UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW JUDGES

Application of

Sisseton Wahpeton
Community College

Applicant.

Docket No. 95-86-0

Indian Vocational Education
Program Proceeding

DECISION

Appearances:

Kurt V. BlueDog, Esq., and Greg S. Paulson, Esq., of BlueDog, Olson & Small, Minneapolis, Minnesota, for Sisseton-Wahpeton Community College

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

Before: Allan C. Lewis, Chief Administrative Law Judge

Sisseton Wahpeton Community College (College) seeks a review of a decision by the Secretary not to include College among the 11 applicants selected in a competitive grant process for the award of a grant under the Indian Vocational Education Program. 34 C.F .R. § 401.23. College asserts that the Department's regulation which sets forth the various criteria to evaluate grant applications Conflicts with the authorizing statute; that the utilization of more than one panel to evaluate the applications resulted In an erroneous ranking of its application; and that two reviewers colluded in their review of College's application. As a result, College seeks the voidance of the proposed grant awards by the Department, or in the alternative, an award of 5 additional points to its score which would place it within the group of successful applicants for the award of a grant. Based on the analysis set forth infra, no adjustment in the review process or the score assigned to College is warranted.

I. OPINION

The Indian Vocational Education Program provides financial assistance to projects that provide vocational education for the benefit of Indians. 34 C.F.R. § 401.1 The Secretary provides financial assistance through grants, contracts, or cooperative agreements to plan, conduct, and administer projects that are authorized by and consistent with the purpose of the Carl D. Perkins

Vocational and Applied Technology Education Act, Pub. L. No. 88-210, 77 Stat. 403 (1963), as amended by the Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990. Pub. L. No. 101-392, 104 Stat. 753 (1990) and the National Dropout Prevention Act of 1991, Pub. L. No. 102-103, § 311, 105 Stat. 497, 505 (1991) (to be codified at 20 U.S.C. § 2301 et seq.) Pursuant to this authorization, the Secretary published a notification which solicited applications for a limited number of grants. Sixty-three applications were received and reviewed.

The Office of Vocational and Adult Education (ED) used seven panels, each comprised of three reviewers, to evaluate the applications. Each panel reviewed approximately nine applications. The applications were evaluated based upon seven criteria set forth in 34 C.F.R. § 401.21, totalling 100 points, and two additional criteria set forth in 34 C.F.R. § 401.20(e), totalling up to 10 points. The latter criteria were promulgated by the Secretary to implement 20 U.S.C. § 2313(b)(l)(C) (1990). Under this provision, Congress required that the Secretary give special consideration in making grants in two situations: for grants which encourage tribal economic development plans and for applications from tribally controlled community colleges which are accredited as an institution of postsecondary vocational education or operate accredited vocational education programs.

Initially, College challenges the validity of the Secretary's assignment of a 10-point preference for the special considerations. In its view, the 10-point preference has an insignificant effect on the award of the grants and, therefore, fails to provide the "special consideration" as required by 20 .S.C. § 2313 (b) (1) (C) . As such, College contends that the regulation conflicts with the governing statute and, therefore, is invalid.

Indian Vocational Education grants are governed by 20 U.S.C. § 2313(b) (1) (A) (ii) (I) which requires that "such grants or contracts with any tribal organization shall be subject to the terms and conditions of section 102 of the Indian SelfDetermination Act [25 U.S.C.A. § 450f]." Section 102 of the Indian Self-Determination Act provides, in turn, for a hearing on the record to resolve disputes--

[w]henever the Secretary declines to enter into a self- determination contract . . . the Secretary shall . . . provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised.

25 U.S.C. § 450f(b) . (1983). The hearing "on the record" language mandates that the hearing is a proceeding governed by the Administrative Procedure Act. 5 U.S.C. § 554(a).

