



INTERIOR BOARD OF INDIAN APPEALS

Allakaket Village Council; Grayling Ira Council; Koyukuk Tribal Council;
and Alatna Village Council v. Acting Juneau Area Director, Bureau of Indian Affairs

27 IBIA 190 (03/03/1995)

Related Board case:
27 IBIA 198



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

ALLAKAKET VILLAGE COUNCIL, GRAYLING IRA COUNCIL,
KOYUKUK TRIBAL COUNCIL, and ALATNA VILLAGE COUNCIL

v.

ACTING JUNEAU AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-138-A, 94-144-A,
94-145-A, and 94-146-A

Decided March 3, 1995

Appeals from denials of funding of Small Tribes grant applications.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters:
Financial Assistance

Decisions concerning whether a tribe's application for a Small Tribes grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

APPEARANCES: Philip Baker-Shenk, Esq., Washington, D.C., for all appellants.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Allakaket Village Council, Grayling IRA Council, Koyukuk Tribal Council, and Alatna Village Council sought review of separate decisions issued on May 6, 1994, by the Acting Juneau Area Director, Bureau of Indian Affairs (Area Director; BIA), declining each appellant's application for a FY 1994 Small Tribes grant. ^{1/} For the reasons discussed below, the Board of Indian Appeals (Board) affirms those decisions.

^{1/} In their opening briefs, each appellant inadvertently stated that it had applied for FY 1995 funds.

Background

Pursuant to an announcement published at 58 FR 68696 (Dec. 28, 1993), each appellant submitted an application for a Small Tribes grant to the Juneau Area Office. Allakaket and Alatna filed under the Developmental component of the program, and Grayling and Koyukuk filed under the Expansion/Enhancement component. Each application was received by the Area Office on February 28, 1994, the last day for filing applications, and each sought \$35,000, principally for the purchase of computer hardware and software, and training and technical assistance, all to be provided by the Central Council of Tlingit and Haida Indian Tribes of Alaska (Central Council) and its subsidiary, the Indian Software Company. ^{2/}

The applications were reviewed by three-member rating panels consisting of at least one BIA employee and one tribal representative. By letters dated May 6, 1994, the Area Director declined to fund the applications. He stated that the Juneau Area allocation for the Small Tribes program had been \$590,000, and that the Area had received applications from 110 tribes. Based on the competitive rating of the applications, the Area Director indicated that the lowest score of any application funded was 89. He informed appellants that their scores had been: Allakaket--77.33; Grayling--77.67; Koyukuk--85.67; and Alatna--80.67.

After appealing to the Board, each appellant moved to consolidate its appeal with seven other appeals. ^{3/} The Board declined to consolidate the appeals, stating that, although similar issues might be raised in each of the cases, there were obvious differences between them, and "consolidation will not allow clear delineation of those areas which are similar and those which are not." Appellants subsequently filed individual briefs. The Area Director did not file an answer brief in any appeal.

Discussion and Conclusions

[1] Appellants' first argument concerns the standard of review for these appeals. The Board has often stated the standard of review in appeals from denials of applications for discretionary grants, including the Small Tribes program:

^{2/} The breakdown of contractual costs in each application was: equipment, \$5,307; software, \$4,750; technical services, \$5,275; and training, \$14,668. Each appellant also sought \$5,000 for salaries, fringe benefits, travel, etc.

^{3/} In addition to the appeals addressed in this decision, the other appeals for which consolidation was sought are identified and addressed in Chilkoot Indian Association v. Acting Juneau Area Director, 27 IBIA 198 (1995).

^{4/} The Central Council filed a motion to intervene. The Board denied this motion, concluding that the interests of the Central Council could be adequately represented by the appellants, especially considering the fact that counsel for the appellants also represents the Central Council.

Decisions concerning whether or not a particular application for a [Small Tribes] grant should be funded are committed to the discretion of BIA. In reviewing such decisions, it is not the Board's function to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Lower Elwha Tribe v. Portland Area Director, 18 IBIA 50, 51 (1989). Accord, e.g., Native Village of Venetie Tribal Government (IRA) v. Juneau Area Director, 23 IBIA 132 (1992); Sauk-Suiattle Indian Tribe v. Portland Area Director, 20 IBIA 238 (1991); Washoe Tribe of Nevada and California v. Acting Phoenix Area Director, 19 IBIA 190 (1991). The Board has consistently applied this standard of review in all appeals relating to denials of discretionary grant applications, and will apply the same standard here.

Appellants contend that the reviewers unlawfully reduced their scores because they proposed to use a consultant. Allakaket and Alatna, who filed under the Developmental component of the Small Tribes program, contend there is nothing in the announcement allowing the reduction of points for using a consultant or requiring that the grant funds remain in the community. They argue that the nature of their proposal was "developmental in the truest sense of the word" (Allakaket's Opening brief at 5). ^{5/} Grayling and Koyukuk, who filed under the Expansion/Enhancement component, similarly argue that their proposals were appropriate under the terms of the announcement.

