



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

DECISION

Appearances: Ronald P. Andrade, San Jacinto, Ca., for the Soboba Band of Luiseno Indians

Daphna Krim, Esq. for the Office of General Counsel, United States Department of Education, Washington, D.C., for the Assistant Secretary for Vocational and Adult Education

Before: Allan C. Lewis, Chief Administrative Law Judge

The Soboba Band of Luiseno Indians (Soboba) seeks a review of a decision by the Assistant Secretary for Vocational and Adult Education (Department) 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).

The Native American Career and Technical Education Program provides grants for projects that provide career and technical education and training for the benefit of Native Americans and is authorized by Section 116 of the Carl D. Perkins Career and Technical Education Act of 2006. 20 U.S.C. § 2326. Pursuant to this mandate, the Department published on March 23, 2007, a notification that solicited applications for a limited number of grants to be awarded under a competitive process. 77 Fed. Reg. 13,770. The applications were to be evaluated using selection criteria with assigned weights or points as set forth in 34 C.F.R. § 401.21, as supplemented by 34 C.F.R. § 401.20(b) and 34 C.F.R. § 401.20(e). As a result of the published notice, 57 applications were received and evaluated for grant funding.

Applications were evaluated based on nine selection criteria: (1) need for project (5 pts), (2) significance (15 pts), (3) quality of project design (25 pts), (4) quality of project services, (5) quality of project personnel (15 pts), (6) adequacy of resources (20 pts), (7) quality of management plan (15 pts), (8) quality of project evaluation (25 pts), and (9) economic development plan (10 pts). Under each criterion, there were anywhere from one to five factors,

all of which had an assigned point value that together totaled the point value assigned to that particular criterion. The maximum combined score, with an optional 10 extra points for economic development involvement and an optional 5 points if the applicant was an accredited tribally controlled college or university, was 155 points.

In the evaluation process, the Department employed nine panels to evaluate the applications. Each panel had three reviewers and evaluated approximately six applications. With respect to each application, it was read separately by each reviewer who then completed a technical review form wherein the reviewer articulated his or her comments concerning the strengths and weaknesses of the application under each criterion and assigned a preliminary score to each criterion. 34 C.F.R. §§ 401.20 and 401.22. With respect to Soboba's application, this format was followed by its reviewers. None of the reviewers recorded scores for the individual factors under any of the criteria.

After completing the initial rating, the reviewers met as a group and discussed the merits of the application. Each panel member determined his or her final score for each criterion and, ultimately, the application. Soboba's application received a final, averaged score of 99.67 that reflected scores of 98, 100, and 101 awarded by reviewers 9A, 9B, and 9C, respectively.

Ultimately, the final scores were consolidated in a list for selection and the Department elected to fund the top 30 applications. Of these applications, the lowest three ranking successful applicants had averaged scores of 128, 121, and 115.33. Soboba's averaged score of 99.67 ranked it 37th among the 57 applications and, as such, it was not selected for funding.

In its appeal, Soboba claims that there are several problems with the Department's scoring of its grant application. First, Soboba charges that the Department did not follow the mandatory scoring criteria (i.e. no scores were recorded for individual factors under the criteria and no specified point deductions were assigned for identified weaknesses under the criteria). Second, the Department's failure to set a page limitation for grant applications is discriminatory and gives prior grantees and tribal colleges an unfair advantage. Third, the reviewers erred in their score determinations with respect to several criteria. Fourth, Soboba maintains that the reviewers lacked knowledge of tribal structure, tribal authority, Indian affairs, and Indian organizations. Soboba asserts that the Department's use of these reviewers as well as the special benefit awarded tribally controlled colleges gave a potential or actual advantage in the evaluation of applications to the mainstream tribal colleges and non-tribal college programs.

The tribunal has long held that a panel's scores should not be disturbed unless significant error exists. *In re Sisseton Wahpeton Community College*, Dkt. No. 95-86-O, U.S. Dep't of Education (Aug. 7, 1995). Pertinently, the tribunal has found that a panel's failure to more specifically delineate or explain its scoring did not create significant error. *In re Miccosukee Corporation*, Dkt. No. 97-9-O, U.S. Dep't of Education (Mar. 24, 1997). "The role of the tribunal in this process is not to reevaluate the application and supplant the judgment of the

reviewers with its judgment.” *Id.*, at 4. Rather, the tribunal is charged with ensuring that the process of selecting successful grant recipients is fundamentally sound. In this regard, although within each criterion, the factors are assigned a point value, there is nothing in the Department’s reviewer guidelines or instructions that mandates that reviewers record a score for each of the factors. In fact, the Department’s sample technical review form provided to the reviewers as part of their orientation does not breakdown a score for each factor in a criterion nor does it assign a point deduction attributable to an identified weakness.

