



In the Matter of:

UNITED URBAN INDIAN COUNCIL, INC.,

ARB CASE NO. 01-025

COMPLAINANT,

ALJ CASE NO. 2000-WIA-4

v.

DATE: May 18, 2001

U.S. DEPARTMENT OF LABOR,

RESPONDENT,

and

CITIZEN POTAWATOMI NATION,

PARTY-IN-INTEREST.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Vincent L. Knight, Esq., *Oklahoma City, Oklahoma*

For the Respondent:

Louisa M. Reynolds, Esq.; Harry L. Sheinfeld, Esq.; Charles D. Raymond, Esq., *U.S. Department of Labor, Washington, D.C.*

For the Party-in-Interest:

Michael Minnis, Esq., *Michael Minnis & Associates, Oklahoma City, Oklahoma*

FINAL DECISION AND ORDER

I. INTRODUCTION

This matter arises under Title I of the Workforce Investment Act (“WIA”), 29 U.S.C.A. §2911, *et seq.*(West 1999), and 20 C.F.R. §§626-668 (2000). By this Order we affirm the decision of the Administrative Law Judge (“ALJ”).

This case involves a dispute over who should be designated to receive an “Indian and Native American” (INA) grant to provide WIA services in a 12-mile wide area along the eastern boundary of Oklahoma County, Oklahoma.^{1/} The essential facts are not in dispute.

A. Statutory and Regulatory Background

In 1998, Congress enacted the WIA for, among other things, the purpose of supporting employment and training activities for

Indian, Alaska Native, and Native Hawaiian individuals in order -

- (A) to develop more fully the academic, occupational, and literacy skills of such individuals;
- (B) to make such individuals more competitive in the workforce; and
- (C) to promote the economic and social development of Indian, Alaska Native, and Native Hawaiian communities in accordance with the goals and values of such communities.

29 U.S.C.A. §2911(a)(1). The Department of Labor, Employment and Training Administration (ETA), is responsible for making grants to designated “Indian tribes, tribal organizations,” and “Indian-controlled organizations serving Indians” to carry out various activities authorized by the WIA. 29 U.S.C.A. §2911(c)(1).

Where more than one grant applicant seeks a WIA INA grant for a particular area, the grant is usually awarded competitively. However, the WIA regulations specify that under certain circumstances one of the applicants will be given “priority for designation” and will be awarded the grant without competing for it. Thus, at the time the grant at issue in this case was awarded, the WIA Interim Final Regulations provided in relevant part:

What priority for designation is given to eligible organizations?

- (a) Federally-recognized Indian tribes, Alaska Native entities, or consortia that include a tribe or entity will have the highest priority for designation. To be designated, the organizations must meet the requirements in this Subpart. These organizations will be designated for those geographic areas over which they have legal jurisdiction. (WIA section 166(c)(1).)

* * * *

- (c) In geographic areas not served by Indian tribes or Alaska Native entities, 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.

^{1/} Oklahoma County is rectangular in shape and is 30 miles wide and 25 miles long.

20 C.F.R. §668.210 (2000).^{2/}

Once grantees are designated for a given grant cycle, the WIA regulations prescribe that the amount of the grant awarded to each grantee will be based upon a formula. The regulation provides:

(b) Each INA grantee will receive the sum of the funds calculated under the following formula:

(1) One-quarter of the funds available will be allocated on the basis of the number of unemployed Native American persons in the grantee's designated INA service area(s) compared to all such persons in all such areas of the United States.

(2) Three-quarters of the funds available will be allocated on the basis of the number of Native American persons in poverty in the grantee's designated INA service area(s) as compared to all such persons in all such areas of the United States.

(3) The data and definitions used to implement these formulas is provided by the U.S. Bureau of the Census.

20 C.F.R. §668.296.

B. Facts and Procedural History

The dispute in this case is over ETA's interpretation of Section 668.210(a) in light of facts unique to Indian tribes in Oklahoma. Briefly, those facts are that although most of the Indian tribes in Oklahoma (including the Citizen Potawatomi Nation) at one time had reservations – geographic areas over which they exercised sovereignty – those reservations were divided into allotments during the period immediately preceding Oklahoma statehood. Thus, with one exception not relevant here, there are no longer Indian reservations in Oklahoma. The geographic area that once encompassed a tribe's reservation is commonly referred to as a "former reservation."