In Venetie, the Board considered a comment made by a reviewer under the FY 1992 Training and Technical Assistance grant program that there "seem[ed] to be a lot of consulting which could be deleted and work done by BIA advisors." 23 IBIA at 134. The Board concluded that it was improper to downgrade an application "based upon the fact that appellant proposed to use outside consultants rather than to seek advice from BIA." 23 IBIA at 135.

As in Venetie, the Board finds that the Developmental and Expansion/Enhancement components of the FY 1994 Small Tribes program announcement contain no explicit prohibition against using outside consultants, although section D(2) (iii) (A) of the announcement, which explains criteria for evaluating applications filed under the Expansion/Enhancement component, states: "[A]pplications most consistent with the purpose of this component of the program and those with clearly stated developmental objectives will receive higher ratings than those which are for the purpose of purchasing professional expertise or equipment." However, the reviewers were required to compare the proposed uses of program funds under each application in order to determine which applications presented the best chances to meet--and sustain--the program objectives so that the limited program funds would be

^{5/} When identical or substantially similar arguments are made by more than one appellant, the Board will cite only one brief.

used most beneficially. It was within the scope of the reviewers' discretion to conclude that a proposal under which funds would be directed primarily to a consultant did not best fulfill the program objectives, whether the application was filed under the Developmental or the Expansion/Enhancement component.

Appellants next contend that the reviewers improperly commented that the amounts requested were too high, arguing that no reasons were given to support this conclusion. Appellants argue that these comments are irrelevant and unsupported.

The Board has consistently acknowledged that ratings under BIA's discretionary grant programs are, of necessity, subjective. *See, e.g., Colville Confederated Tribe v. Acting Portland Area Director*, 27 IBIA 24 (1994); *Delaware Tribe v. Acting Anadarko Area Director*, 18 IBIA 98, 100 (1990). It has also stated that "[i]n reviewing grant applications, BIA must exercise the expertise and insights it has developed in dealing with tribes that are attempting to improve their performance in the area of the grant program." *Venetie*, 23 IBIA at 134, and that BIA is entitled to draw conclusions based upon that expertise.

Comments concerning the apparent high costs detailed in appellants' grant applications are based upon the reviewers' experience in considering other applications and in dealing with real-life costs and expenses. The Board will not second-guess the reviewers' conclusions that the amounts sought under these applications appeared high. *Cf. Ak-Chin Indian Community v. Acting Director, Office of Tribal Services*, 26 IBIA 174 (1994) (addressing comments that the timeframe was inadequate and the people to be employed were not sufficiently trained in a proposal submitted under the Special Tribal Court grant program).

Appellants allege that the reviewers were biased against them because the consultant they chose was the Central Council. They first cite comments concerning the similarities between their applications as indicative of a negative attitude toward the Central Council, which prepared all of their applications. They argue that "uniformity and consistency should be viewed with favor, as it permits Tribes with economies of scale to participate in a concerted, coherent effort to share costs and lessons learned and thereby make funds go further" (Allakaket's Opening Brief at 9).

The Board is unsure how appellants intended to use the phrase "economies of scale." Normally, in the context of a situation similar to this one, it would expect the phrase to relate to the ability of several persons or entities to do something together cheaper than each could do it alone. Here, appellants argue that the equipment and software they were purchasing was cheaper because of the Central Council's greater buying power. However, the Board fails to see any other way in which any "economy of scale" appears in these grant applications.

Furthermore, this is a competitive grant program. Appellants are competing for very limited funds against not only other tribes served by the

Juneau Area office, but also against each other. Under such circumstances, the Board sees no reason why the fact that appellants submitted essentially identical applications should be viewed “with favor.” At most, it should be viewed neutrally.

Appellants continue their bias argument, alleging that BIA Area Office officials reviewing their applications were biased against the Central Council because of “its leadership role in Self-Governance in the region.” (Allakaket's Opening Brief at 10). Appellants contend that these officials were interested in preserving BIA jobs and control, and that this self-interest has been threatened by the Central Council, resulting in bias and discrimination against the Central Council, and derivatively against them because of the Central Council's involvement in their proposed projects.

The administrative record in each of these appeals contains a document entitled “Review and Scoring Process: Small Tribes Grant Program F.Y. 1994.” This document describes the review process. As relevant to appellants' bias argument, the document states at page 1:

A fifteen member ad hoc rating group was formed by the Area Director to review and score the applications * * *. This group was composed of both [BIA] employees and tribal representatives (council members or employees of tribes or tribal organizations). This group was broken down into five teams of three each with a mix of both [BIA] employees and tribal representatives. Each team had at least one [BIA] and one tribal member.

