, have been sufficient to sustain her decision.[25]

On March 1, 2000, the Grant Officer conditionally designated the Wyandottes as the WIA section 166 grantee for the nine counties for the period beginning July 1, 2000 and ending June 30, 2002. (JX 1; AF at B-1-3, 4/27/00 letter; C-1). The Grant Officer and the Wyandotte Tribe signed a written grant agreement on June 30, 2000. The ETA has provided the Wyandotte Tribe with WIA section 166 grants in the amount of $101,600 for PY 2000 and 2001.

I find the Grant Officer met her burden of production, under 20 C.F.R. § 667.819(e), by submitting an Administrative File which was admitted into evidence. Under 20 C.F.R. § 667.819(e), the Complainant thus had the burden of persuasion to establish that the Grant Officer's decision should be overturned in whole or in part. The United Tribes has not established that the Grant Officer's decision should be overturned in whole or in part. The evidence establishes the Grant Officer did not abuse her discretion in the award of this WIA grant to the Wyandottes.

CONCLUSIONS

The United Tribes successfully, and with great expertise, provided employment and training services to Native Americans in the service area for twenty-four years. Ms. Ida Nadeau, employed by the United Tribes, surely is among the most knowledgeable and accomplished veterans of the CETA, JTPA, WIA program. The Wyandotte's NOI demonstrated potential superiority over the incumbent, thus justifying the use of the review panel process. Both applicants submitted NOIs in proper form. A review panel was properly constituted and it properly evaluated the NOIs. Utilizing the review panel results and other information, the Grant Officer had a reasonable basis to decide to award the grant to the Wyandottes. As an aside, I observe, that while the Wyandottes have experienced travails inherent in becoming a WIA grantee, they appear to be on the road to establishing a viable education and training program.

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[24] Even had I granted the Complainant's Motion to Strike evidence concerning the review panel, given the relative burdens of production and persuasion, the ETA may nevertheless not have required the same to prevail. See, MOORE'S FEDERAL PRACTICE, § 26.60[6] (2d Ed. 1989).

[25] Generally, an order precluding a party from introducing evidence on a necessary element, because of its failure to respond to discovery, is upheld "only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party, deliberate callousness or intended negligence." § 37.03[2], MOORE'S FEDERAL PRACTICE, Vol. 4A (2d Ed. 1989). *See Wembley, Inc. v. Diplomatic Tie Co.*, 216 F. Supp. 565 (D. Md 1963)(Defendant was not entitled to a preclusion order when it had not moved to compel production of evidence not provided in response to pretrial interrogatories) and *Grochal v. Aeration Processes, Inc*., 797 F.2d 1093 (D.C. Cir., 1986)(Court of Appeals reversed preclusion order finding judge should have considered less severe sanction if the non-complying party's behavior had been culpable). In the case *sub judice*, there has been no wilful disobedience or gross indifference to the rights of the adverse party, deliberate, callousness or intended negligence. Further, since the ETA, in disclosing at the hearing, certain redacted panel documents (RX 2 & 3) which were background support for released documents the Complainant had previously sought, did not intend to mislead the Complainant, I find no waiver of the deliberative process privilege. *See*, § 511.06[4], WEINSTEIN'S FEDERAL EVIDENCE (2d Ed. 2000).

The United Tribes merit appreciation for their many years of exemplary service to the Native American community under CETA and the JTPA.

The Grant Officer properly considered the relevant factors established in the SGA, the statutes and regulations, and selected the grantee based upon reasoned decision-making in accordance with the law. While, as the government stated at trial, the grantee selection process was not "perfect", the selection process was fundamentally fair. (TR 23).

ORDER

WHEREFORE IT IS ORDERED THAT the Complainant's challenge to the ETA's award of the WIA grant for the nine-county area in contention is DENIED.

RICHARD A. MORGAN
Administrative Law Judge

RAM:dmr

The decision of the administrative law judge shall constitute final action by the Secretary of Labor unless, within 20 days after receipt of the judge's decision, a party dissatisfied with the decision or any part thereof has filed exceptions with the Secretary (Administrative Review Board) specifically identifying the procedure, fact, law, or policy to which exception is taken. Thereafter, unless the Administrative Review Board, within thirty days of the filing of the petition for review, notifies the parties the case has been accepted for review, the decision of the ALJ constitutes final agency action. 20 C.F.R. § 667.830(b).