On September 13, 1999, the Department of Labor ("Department") solicited applications for WIA-Indian and Native American ("INA") grants.^{3/} The United Urban Indian Council d/b/a

^{2/} The language of subsection (a) was clarified in the WIA Final Rule, and the last sentence now reads: "These organizations will be designated for the geographic areas **and/or populations** over which they have legal jurisdiction." 65 Fed. Reg. 49,294, 49,437 (Aug. 11, 2000) (emphasis added). Although the explanation for this clarification relates to Oklahoma Indian tribes (*Id.* at 49,373), the clarification itself does not affect our decision. For simplicity's sake we will refer to the wording in the Interim Final Rule.

^{3/} The notice contained a provision relating to Oklahoma Indian tribes:

V. Special Designation Situations

(continued...)

American Indian Education Training and Employment Center (“UUIIC”) – the incumbent grantee in Oklahoma County and an organization with a “Native American controlled governing body . . . which [is] representative of the Native American community” within the meaning of Section 668.210(c) – submitted an application to serve that County. UUIIC also sought a grant to serve neighboring Cleveland County. The Citizen Potawatomi Nation (“the Potawatomi”) – the incumbent grantee in Cleveland County and a “federally-recognized Indian tribe” within the meaning of Section 668.210(a) – submitted an application to serve all of Cleveland County and a 12-mile wide area along the eastern boundary of Oklahoma County that is within its “tribal jurisdiction statistical area” (TJSA) and that of the Iowa Tribe of Oklahoma.^{4/} The Iowa Tribe, as well as the Kickapoo Tribe

^{3/}(...continued)

* * * *

(2) Oklahoma Indians

DOL has established a service delivery system for Indian employment and training programs in Oklahoma based on a preference for Oklahoma Indian tribes and organizations to serve portions of the State. Generally, service areas have been designated geographically as countywide areas. In cases in which a significant portion of the land area of an individual county lies within the traditional jurisdiction(s) of more than one tribal government, the service area has been subdivided to a certain extent on the basis of tribal identification information contained in the most recent Federal Decennial Census of Population. Wherever possible, arrangements mutually satisfactory to grantees in adjoining or overlapping geographic service areas will be honored by DOL. Where mutually satisfactory arrangements cannot be made, DOL will designate and assign service area[s] to Native American grantees in a manner which is consistent with WIA and that will preserve the continuity of services and prevent unnecessary fragmentation of the program.

64 Fed. Reg. 49,522, 49,525-49,526 (Sept. 13, 1999).

^{4/} A “TJSA” is a “statistical entity” created by the Bureau of the Census for the 1990 census specifically for the purpose of tabulating data in Oklahoma:

Tribal jurisdiction statistical areas (TJSA’s) are areas, delineated by federally-recognized tribes in Oklahoma without a reservation, for which the Census Bureau tabulates data. TJSA’s represent areas generally containing an American Indian population over which one or more tribal governments have jurisdiction. . . .

U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population, General Population Characteristics Oklahoma, 1990 CP-1-38, A-3.

Although there are two TJSAs in the contested portion of Oklahoma County, for simplicity’s sake we will refer to “the TJSA.”

of Oklahoma, and the Sac and Fox Tribe of Oklahoma, authorized the Potawatomi to provide employment services in their respective portions of the TJSA.^{5/}

ETA's Grant Officer determined that the process of awarding the grant for Cleveland County should be competitive. After evaluating the merits of both applications, the Grant Officer awarded that grant to the Potawatomi.^{6/} The Grant Officer also determined that a grant for the 12-mile wide area in Oklahoma County should be awarded to the Potawatomi. The Grant Officer noted that the Solicitation for Grant Applications informed applicants that "A Federally-recognized tribe . . . on its reservation . . . (is) given highest priority over any other organization if they have the capability to administer the program." Because the contested area was contained within the TJSA, which the Grant Officer equated with a reservation, and because the Potawatomi had the capability to administer the program, the Grant Officer accorded the Potawatomi highest priority designation for the contested area, and awarded it the grant for that portion of Oklahoma County. The grant for the remainder of Oklahoma County was awarded to UUIC. *See* Declarations of Lorraine H. Saunders and Gregory J. Gross attached to The Grant Officer's Reply Brief filed with the ALJ, November 27, 2000.

