U.S. Department of Labor

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

In the Matter of
U. S. Department of Labor

vs

Pasqua Yaqui Tribe

JUN 2 0 1984

Case No. 84-JTP-6

DECISION AND ORDER - AWARDING ATTORNEY'S FEES

The attorney's fee application in the above-referenced case is requested pursuant to the Equal Access to Justice Act, 5 USC §504 and 28 U.S.C.A. §2412(b) (1982). The application was timely filed on April 5, 1984 pursant to the thirty (30) day rule required by the Regulations.

Counsel for the Solicitor was granted an extension of time until June 4, 1984, in which to file his objections. By letter dated June 4, 1984, Counsel for the Solicitor stated that there were no objections to awarding Counsel for the Pasqua Yaqui Tribe, Arthur A. Chapa, his requested amount of $1,974.40.

ORDER

Accordingly, in that there are no objections, the Department of Labor is hereby ORDERED to pay Arthur A. Chapa, Esquire, the sum of $1,974.40 for legal services and expenses incurred in his successful representation in this case.

Nahum Litt
NAHUM LITT
Chief Judge

MS:ajg

Service Sheet

Case Name: U. S. Department of Labor v Pasqua Yaqui Tribe

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I certify that a copy of the foregoing document was sent to the following on JUN 20 1984

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> group has demonstrated the capability to effectively administer a comprehensive manpower program, he shall require such tribe, band or group to submit to him a comprehensive plan meeting the requirements of section 105.

29 U.S.C. § 1671 (1973), (amended in 1978, repeated in 1982) (emphasis added).

13. Section 401 of the JTPA and Section 302 of CETA also clearly contemplate that the Secretary will consider the capability of a particular applicant to effectively operate an employment and training program.

14. Relying upon American Textile Manufacturers Institute v. Donovan, 452 U.S. 490, 508, 509 (1981), the Creek Nation asserts that the provision "whenever possible" means whenever it is capable for the Grant Officer to award grants to "Indian tribes, band or groups," it should make this award.

In American Textile Manufacturers Institute, Inc., the Supreme Court interpreted a provision of the OSHA statute requiring the Secretary of Lator to promulgate standards "which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment

15. In determining the "capability" of and utilization of a Native American "tribe, band or group on Federal or State reservations and Oklahoma Indians" it is clear that Congress required an analysis of the program's effectiveness.

Where it is clear that a Native American "tribe, band, or group on Federal or State reservations and Oklahoma Indians is capable of operating a particular grant the Grant Officer does award that group preference. (TR 81-83, 97-98).

16. JTPA, and CETA, however, both clearly require that all applicants be reviewed to determine the general standard for applicants' capability to effectively administer an employment and training program. If the program effectiveness standard is met by the Native American group, preference is given to that group. This preference, however, is not absolute. (TR 81-82, 97-98). A competition to establish the general standards for effective administration of a program in the specific area in question is clearly comtemplated by the Act.

17. This preference, however, only applies when a Native American "tribe, band or group on Federal or State reservations" or a group of "Oklahoma Indians" are competing with entities not similarly situated.

18. It is generally recognized that Oklahoma Indians are treated different from Native Americans in other States because their are no Federal or State recognized reservations.

19. The 1978 Amendments of CETA were added to clarify the Native American preference. (See paragraph 12 for comparison). This provision clearly recognized that Oklahoma Indians and Indian "tribes, bands, or groups on Federal or State reservations" were entitled to some preference.

20. Oklahoma Indians were not, however, classified in any generic "tribal" sense in the JTPA. Given the plain meaning of the statutory language the Grant Officer has concluded that any organization, or "group" of Oklahoma Indians that are filing applications for Native American grants are entitled to preference. (TR 96-98).

21. OTAP is an organization controlled by Oklahoma Indians and therefore constitutes an entity entitled to the same preference under Section 401(c)(l)(A) as any other Native American group.

B. Grant Officer's Determination of the Allocation Service Areas for Purpose of Fund Distribution

22. The Creek Nation recognizes that the SNOI does not establish a process by which Native Americans

are designated service areas for purposes of fund distribution. (See Complainants Conclusions of Law number 13).

23. The record clearly establishes that the process of determining an applicant's eligibility to be a grantee, the process covered by the SNOI, was distinct from the process of allocation of service areas for purposes of allocation of funds.

24. An overlap between the two processes only occurred in the situation where more than one applicant was requesting the same service areas. In this case, a panel consideration was given to each applicant's request. (TR 76, 77, 90-91).

25. The Grant Officer, however, was not under any obligation to give every applicant the areas it requested. Indeed, this practice was recognized by the Creeks. (TR 217).

26. JTPA imposed a specific requirement on the Grant Officer to use the 1980 Census to determine allocation of funds. 29 U.S.C. § 1572. As previously indicated FY 1984 was the first year for which the 1980 Census data was broken down in a manner which enabled the Grant Officer to determine the number of poverty level and unemployed Native Americans. However, given the manner in which the data was broken down a different

methodology for determining service areas and allocation of funds needs to be employed.

27. No evidence has been presented which establishes a different data source for determining poverty level or unemployed Native Americans. Taking the data which the Grant Officer was required to employ, and allocating service areas and funds based on it was reasonable.

28. It is recognized, that when the hold harmless factor is removed that Creek Nation will experience a decrease in allocation. This decrease, however, is to due to the restriction on the overall dollars available for Native American grantees, rather than the methodology which the Grant Officer employed in determining allocation of service areas for purposes of fund distribution.

29. The Grant Officer's responsibility to balance administrative feasibility with fundamental fairness to all the Native American grantees was reasonably achieved.

ORDER

Based on the foregoing, the complaint is dismissed.

GLENN ROBERT LAWRENCE
Administrative Law Judge

Dated: JUN 22 1984
Washington, D.C.

GRL:crg