

APPLICATION OF THE

Docket No. 97-13-O

CHEYENNE RIVER COMMUNITY

Indian Vocational Education

COLLEGE,

Program Proceeding

Applicant.

DECISION

Appearances: Tanya Ward, President for the Cheyenne River Community College

Daphna Crotty, Esq. for the Office of the General Counsel, United States Department of Education

Before: Allan C. Lewis, Chief Administrative Law Judge

Cheyenne River Community College (College) seeks a review of a decision by the Secretary not to include College among the 25 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 (1996). College's application was one of 80 applications reviewed, evaluated, and rated. In the letter conveying College'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 that College had not submitted its request for a hearing within the 30-day period required under 34 C.F.R. § 401.23(a). As a result, the parties were requested to present their views on this matter and did so.

Regulations Section 401.23(a) (1996) provides for a 30-day period within which an Indian tribal organization may request a hearing to contest its failure to receive an award of a competitive grant--

(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.

Thus, the period for making a request for a hearing begins with the receipt of the written notice by the Indian tribal organization and, within 30 days thereafter, the written request must be made to the Secretary.

In the instant case, College received the notice of non-funding of its application on December 27, 1996. As a result, the 30-day period ended January 26, 1997, which is a Sunday. College's letter requesting a hearing was written on January 30, 1997 -- a couple of days after the period ended -- and was subsequently hand delivered to the Office of the Assistant Secretary on Monday, February 3, 1997. Thus, College's request for a hearing was not made within the period

prescribed by the regulations.

College maintains that it should be excused from the limitation period due, in part, to the extreme bad winter weather in South Dakota during this period and, more importantly, due to the excessive delay by the Department in providing College with the ratings and written comments by the evaluators of its application -- information which it urges was necessary to determine whether to pursue a request for a hearing. [See footnote 1<sup>1/</sup>](#) As explained by the College--

[the president] did not personally receive the information [notice on non-funding] until January 3, 1997.

The . . . College **submitted a request for copies of the technical review forms**

**on January 8, 1977, however, we did not receive these forms (ratings; comments on application) until January 28, 1997. This delay in responding to our request directly impacted our ability to file an appeal by the timeline** indicated by the Attorney for the Assistant Secretary of Vocational and Adult Education [in her letter of February 6, 1997, transmitting the request for a hearing to the Office of Administrative Law Judges.]

This can be substantiated by the fact that **we were able to prepare a thorough response to the ratings and comments of reviewers within (2) days of receipt** of the technical review forms; however it **took the U.S. Department of Education nearly three weeks to respond to our request for information** that we needed to file an appeal. If applicant organizations are to be held to meeting specific timeliness, the agency receiving information must also be required to **respond to requests for**

**information by a specific timeline. We had no information from which to consider whether or not a request for a hearing was warranted until we were able to receive and review the ratings and comments of application reviewers.**

As you may notice upon review, **it only took (3) days for the General Counsel to respond and request a dismissal to our request for a hearing.** Had the Office of Vocational Education responded in such a timely manner to our request for technical review forms, we would have been able to immediately submit our request for a hearing.

Initially, it is clear that jurisdictional statutes are strictly construed. In re Maine Dep't of Education, Dkt. No. 90-74-R (Initial Decision Nov 27, 1990; Final Decision Jan. 30, 1991) (citing Danko v. United States Dep't of Labor, 864 F.2d 366, 369 (6th Cir. 1988); King v. Dole, 782 F.2d 274 (D.C. Cir. 1986), cert. denied, 479 U.S. 856 (1986)). Excusable neglect, such as a good faith error by counsel for the litigant in calculating the due date for filing an appeal, does not validate an otherwise untimely petition for review. Midway Industrial Contractors v. OSHRC, 616 F.2d 346 (7th Cir. 1980). Where, however, there has been an official misrepresentation as to the time within which to file a notice of appeal, the late notice may be deemed to have been constructively filed within the jurisdictional time limits. Hernandez - Rivera v. INS, 49 AdL2d 809 (9th Cir. 1980).

In the instance case, there was no misrepresentation regarding the appropriate period in which to submit the request for review. The regulations and the non-funding notice advised College that it had 30 days from the date of its receipt of the notice to submit a request for a hearing. In addition, 34 C.F.R. § 401.23 requires only a written request for a hearing. There is no requirement that a request for a hearing include an identification and explanation of each error and omission which supports the organization's belief that its ranking was incorrect. As a result, there is nothing which precludes the submission of a request for a hearing at any time during the 30-day period. If College could not make an informed decision on the merits of its evaluation and rating before the period expired, then the appropriate action was to submit a protective request for a hearing within this period. College failed to do so. [See footnote 2<sup>2/</sup>](#)

While not a factor in this decision, it should be mentioned that College is somewhat familiar with the procedure employed by the tribunal under which disputes are resolved in this area. College submitted, in November 1994, a

request for a hearing regarding the Secretary's decision not to award it a competitive grant in that year. Upon receipt of the request for a hearing, the tribunal issued, as is its current practice, an Order Governing Proceedings which required, inter alia, College to submit, at a later date, a memorandum setting forth the errors and omissions by the panel members who rated its grant application. In re Cheyenne River Community College, U.S. Dep't of Education, Dkt. No. 94-201-O. Therefore, in addition to the constructive notice in the regulations, College has had actual notice that a request for a hearing need not include an explanation of the purported errors in the rating of its grant application.

Based upon the foregoing, it is concluded that the request for a hearing by the Cheyenne River Community College was not submitted within the period prescribed by the regulations and, therefore, it is **HEREBY ORDERED** that its request for a hearing is dismissed with prejudice.

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Allan C. Lewis

Chief Administrative Law Judge

Issued: February 26, 1997  
Washington, D.C.

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#### SERVICE

On February 26, 1997, a copy of the attached decision was sent by certified mail, return receipt requested to the following:

Ms. Tanya Ward, President  
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***Footnote: 1** <sup>1/</sup> There is a possibility that the winter blizzard delayed by several days the delivery of the College's request for its rating and the comments by the evaluators to the Department. A 30-day period for submitting a hearing request, which begins upon the receipt of the non-funding letter by the applicant, allows time for this or other interim misfortunes which are outside the control of the parties. Accordingly, this argument is not persuasive even if it were relevant. By the same token, ED's attempt to deflect its somewhat slow response to College's request for the evaluator's comments is troublesome though not relevant in the disposition in this case. The mere statement by ED in its non-funding notice -- that an Indian tribal organization may obtain a copy of the evaluators' comments to assist in its preparation for another competition -- does not attach such a purpose to the requests by organizations for such comments. Absent specific information to the contrary, ED should assume that each request for this information is made for the purpose of evaluating whether to submit a request for a hearing. This is appropriate because the non-funding*

*notice is devoid of any information upon which an Indian tribal organization can make an informed decision as to whether to pursue a request for a hearing.*

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*[Footnote: 2](#) <sup>2</sup>/ Once a protective request is submitted, College may consider its evaluation and, thereafter if appropriate, withdraw its protective request.*