It is the 12-mile wide area in Oklahoma County which is the subject of the dispute between UUIC on the one hand and the Grant Officer and the Potawatomi on the other, because a portion of the contested area falls **outside** of the boundaries of the former reservations of the Potawatomi and its consortia tribes.

UUIC objected to the Grant Officer's determination that the Potawatomi was entitled to "highest priority" in the TJSA portion of Oklahoma County and requested administrative review of this issue. The matter then was assigned to a Department of Labor ALJ for disposition, and the parties submitted stipulations of fact and briefs in lieu of a formal hearing. UUIC argued that, although the Potawatomi and its consortia were entitled to "highest priority designation" under Section 668.210(a) for that part of Oklahoma County that falls **within** their former reservation boundaries, they were not entitled to highest priority for that portion of the 12-mile wide area that is **outside** the former reservation boundaries. *See* Complainant UUIC's Reply Brief at 8.

Following his review of the stipulations and briefs, the ALJ issued a Decision and Order in which he stated:

^{5/} The parties stipulated that:

The contested area consists of those designated Tribal Jurisdictional Statistical Areas (TJSAs) as having "on or near reservation" status for the Citizen Nation Potawatomi Tribe of Oklahoma, the Iowa Tribe of Oklahoma, the Kickapoo Tribe of Oklahoma, and the Sac and Fox Tribe of Oklahoma, all east of Post Oak Road in Oklahoma County to the Oklahoma County border.

Decision and Order of the Administrative Law Judge (D&O) at 2.

^{6/} The Cleveland County grant is not at issue in this case.

[20 C.F.R.] §668.210 provides that the highest priority designation shall be given to Indian tribes, Alaska Native entities, or consortia that include a tribe or entity, for those geographic areas over which they have legal jurisdiction The parties have stipulated that the contested area is a TJSA for the Potawatomi and other named tribes. The U.S. Census Bureau defines “tribal jurisdiction statistical areas (TJSAs)” as “areas, delineated by Federally-recognized tribes in Oklahoma without a reservation, for which the Census Bureau tabulates data,” and further states “TJSAs represent areas generally containing the American Indian population over which one or more tribal governments have jurisdiction Thus, the designation of the area as the TJSA of the Potawatomi, by definition, signifies that the Potawatomi has jurisdiction over the area and is therefore entitled to highest priority pursuant to section 668.210.^{7/}

D&O at 4. The ALJ therefore affirmed the Grant Officer’s grant award to the Potawatomi for the portion of Oklahoma County that lies within the TJSA. This appeal followed.

II. JURISDICTION

The Board has jurisdiction pursuant to 20 C.F.R. §667.830.

III. STANDARD OF REVIEW

Our review in this case is limited to a determination of “whether there is a basis in the record to support the Department’s decision.” 20 C.F.R. §667.825(a).

IV. DISCUSSION

UUIC argues that: 1) Under 20 C.F.R. §668.210(a), a federally recognized tribe or consortia can be accorded “highest priority” for a particular area only if it has “legal jurisdiction” over that geographic area; 2) With regard to Oklahoma Indian tribes, “legal jurisdiction” over a geographic area must equate to the “former reservation” boundaries of the tribes; 3) The TJSA at issue in this case extends beyond the former reservation boundaries of the Potawatomi and its consortia members; and 4) the Census Bureau’s inclusion of areas outside the former reservation boundaries within the TJSA cannot justify the “highest priority” designation accorded to the Potawatomi for that area.

^{7/} UUIC also argued that it should be designated the grantee for the TJSA of Oklahoma County pursuant to §668.210(c) because it is an entity “with a Native American controlled governing body” which is “representative of the Native American community or communities involved” within the meaning of subsection (c), and therefore should be given priority. However, the ALJ determined that designation of highest priority status to the Potawatomi pursuant to §668.210(a) supersedes any claim to priority based under §668.210(c). D&O at 5.

