

**UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

IN THE MATTER OF

Docket No. 01-16-O

Washoe Tribe of Nevada  
and California,

Indian Vocational Education  
Program Proceeding

Applicant.

DECISION

Appearances:

A. Brian Wallace, Chairman, Gardnerville, Nevada, for the Washoe Tribe of Nevada and California.

Daphna Krim, Esq., of the Office of the 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 Washoe Tribe of Nevada and California (Washoe) seeks a review of a decision by the Secretary not to include Washoe among the 30 applicants selected in a competitive grant process for the award of a grant under the Native American Vocational and Technical Education Program. 66 Fed Reg. 560 (2001). This program provides grants to improve vocational and technical education programs that are consistent with the purposes 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 Amendments of 1998, Pub. L. No. 105-332, 112 Stat. 3076 (1998) (to be codified at 20 U.S.C. § 2301 *et seq.*). In awarding grants and entering into contracts, the Secretary shall ensure that the grants and contracts will improve vocational and technical education programs. 20 U.S.C. § 2326(e). Pursuant to this mandate, the Secretary published on January 3, 2001, a notification that solicited applications for a limited number of grants. 66 Fed. Reg. 560. The notification articulated the various criteria considered in evaluating an application. It included eight categories of criteria, totaling 125 points, and two additional categories, totaling 15 points, authorized under Section 116(e) of the Carl D. Perkins Vocational and Applied Technology Education Act.

Under the award process, an application is reviewed by a panel of four qualified individuals. In reviewing an application, each panel member reads the material submitted under each category and completes a review form wherein the reader articulates his or her comments, positive and negative, and assigns a score. Thereafter, a discussion among the panel members is held and each member determines his or her final score for each category and, ultimately, the application. These scores are standardized and then averaged. In Washoe's case, its application received raw scores of 37, 41, 46, and 51. After the scores were standardized and averaged, Washoe's final score was 43.43 and ranked 68<sup>th</sup> among the 73 applicants. This was 38 places removed from the last funded applicant which had a standardized score of 106.5.

On May 22, 2001, the Assistant Secretary for Vocational and Adult Education (ED) received Washoe's appeal and the matter was subsequently assigned to this tribunal. On May 29, 2001, the tribunal issued an Order Governing Proceedings that set forth, in detail, the rules and obligations of the applicant and ED. ED was required to produce and send by facsimile transmission to Washoe, inter alia, the scoring record and related scoring comments made by each reader in evaluating Washoe's application. Two and one-half weeks later, Washoe was required to file a memorandum that included—

- a. Each objection to the procedures employed by the Department to arrive at the applicant's score.
- b. Each objection and the basis therefor (with appropriate citation) to the score assigned to the application;
- c. Any other pertinent information.

ED's reply was due 10 days after the receipt of the applicant's memorandum.

Washoe filed its memorandum and ED replied. In its reply, ED argues that Washoe's memorandum addresses none of the matters required under the order as "[i]t includes no objections to Department procedures, no objections to the score assigned to its application, and no 'pertinent' information." ED asserts that Washoe's memorandum includes primarily new information and data that was not included in its application. As such, this information is untimely presented and cannot now be considered. Changes to an application are allowed "on or before the deadline date" and the readers determine scores based upon the quality of the submitted application. 34 C.F.R. §§ 75.109(b) and 75.217(c) (2000). ED maintains that consideration of this material at this juncture creates an unworkable process, is unfair to other applicants, and improperly changes the role of the tribunal.

ED is correct in that Washoe's memorandum fails to comply with the Order Governing Proceedings. It does not specifically set forth any objections to the weaknesses cited by the readers in their comments to the various categories and criteria considered in rating the application. The memorandum does not contain any citation to the specific weaknesses or the sources of information that rebuts the weaknesses cited by the readers.

It is evident, however, after examining the comments by the readers and the memorandum together, that Washoe's memorandum was intended to respond to some of the weaknesses cited by the readers. In virtually all instances, the responses presented new, additional information in an effort to address the concerns and deficiencies articulated by the readers in their comments. The tribunal cannot consider this material in evaluating a reader's assigned score for a particular category because it is inconsistent with the evaluation process adopted in the regulations and inconsistent with a typical appeal type process. It is the reader who evaluates the material in the application and assigns a score "based solely on the evaluation of [the] . . . quality of [an] application according to the selection criteria." 34 C.F.R. § 75.217(c). The tribunal assesses whether the assigned score reflects "significant error" based upon the information presented in the application and, if so, determines the extent of the appropriate revision. In re Sisseton Wahpeton Community College, Dkt. No. 95-86-O, U.S. Dept. of Education (Aug. 7, 1995).

It is therefore concluded that, due to the nature of the information set forth in Washoe's memorandum and its failure to comply with the Order Governing Proceedings, there is no merit to the appeal and, it is **HEREBY ORDERED**, that the appeal by the Washoe Tribe of Nevada and California is dismissed with prejudice.

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Allan C. Lewis  
Chief Administrative Law Judge

Issued: July 24, 2001  
Washington, D.C.