

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 November 2002

Case No.: 2002-WIA-3

In the Matter of:

LUMBEE TRIBE OF NORTH CAROLINA,
Complainant

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent

ORDER GRANTING MOTION TO DISMISS

On July 17, 2002, the Respondent Department of Labor filed a Motion to Dismiss this appeal from the decision of the Respondent to provide a waiver from competition for Section 166, Workforce Investment Act ("WIA") funding for Robeson, Scotland, Hoke, and Bladen Counties, in North Carolina, arguing that the Office of Administrative Law Judges lacks jurisdiction over the appeal. The Respondent bases this assertion on the fact that the Complainant's Notice of Intent under the Workforce Investment Act is to apply for a grant for an area that has already been waived from competition under 29 U.S.C. Section 2911 (c)(2), and under 20 C.F.R. Sections 667.800 and 668.270, the Office of Administrative Law Judges lacks jurisdiction over a decision to grant a waiver. The Complainant filed a response arguing that the grantee, the Lumbee Regional Development Association ("LRDA") was no longer eligible for WIA funding, and that a waiver should not be granted.

The Court agrees that the Office of Administrative Law Judges lacks jurisdiction to make a determination in this case. 29 U.S.C. Section 2911(c)(2) states:

The competition for grants, contracts, or cooperative agreements conducted under paragraph (1) shall be conducted every 2 years, except that if a receipt of such a grant, contract or agreement has performed satisfactorily, the Secretary may waive the requirements for such competition on receipt from the recipient of a satisfactory 2-year program plan for the succeeding 2-year period of the grant, contract, or agreement.

Here, it is uncontested that the Secretary waived the area from competition that the Complainant was interested in. In fact, the Complainant specifically challenges the Secretary's determination to grant a waiver.

The regulations promulgated under the WIA do not allow for an administrative review of the grant of a waiver. 20 C.F.R. Section 667.825(a) provides that an appeal from the denial of a grant under Part 668 of the WIA may be taken under Section 667.800, which states:

An applicant for financial assistance under title I of WIA which is dissatisfied because we have issued a determination not to award financial assistance, in whole or in part, to such applicant . . . may appeal to the U.S. Department of Labor, Office of Administrative Law Judges. . . .

Here, however, a determination to award or not to award financial assistance was never made. Thus, although the Complainant states that "On May 9, 2002, Department of Labor Grant Officer Lorraine H. Saunders advised the Lumbee Tribe of North Carolina [Tribe] that its application for designation under WIA had been denied," the letter from the Grant Officer states:

We have completed our review of your organization's application for designation, and have determined that your organization has applied for a service area that was not open for competition.

This determination results from our decision to waive competition under WIA Section 166(c)(2), as explained in the Solicitation of Grant Application Section II: Waiver Provisions . . .

In addition, the Complainant makes it clear in its brief that competition for WIA funding for North Carolina for the program years 2002 and 2003 was waived, allowing LRDA, the incumbent grantee, to continue to receive WIA funding without competition. The Complainant also makes it clear in its brief that it is challenging, not a denial of an award under WIA, but the decision to grant a waiver. Because there was a waiver of competition, there was no competitive designation process, and thus no determination that had to be made by the grant officer. According to Section 668.250(a), which specifically deals with Indian and Native American Programs under the WIA, a solicitation for grant applications for an area is issued every two years "unless there has been a waiver for competition for the area." Since no determination was made by the Grant Officer, there is no determination from which an appeal can be taken by the Complainant, and no determination that can be reviewed by the Office of Administrative Law Judges.

Accordingly, the Respondent's Motion to Dismiss is **GRANTED**.

SO ORDERED.

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LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Order Granting Motion to Dismiss may appeal it to the Administrative Review Board within 20 days after receipt of the Order, by filing exceptions specifically identifying the procedure, fact, law, or policy to which exception is taken. Thereafter the decision of the administrative law judge shall become the final decision of the Secretary unless the Secretary, within 30 days of such filing, has notified the parties that the case has been accepted for review. The petition for review may be filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. A copy of any such petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, N.W., Washington, D.C., 20001-8002.