As a threshold matter to the validity issue, the question arises whether an Administrative Law Judge conducting a hearing under the Administrative Procedure Act has the authority to invalidate a regulation. ED argues that the tribunal lacks the authority relying upon In re Smithville R-II School District, Dkt. No. 91- 4-I, U.S. Dep't of Education (Sec. Dec. July 27, 1992) and In re Lemont Township High School District #210, Dkt. No. 89-48-I, U.S. Dep't of Education (Feb. 6, 1992), certified by the Secretary (May 4, 1992).

Lemont is squarely on point. There, the hearing was also a proceeding under the Administrative Procedure Act, 5 U.S.C. § 551 et seq., the statute of general application to agency adjudications. In addressing its authority to invalidate a regulation, the tribunal held that the proceeding was adjudicated " [s] ubject to the published rules of the agency" under 5 U.S.C. § 556(c) which required the tribunal to follow the agency's regulations and precluded its consideration of the validity of an agency's regulations. Lemont at 5-6.

College urges, however, that Section 102 of the Indian Self- Determination Act authorizes the Administrative Law Judge to decide "any issue raised in the matter" by the parties and, therefore, Congress. empowered the tribunal to resolve all issues of law including the validity of regulations. College's view is incorrect. The issue language is employed in that part of the provision which simply directs that discovery will be permitted in an Indian Self-Determination matter. Hence, this language does not in any manner override the specific mandate of 5 U.S.C. 5 556 (c) that the substantive regulations of an agency are applicable in the proceedings before that agency.

Given the applicability of the Administrative Procedure Act and the decision in Lemont, the tribunal concludes that it has no authority to declare invalid 34 C.F.R. § 401.20(e).

Next, College argues that the utilization of more than one panel to evaluate the applications resulted in an erroneous ranking of its application since it did not produce a true curve for purposes of comparison. College Br. at 7. In its view, seven panels consisting of different readers--

allow[] each member of a panel to develop her/his own scoring and ranking system among the nine applications. When those nine applications are combined with all the other applications, the score and rank which the application received in the small group of applications will not correspond to the total group of applications to produce a true curve.

College Br. at 7-8. Thus, it concludes that "a true curve is for all the applications to be read by the same reader." Id. at 7.

ED responds that the scores of the applicants are subjected to a statistical standardization program designed to eliminate the potential problem of employing more than one panel to evaluate the applications. According to Susan Ahined, the Chief Statistician at the National Center for Education Statistics, the mathematical basis for the standardization process is--

statistically sound. It is based on a widely-accepted formula for standardizing scores from different distributions [and] . . . allows applications read by different panels to be ranked according to their relative merit regardless of what particular panel read any specific application .

ED Ex. F at 1-2. In light of the standardization program employed, there is no merit to College's argument.

Lastly, College raises two arguments as the result of an identical evaluative comment under the plan of operation criterion made by two of its reviewers. Each reviewer commented that--

[t] he tech p rep nature of this project, while laudatory, is troubling in that students must meet school and federal guidelines for gifted and talented in order to enroll in the program .

College argues that these identical comments "are not the product of the panel discussions but are the result of two reviewers copying each others comments . . . [and] [s]uch evidence casts doubt upon the entire review process as it relates to the College." College Br. at 9. College adds that this circumstance raises the possibility that one reviewer did the reading and evaluating for both reviewers which would warrant a reexamination of its application.

ED responds that the tribunal must presume that the readers acted properly in the review process "unless [College] . . . can clearly demonstrate to the contrary" because public officers are presumed to have properly discharged their official duties. ED Br. at 11-12. ED further maintains that it is not unexpected for two reviewers to make an identical comment since the evaluation process provides for a panel discussion and an opportunity to change or amend comments and to change scores. Lastly, ED argues that the possibility that one reviewer did the reading and evaluating for another reviewer is easily dispelled based upon the two application technical review forms completed by the two reviewers. ED points out that only one comment had the identical language in the two review forms and that this comment was accompanied by four and six other comments within that criterion by each of the respective reviewers.