Therefore, UUIIC contends, the ALJ erred in ruling that the Potawatomi had highest priority in the contested area of Oklahoma County.^{8/}

On the other hand, the Grant Officer asserts that both Section 182(a) of the WIA, 29 U.S.C.A. 2932(a),^{9/} and 20 C.F.R. §668.296 (b)(3)^{10/} require that the Grant Officer use the data and/or definitions provided by the U.S. Bureau of the Census. In light of the parties' stipulation that the contested area is encompassed within the TJSA, and considering that the Census Bureau defines a TJSA as an "area generally containing the American Indian population over which one or more tribal governments have jurisdiction," the Grant Officer argues that its decision to award the grant to the Potawatomi is based on the record and must be affirmed.^{11/} As we discuss below, we conclude that the Grant Officer's interpretation of Section 668.210 in the circumstances of this case is reasonable. Therefore we affirm the ALJ's order.

It is a settled principle of administrative law

"that an agency's construction of its own regulations is entitled to substantial deference." . . . In situations in which "the meaning of [regulatory] language is not free from doubt," the reviewing court should give effect to the agency's interpretation so long as it is "reasonable," . . . that is, so long as the interpretation "sensibly conforms to the purpose and wording of the regulations" Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.

Martin v. Occupational Safety and Health Review Com'n, 499 U.S. 144, 150-151, 111 S.Ct. 1171, 1175-1176 (1991) (citations omitted). This standard accords the Grant Officer wide latitude in effectuating the purposes of the WIA INA regulations; we will not substitute our judgement for that of the agency which wrote the regulations at issue and must apply them in sometimes widely different circumstances. With these principles in mind, we turn to the facts of this case.

^{8/} UUIIC also renews its argument that because the Potawatomi is not entitled to highest priority under §668.210(a), UUIIC is entitled to priority under §668.210(c). Because we find that the Grant Officer did not err in giving the Potawatomi priority under §668.210(a), UUIIC's argument is moot.

^{9/} Section 182(a) states that "[a]ll data relating to disadvantaged adults and disadvantaged youth shall be based on the most satisfactory data from the Bureau of the Census."

^{10/} Section 668.296(b)(3) states that the amount INA grantees receive must be based on formulas which use "[t]he data and definitions . . . provided by the U.S. Bureau of the Census."

^{11/} The Potawatomi filed a brief in support of the Grant Officer's decision raising a number of issues which we need not address in this decision.

UUIC argues that the Potawatomi and its consortia should only be accorded highest priority status with regard to areas contained within their former reservation boundaries. We conclude that although it might have been reasonable for the Grant Officer to determine that “former reservation” boundaries would be equated with “legal jurisdiction” over “geographic areas” in Oklahoma, we do not think that Section 668.210(a) permits **only** that interpretation. In light of the unusual facts relating to Indian tribes in Oklahoma, it was reasonable for the Grant Officer to use the Census Bureau’s TJSAs as a proxy for “geographic areas over which [Indian tribes and consortia] have legal jurisdiction.”

An appraisal of the facts in this case clearly establishes this point. Under Section 668.210(a) the Potawatomi and its consortia are entitled to “highest priority” with regard to “geographic areas” in which they have “legal jurisdiction.” UUIC concedes that this provision requires that the Potawatomi and its consortia be accorded “highest priority” with regard to the area encompassed by their former reservations. However, the Bureau of the Census does not collect statistics for the exact areas encompassed by the former reservations in Oklahoma. Instead, in 1990 it collected data based upon TJSAs.^{12/} Although the TJSAs approximate the same area as that included within the former reservations, the fit is not exact. It is this characteristic of the TJSAs that leads to the situation presented in this case, in which a portion of the 12-mile wide area included in the TJSAs did not fall within the boundaries of former reservations.^{13/}

^{12/} The Bureau of the Census is using a similar statistical entity, denominated “Oklahoma tribal statistical area,” for the 2000 Decennial Census:

Oklahoma tribal statistical area (OTSA) SA statistical entity identified and delineated by the U.S. Census Bureau in consultation with federally recognized American Indian tribes that have no current reservation, but that had a former reservation in Oklahoma. The boundary of an OTSA will be that of the former reservation in Oklahoma, except where modified by agreements with neighboring tribes for statistical data presentation purposes. OTSA replaces the 1990 census term tribal jurisdiction statistical area (TJSA).

