

APPLICATION OF THE

Docket No. 97-14-O

NISQUALLY INDIAN TRIBE

Indian Vocational Education

Program Proceeding

Applicant.

DECISION

Appearances: Richard A. Wells, Administrator, for the Nisqually Indian Tribe

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

Before: Allan C. Lewis, Chief Administrative Law Judge

The Nisqually Indian Tribe (Nisqually) seeks a review of a decision by the Secretary not to include Nisqually 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). Nisqually'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 Nisqually 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, Nisqually received the notice of non-funding of its application on Friday, December 27, 1996. As a result, the 30-day period ended January 26, 1997, which is a Sunday. Nisqually's letter requesting a hearing was mailed on January 30, 1997. Thus, Nisqually's request for a hearing was not made within the period prescribed by the regulations.

Nisqually maintains that it should be excused from the limitation period. While the non-funding notice was received on

Friday, December 27, 1996, it was not date stamped and logged into the tribal's mail or correspondence system until Monday, December 30, 1996. The tribal staff, who needed to be aware of the limitation period, relied upon the erroneous date stamp as the beginning of the 30-day period for the appeal. Thus, Nisqually urges that its request for a hearing was timely if the date stamp date is used. In addition, Nisqually mentions that, during the week of December 26-December 31, there was an ice storm throughout the Pacific Northwest that caused extensive power outages and that its tribal center was without power for much of this time and was closed during most of this period although some employees were apparently working while the center was closed.

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)). It is also precedent within the Department that receipt of the notice by the applicant's mail room rather than a higher official in the organization begins the running of the particular time limit. In re Commonwealth of Puerto Rico Dep't of Education, Dkt. No. 89-2-R, U.S. Dep.'t of Education, at 8 (Sep. 1, 1989). In addition, 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).

Given this precedent, the only outcome in this case is adverse to Nisqually. The period begins with the receipt of the non-funding notice in its mail room. As such, the 30-day calendar period begins on Saturday, December 28th and ends on Sunday, January 26, 1997 -- several days before Nisqually mailed its request for a hearing. Even if, however, the erroneous date stamp date of Monday, December 30th was employed, Nisqually is still out of time by one day. Under this scenario, the period begins on Tuesday, December 31st and the 30th or last day of this period is Wednesday, January 29, 1997. Nisqually mailed its request for a hearing on Thursday, January 30, 1997 -- one day late.

The tribunal understands Nisqually's disappointment. A jurisdictional period is employed, however, to establish a known parameter within which a party must take an appropriate action to assert a right or privilege and, as a natural consequence, it also serves to extinguish a right if it is not asserted within the period. If the parameter is not observed, then its function becomes meaningless.

Based upon the foregoing, it is concluded that the request for a hearing by the Nisqually Tribe 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.

Allan C. Lewis

Chief Administrative Law Judge

Issued: February 28, 1997
Washington, D.C.

SERVICE

On February 28, 1997, a copy of the attached decision was sent by certified mail, return receipt requested to the

following:

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