



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF

Soboba Band of
Luiseno Indians,

Applicant.

Docket No. 07-27-O

Native American Career
and Technical Education
Program Proceeding

ORDER RE JURISDICTION

The Soboba Band of Luiseno Indians (Soboba) seeks a review of a decision by the Secretary not to include Soboba among the 30 applicants selected for grants in a competition under the Native American Career and Technical Education Program. 77 Fed. Reg. 13,770 (2007); 34 C.F.R. § 401.23 (2006). As a non-funded applicant, it may seek a review of this determination before the Office of Administrative Law Judges pursuant to 34 C.F.R. § 401.23(a) (2006). In a letter conveying Soboba's request for a hearing to the Office of Administrative Law Judges, the Office of the Assistant Secretary for Vocational and Adult Education (ED) raised the issue whether Soboba had submitted its request for a hearing within the 30-day period required by 34 C.F.R. § 401.23(a). As a result, the parties were requested to present their views on this matter and did so.

Section 401.23(a) of 34 C.F.R. provides a 30-day period in which to request a review—

(a) After receiving written notice from an authorized official of the Department that the Secretary will not award a grant or cooperative agreement to an eligible applicant under § 401.2(a)(1), an Indian tribal organization has 30 calendar days to make a written request to the Secretary for a hearing to review the Secretary's decision.

The sole issue in dispute concerns the date that the 30-day period begins. Thus, the focus is upon the meaning of the phrase “[a]fter receiving written notice from an authorized official of the Department” that the application has not resulted in an award of a grant.

Since the promulgation of this regulation in 1992, it has been ED's practice to send the written notice of non-funding to the Indian tribal organizations by certified mail, return receipt

requested.¹ Under this method, receipt of the written notice is accomplished by the hand delivery

of the written notice by the postal carrier to the hand of an employee of the Indian tribal organization. This is the method under which Soboba has received its written notices in the past. However, as amplified below, ED altered its practice for reasons known only to it and used two methods of electronic transmission, i.e. facsimile transmission and email, as a means to deliver written notices to Soboba. These methods raise all kinds of interesting questions, some of which are addressed below.

On May 24, 2007, an ED program specialist called Soboba's office to obtain its street address since it was necessary in order to send the written notice by certified mail, return receipt requested and it had been omitted from Soboba's application. On May 25th, the written notice was mailed by ED by certified mail, return receipt requested to Mr. Salgado, the tribe's authorized representative regarding its application. The written notice was mailed to the correct address of the tribal office.

On Friday, June 8th, the unopened envelope containing the written notice was returned to ED by the United States Postal Service with a stamped notation on the envelope stating "No Delivery on Reservation." ED's program specialist tried to contact Soboba but its office was closed. She then prepared a cover sheet for a facsimile transmission of the written notice to Mr. Salgado. The cover sheet stated in part--

Mr. Salgado, [t]he attached [written notice] letter is from the Department of Education . . . We attempted to deliver the [written notice] letter through Certified Mail . . . [h]owever, the letter was returned. Therefore, I am attempting to submit the [written notice] letter again via fax. Additionally, please provide a working mailing address for FedEx packages, ASAP, so that I can submit the original [written notice] letter. Please send the correct mailing address and confirm that you are in receipt of the letter to the following [the program specialist's] email address.

The program specialist tried to send this information to Soboba by facsimile transmission but was unsuccessful.

¹ There have been at least four sets of notices sent over the years including the set mailed in the latter part of May, 2007. Moreover, this practice is consistent with notices sent in other areas that trigger a right to a hearing to review the adverse determination, e.g. civil rights -- registered or certified mail, return receipt requested (34 C.F.R. § 100.9(a)); recovery of funds -- certified mail, return receipt requested, or other means that ensure proof of receipt (34 C.F.R. § 81.34(a)); audit, student financial assistance program -- hand delivery or by U.S. Postal Services mail with a return receipt (34 C.F.R. §§ 668.113(b) and 668.122(c)); termination and limitation, student financial assistance program -- certified mail, return receipt requested or other, more expeditious means if practical (34 C.F.R. § 668.86(b)(1)).