Initially, the tribunal is troubled that ED relies solely upon the review forms completed by the two reviewers to respond to this allegation. An evaluation of a grant application by a non-employee of the Departmental is not the type of "official duty" by public officers included under the presumption urged by ED. Moreover, only these individuals possess the evidence as to whether the identical comment was the result of the effort by one individual or both. Inasmuch as this information is in the sole possession of ED and the language used by the reviewers dispels any notion that it was mere coincidence, the tribunal must conclude that the comment was conceived by one reviewer and copied by the other.

The more important question, however, is whether one reviewer permitted another reviewer to perform his or her evaluation of College's application. In this regard, there is sufficient information in the record to conclude that each reviewer performed his or her own evaluation. Of the two reviewers, Reviewer A used a machine to print his or her initial comments and later used handwriting to add, modify, or delete matters. In contrast, Reviewer B used handwriting to present his or her comments. There is also a marked difference in the handwriting between these two individuals which indicates that the technical review forms were not prepared by the same individual. In addition, there were differences, sometimes markedly so, in the evaluative scores assigned in four of the eight categories by the two individuals. Lastly, as to the plan of operation category which had the identical comment, each reviewer not only scored the category differently but also included four other comments, none of which were similar. Based on this information, it is clear that neither Reviewer A nor Reviewer B permitted the other to perform the task of evaluating College's application.

College also argues that this purported weakness -- that the program had guidelines which limited the program to gifted and talented students -- is not a matter properly considered under

the plan of operation criterion. In the view of College, this comment by the reviewers represents a personal remark and is not a basis for deducting points from its application.

ED responds that the inclusion of this information by College in its plan of operation makes it a matter for consideration under this criterion. ED adds, further, that the exclusion of non gifted and talented students from the program is inconsistent with the Perkins Act and other Acts and, therefore, the reviewers were evaluating, in tact, the College's stated goals and objectives. Lastly, ED maintains that the "ALJ should not ' second-guess' the reviewers' judgment and alter the competitive scoring in a properly-run grant competition . . . . Those types of judgments are best made by the readers who are specifically chosen because of their expertise in the field . . . and not by an ALJ in the course of litigation." ED Br. at 15.

Initially, the tribunal disagrees with ED that the material included within one section of an application makes all of that material relevant to that criterion. Information, which is otherwise pertinent to the program, should not be considered under a criterion if it is not relevant to that criterion. Here, the plan of operation criterion assesses the "quality" of the plan of operation. 34 C.F.R. § 401.21(c). While it may be argued that an inadequate breadth of a program is a weakness relating to the quality of the program, the better view is that this factor should be considered under the program factors criterion. The latter addresses, inter alia, whether the program is targeted to individuals with inadequate skills. 34 C.F.R. § 401.21 (a) (5). Thus, the comment in issue, while relevant in evaluating the application, is properly included under another criterion .

In the tribunal's view, the score rendered by a reviewer with respect to each criterion should not be disturbed unless there is significant error. Reviewers are required to render judgments in the evaluative process and reviewers may differ in their views despite established criteria.

Excluding the comment in question, Reviewer A had five comments addressing his or her perceived weaknesses in College's plan of operation and evaluated its plan as a 9 out of 20 points. This was in the mid-range of adequate. Reviewer B had one other comment under the weakness column and rated the plan as a 13 out of 20 points. This rating reflected an overall evaluation in the lower range of good to excellent. Having reviewed the comments by Reviewers A and B regarding the weaknesses and strengths of the plan of operation, I find that their respective ratings were reasonable and justified without considering the comment in question. Accordingly, no change in their respective scores is warranted .

II. ORDER

In light of the above, it is HEREBY ORDERED that the appeal by the Sisseton Wahpeton Community College is denied.

Allan C. Lewis
Chief Administrative Law Judge

Issued: August 7, 1995
Washington, D.C.

SERVICE

On August 7, 1995, a copy of the decision was sent by certified mail, return requested to the following:

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