65 Fed. Reg. 39,062, 39,065 (June 21, 2000). The Census Bureau noted that: “The 1990 census TJSAs essentially were defined in the same manner as planned for the OTSAs in Census 2000; the descriptive designation is being changed for 2000 to correct the impression that these statistical entities conveyed or conferred any jurisdictional authority.” *Id.*

^{13/} In contrast to the situation in Oklahoma, in other areas of the United States where there are Indian reservations, the Census Bureau collects data based upon current reservation boundaries. Thus, the Census Bureau has stated with regard to the 2000 census, “[f]or legal entities [i.e. current reservations], the Census Bureau is committed to using the most accurate governmental unit boundaries established by law as of January 1 of the census year.” 65 Fed. Reg. 39,062, 39,063 (June 22, 2000). The Census Bureau has explained the difficulties it faces in attempting to define appropriate geographic areas for purposes of tabulating data on Native Americans and Alaskan Natives:

The challenge of developing geographic frames of reference for [American Indian and Alaska Native areas] was made more difficult by the lack of one

(continued...)

The WIA INA regulations make it clear that in order to allocate grant funds under the WIA INA grant program, ETA employs a formula based upon Census data. 20 C.F.R. §668.296(b). Because the only framework that the Census Bureau uses to tabulate data regarding Indian tribes in Oklahoma is the TJSA, that is the only Census data source that closely approximates the geographic areas encompassed by the former reservations, and therefore the only Census data that ETA can use to calculate grant amounts. To put it another way, there is no Census data based exclusively on the former reservations in Oklahoma; there is only data based upon TJSAs.^{14/}

^{13/}(...continued)

definitive source of information and the differing legal circumstances and geographic settlement patterns of particular tribes. There are both federally recognized and state recognized tribes. Some have reservations and/or established land bases, while others do not have established land bases, even though they conduct tribal activity within a geographically definable area.

* * * *

For tribal governments with reservations and/or off-reservation trust lands existing under law today, the U.S. Census Bureau had to develop a mechanism to obtain and maintain the most current, legally established boundaries for data tabulation purposes. Because some tribes currently do not have a legally established land base (reservation or off-reservation trust lands) with clearly delineated boundaries and legally recognized authority, the Census Bureau has developed a set of statistically equivalent entities. In doing so, the Census Bureau has focused on the overall objective **S** producing statistics for a geographically defined entity that has significance for each tribal government as well as for the federal and state agencies administering tribal programs benefitting the tribe.

With this as the objective, the U.S. Census Bureau developed the underlying premise that geographic statistical entities should reflect, to the extent reasonably possible, the area in which there is structured/organized tribal activity and a concentration of individuals residing who identify with the particular tribe conducting such activities. These criteria are, of necessity, somewhat amorphous because of the lack of a clearly defined land base for some recognized tribes, and because individuals who identify with other tribes may be concentrated in the same areas.

65 Fed. Reg. 39,062 (June 22, 2000).

^{14/} It is most likely for this reason that ETA uses TJSAs as the reference to define service areas in Oklahoma under the INA Welfare-to-Work Program. *See* 20 C.F.R. §646.510. Of course, had a provision such as this been included in the WIA regulations, this case would have been significantly simpler to resolve. We also are constrained to note that much of the regulatory background needed to resolve this case, including information regarding the Census Bureau's use of TJSAs for data tabulation purposes in Oklahoma, was not provided to the Board by any party, most importantly the Grant Officer.

Thus, under the unique circumstances presented in the State of Oklahoma, the Grant Officer had only two alternatives: Base the grantee designation upon the TJSA area in eastern Oklahoma County, and therefore grant the Potawatomi highest priority in an area that extends beyond the former reservation boundaries; or decline to give highest priority to the Potawatomi with regard to any of the contested area in eastern Oklahoma County, including the area which indisputably was encompassed within former reservations of the Potawatomi and its consortia. Faced with these alternatives, and in light of the limitations of the data available, we conclude that the Grant Officer's determination to accord the Potawatomi highest priority and award it an INA WIA grant to serve the TJSA area in eastern Oklahoma County was reasonable. Therefore we **AFFIRM** the order of the ALJ.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member