On the following Monday, June 11th, the program specialist was successful in the facsimile transmission of the cover page and the written notice. Even though the facsimile transmission was successful and requested Soboba to provide a working office address, the

program specialist called Soboba later that day. The program specialist spoke with an office worker, related the problem with the delivery of the written notice, and verified that the address on the envelope containing the written notice was, in fact, correct. For reasons not revealed in the record, the program specialist also requested the email address for Mr. Salgado. The Soboba staffer replied that Mr. Salgado did not have an email address and that an email should be sent to Ms. Arres, Soboba's contact person for the grant application. Later that day, the program specialist sent an email to Ms. Arres with the written notice in pdf form as an attachment. The email provided in part—

PLEASE FORWARD TO ROBERT SALGADO

Mr. Salgado,

This email is sent because [ED's] . . . attempt to deliver a certified letter to you regarding your submission of the . . . application to the [Native American] program for review was returned to the Departmentthis is another attempt to deliver the attached [notice] letter. Review the attachment and use June 11, 2007 as your receipt date of the letter. Please note that I also faxed you a copy of the letter on June 11, 2007.

Confirm that you have received this email (letter) by using the contact information below.

. . . .

ED's email was transmitted to the email inbox of Ms. Arres on that Monday, June 11th. Since Ms. Arres was out of the office on this Monday and did not return until the following Monday, June 18th, the email remained unknown to Soboba as well as inaccessible to it during this period.

On Monday, June 18th, ED's program specialist sought a confirmation of the receipt of the June 11th email from Ms. Arres by phone but had to leave a message. Subsequently, Ms. Arres opened ED's email of June 11th on Tuesday, June 19th and informed ED by email that the notice letter had been received in her email inbox on June 11th.

The parties do not dispute that facsimile transmission and email may be used as a means to transmit a notice that advises an Indian tribal organization of its right to seek a review of its adverse determination and that triggers the beginning of its appeal period.

Initially, ED's facsimile transmission to Soboba was not intended to serve as legal notice of its non-funding of Soboba's application. Rather, it represented an attempt to provide an

advance warning to Soboba that, since the written notice sent by certified mail had been returned, Soboba could expect to receive the written notice by a different means in the near future, namely, by FedEx. And, in order to facilitate this means of delivery, Soboba should provide ED with its “working address” as soon as possible. Thus, although ED’s facsimile transmission included the written notice, it cannot be construed as receipt of a written notice under 34 C.F.R. § 401.23(a).

Factually, after informing Soboba that the written notice was forthcoming by FedEx, ED then proceeded within hours to transmit an email with the written notice as an attachment to Ms. Arres to be delivered by her, in turn, to Mr. Salgado. The email was sent by ED on Monday, June 11th and deposited in Ms Arres’ email inbox on the same day. In ED’s view, the deposit of the email into the email inbox constitutes receipt by Soboba of the written notice and the period for appeal has begun. For its part, Soboba points out that Ms. Arres was out of the office on the day the email was deposited in her email box. While she returned to the office on the following Monday, June 18th, she did not open ED’s email until Tuesday, June 19th. In short, the existence of this email was unknown as well as inaccessible to Soboba until it was opened on that Tuesday. Accordingly, Soboba argues, in effect, that the date of receipt cannot be any earlier than the day ED’s email was opened. Hence, its appeal was timely.

The fundamental function of 34 C.F.R. § 401.23(a) is to give notice. Since an Indian tribal organization is a legal entity or fiction, this means that the notice must be given to an employee or authorized representative. The electronic transfer of the written notice into an email inbox does not accomplish this purpose. When the individual opens the email, the written notice has been delivered. The notice function has been served and, as such, the opening of the email constitutes the receipt of the written notice by the Indian tribal organization. As applied to the instant case, Soboba “received” the written notice on Tuesday, June 19th, the day that Ms. Arres opened ED’s email. Accordingly, it is determined that Soboba’s written request for a hearing to review the Secretary’s decision was made within the period prescribed by 34 C.F.R. § 401.23(a).

This determination is consistent with the result reached in *In re Puerto Rico Dep’t of Education*, Dkt. No. 97-52-R (U.S. Dep’t of Education Oct. 15, 1997) (Order Re Statute of Limitations). There, the tribunal held that a grant recipient had not “received written notice” in 20 U.S.C. § 1234a(k) (1996) under the plain meaning of that phrase where the written notice of a preliminary departmental decision was slid under a locked door of the grant recipient after the close of business hours. Receipt occurred the next business day when, during business hours, an employee of the grant recipient discovered the written notice lying on the floor.

For the foregoing reasons, the motion to dismiss filed by Office of the Assistant Secretary for Vocational and Adult Education is denied.

Allan C. Lewis

Issued: August 30, 2007
Washington, D.C.

SERVICE

On August 30, 2007, a copy of the attached document was sent by mail and facsimile transmission to the following:

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