Soboba argues that the absence of a page limitation for the grant application constitutes a discriminatory practice and provides an unfair advantage to prior grantees and tribal colleges. This argument requires, however, that Soboba establish a nexus or causal relationship between the presence of a page limitation and how its absence creates an unfair advantage for prior grantees and tribal colleges. This, it did not do. Without such a connection, and the tribunal cannot discern one, its argument must be rejected. Since the proposed programs are many and varied in this competition, the absence of a page limitation provides each applicant the freedom to determine the appropriate length of its application.

In connection with its page limitation argument, Soboba maintains that it was unsure whether a page limitation was in effect. This, in turn, apparently caused it to curtail the length of its narrative under some of the evaluation criteria and led the reviewers to criticize its application for lack of specificity in some instances. Soboba apparently feels that if there were a page limitation that was in excess of the length of its application, it would have included more material and thereby warranted a higher score.

The Department’s application announcement letter and the Federal Register announcement were clear in that they did not specify a page limitation. Soboba could have resolved its apparent dilemma by contacting the Department to ascertain whether there was a page limitation. Unfortunately, it did not. While Soboba’s dilemma may possibly explain some of its omissions in its narrative, it cannot provide a basis for additional points.¹

Soboba challenges the assessment by one or more of the reviewers under four of the criteria -- the adequacy of resources, the quality of project personnel, the quality of project design, and the quality of project services.

¹ Soboba also suggests that applicants who submitted applications electronically using the grants.gov website were harmed due to potential technical problems transmitting excessively large attachments or other data. There is doubt whether this problem affected Soboba. It did not assert that it was harmed. ED maintains that Soboba submitted its application in the paper format and, thus, it could not have been harmed. In any event, to the extent that such a problem existed, applicants, including Soboba, had an alternative. They could elect to submit their applications in a paper format.

With respect to the adequacy of resource criterion, Soboba notes that it appears that the point scores by reviewers 9B and 9C were reduced because the Tribe did not include in its application letters of commitment to hire program participants from tribal businesses. According to Soboba, these comments reflected a failure by the reviewers to understand a basic tenet of tribal authority, namely that a tribal council resolution directed toward the tribal enterprises must be followed. Since Soboba had a Tribal Council resolution, attached to its application, that offered full time employment to the participants under the grant program within the Soboba Tribal enterprises, it was unnecessary and superfluous to procure hiring commitment letters from tribal enterprises.

Soboba misreads the comments by the two reviewers regarding the absence of the letters of support. These comments were not directed toward the absence of commitments from the tribal enterprises as Soboba maintains. Rather, the comments were directed toward the absence of letters of support or commitment by “local employers” (reviewer 9B) and by the “community outside the tribe and college” (reviewer 9C). The missing letters would have provided the last piece of information in the Tribe’s plan, as noted in another clause in the Tribal Resolution, to provide support for job and employment assistance if a grant program graduate chose to seek employment off the reservation. Thus, there is support in the record for reviewer 9B’s determination that a weakness existed.² Moreover, it is also apparent that his or her determination was not based upon a lack of knowledge of tribal authority.

Under the quality of project personnel criterion, the qualifications of the proposed project director, Dr. Carrizales, and the job placement coordinator, Mr. Andrade, were addressed. While Dr. Carrizales was viewed as well qualified, reviewer 9B cited as a weakness that she frequently changed jobs. This observation did not, however, affect his or her score under this criterion. Hence, there is no controversy regarding Dr. Carrizales.

With regard to Mr. Andrade, the reviewers acknowledged that he had extensive experience in matters involving Indian affairs; however, they cited, as a weakness for the position of job placement coordinator, his absence of formal training or experience as a job counselor.

In its appeal, Soboba emphasizes the more than 25 years of experience in various positions held by Mr. Andrade and that one aspect in these positions dealt with the recruitment, training, and counseling of employees.

The Department responds that this information detailing the recruitment, training, and counseling of employees is being presented for the first time in this appeal. It was not discernable from the resume submitted as an attachment to Soboba’s application. As such, it is irrelevant, after-the-fact information that was not available to the reviewers and may not be

² With respect to reviewer 9C, this matter had no effect on his or her determination of Soboba’s score under this criterion. It was noted as a weakness but no points were deducted.

considered in this appeal. *In re Round Valley Indian Tribes*, Dkt. No. 07-20-O, U.S. Dep't of Education (Aug 2, 2007).

The tribunal agrees with the Department. According to the various positions and their respective duties as described by Mr. Andrade in his resume, he is best described as a consultant on Native American affairs and performed duties consistent with that function. His resume is silent regarding the performance of recruitment, training, and counseling of employees as part of his duties of employment. Thus, the weakness identified by the reviewers is consistent with the information in the record and their determinations will not be disturbed. It is equally clear, however, that the resume could have been revised in a manner to emphasize those duties performed by Mr. Andrade that were consistent with the duties required by the job placement coordinator in Soboba's proposal. Unfortunately, Soboba failed to do so before it submitted its application.

The quality of project design criterion consists of four factors, one of which is the extent to which the proposed plan has goals, objectives, and outcomes that are clearly specified and measurable. This factor includes, in part, (1) the identification of course requirements, (2) the identification of the skill proficiencies to be taught and industry-recognized standards or competency assessments to be used, and (3) a description of the industry certifications, credentials, certificates, or degrees that students may earn.

Under Soboba's proposal, the program will award a certificate of accomplishment in light of the skills they acquire from the various education modules completed. Reviewer 9C cited, as a weakness, the certificate of accomplishment since it was not an industry certification or credential. Reviewer 9B had a similar comment.

In its appeal, Soboba asserts that an industry certificate or credential is not a mandatory requirement under this factor. A certificate may also be acceptable. In Soboba's view, its certificate of accomplishment is such a certificate. Therefore, the reviewers erred.

Under the doctrine of *ejusdem generis*, the term certificate as used in this factor must be construed in the context of the other terms used in the phrase "a description of the industry certifications, credentials, certificates, or degrees that student may earn." These terms refer to an award made based upon measurable standards established by an industry or by an organization that establishes vocational or academic standards for its members. When the term certificate is interpreted in this context, Soboba's certificate of accomplishment does not qualify as a certificate. It is not issued by an appropriate organization and it lacks any measurable standards. Hence, the reviewers' comments were appropriate and their scores are upheld.³

³ The identical issue is raised under the quality of project services criterion. Accordingly, the determinations by the reviewers under that criterion are also upheld.

Next, Soboba argues that, as a tribe vis-à-vis a tribally controlled college or university, it was unfairly treated by the Department in the evaluation process because the grant program favors the tribally controlled college or university and the Department employs reviewers who lack knowledge of the Native American culture. There were two instances, cited by Soboba, in which the reviewers purportedly lacked knowledge of tribal structure, tribal authority, Indian affairs, and Indian organizations as it pertained to evaluating its application. One instance concerned the evaluation of its project personnel and the other involved Soboba's failure to include letters from local businesses as part of its application. These items were addressed above and found to involve issues unrelated to Native American culture. Moreover, there is nothing in the record that supports Soboba's broader assertion that a lack of respect and recognition of tribal governments and organization permeates the evaluations by the reviewers. The reviewers did not make any comments that clearly or by inference indicated an improper bias or animus against the Tribe. The reviewers were well qualified to evaluate the applications.

Lastly, it is true that one aspect of the award process favors tribally controlled colleges and universities. By statute, the Department is required to give special consideration to these organizations. 20 U.S.C. § 2326(e)(2). In this competition, five extra points are added to the scores of tribally controlled or universities pursuant to 34 C.F.R. § 401.20(e). Soboba asserts that this is unfair. In its view, a tribal college is a semi-independent organization within its parent tribe. As such, it is inconsistent and unfair to award additional points to a subsidiary organization of the tribe while denying the same points to the tribe. The tribunal appreciates Soboba's position; however, it lacks the authority to rule on this matter and is required to follow the mandate of the regulation. *In re Sisseton Wahpeton Community College, supra* at 2-3. Hence, it cannot award any additional points.

In summary, the tribunal concludes that there is no basis to alter the final rating score of the Soboba Band of Luiseno Indians or its position on the list of applicants.

Allan C. Lewis
Chief Administrative Law Judge

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Washington, D.C.

SERVICE

On September 11, 2007, a copy of the attached decision was sent by certified mail, return receipt requested and by facsimile transmission to the following:

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