The "Agency General Comment" sheet for each appellant's application is signed by three individuals. It appears that these individuals are the three reviewers for each application. The Board does not know the individuals or whether they are BIA employees. Presumably, however, appellants either know the individuals or could have identified them, determined their employment, and alleged specific bias. They did not do so. Even if these individuals were not the reviewers, appellants' broad and general attack on the impartiality of all Juneau Area office employees is unsubstantiated in any way. As it has previously, the Board declines to base a decision on such an unsubstantiated allegation of bias. See, e.g., Rosebud Sioux Tribe v. Acting Aberdeen Area Director, 26 IBIA 272 (1994); Sac and Fox Nation v. Acting Anadarko Area Director, 24 IBIA 16 (1993) (alleging bias because the appellant was a self-governance tribe).

Appellants also allege that bias is shown by the fact that the Cow Creek Band of Umpqua Tribe of Indians submitted essentially the same application to the Portland Area Office, and that application was not only funded, but was rated number 2 in the Portland Area. This fact is not persuasive. As previously mentioned, this is a competitive grant program. The area of competition is coextensive with the jurisdiction of each BIA Area Office. The fact that Cow Creek's application was highly rated by the Portland Area Office does not prove that it should have received the same rating in a different competitive area. The Board declines to find bias against appellants on this basis.

Accordingly, the Board concludes that appellants have not proven that the reviewers were biased against them.

Appellants next contend that their point scores should not have been reduced because of allegedly missing items. They argue BIA was required to inform them within 10 days from the date their applications were received of any information missing from their applications. Because BIA failed to inform them that anything was missing, appellants contend that no points can be deducted for this reason.

The Board has previously considered an argument that BIA was estopped from declining to review and rate an application on the grounds that it was incomplete when BIA failed to inform the applicant within 10 days of receipt of the application of the missing information. In Iowa Tribe of Oklahoma v. Acting Anadarko Area Director, 27 IBIA 87 (1994), although noting that the announcement was not a model of clarity, ^{6/} the Board held that the section relating to notification of missing information applied only when an application was received in advance of the application deadline. Noting that at least some Area Directors had also interpreted the section in this way, the Board concluded that any other interpretation would allow some tribes to submit information after the deadline, thereby prejudicing those tribes which had met the deadline. See, e.g., Akiak Native Community v. Act Juneau Area Director, 26 IBIA 232, 233 (1994), and cases cited therein. In Iowa Tribe, the applications were not reviewed and rated because basic eligibility information was omitted. In the present cases, although the reviewers noted the absence of some information, the applications were still reviewed and rated. ^{7/} Appellants have raised no argument which would cause the Board to depart from its prior holding.

Citing comments suggesting there was not sufficient tribal guidance and involvement in the proposed projects, appellants assert that the reviewers did not understand their proposed projects. They argue that

[w]hile a significant portion of the funds will be used to pay an outside consultant to set up hardware and software, the tribal government/employees will inevitably be directly involved with the

^{6/} Nor is the regulation upon which the announcement language was based. See 25 CFR 278.25(a)(2).

^{7/} One example of information that was found to be missing from several applications was a job description. Appellants admit there was no separate job description, but argue that because the position was part-time and its responsibilities were described in the application itself, a separate description was not necessary.

In Stillaguamish Tribe v. Acting Portland Area Director, 27 IBIA 37 (1994), the Board considered an argument that it was not necessary to provide certain items required under the Small Tribes program because the project was self-evident. Noting that the program was highly competitive, the Board stated that the mere fact that the applicant believed a project was self-evident did not absolve it of the responsibility to meet the program requirements.

training and operation of the equipment and programs post installation. The purpose is to give [appellants'] local tribal staff modern-day tools with which they themselves will do the essential work of tribal government.

(Allakaket's Opening Brief at 13).

The Board finds no evidence that the reviewers misunderstood the proposed projects. The comments concerning minimal tribal involvement in the projects reflect the fact that appellants would for the most part be passive receivers of goods and services provided by the consultants.

In a subsidiary argument, appellants contend that the reviewers' lack of understanding led to "incomprehensible" comments concerning whether the projects were really relevant to the program's purposes. Appellants cite statements in the announcement to the effect that the purpose of the program is to allow small tribes to improve their management and administrative capabilities as proof that the provision of a computer system is exactly the kind of project envisioned under the Small Tribes program.

The Small Tribes program, as shown in the Federal Register announcement, strongly emphasizes the development of human resources within the applicant tribe. Although equipment and systems may also be eligible components of a Small Tribes grant application, the Board does not find it "incomprehensible" that a reviewer might question whether a proposed project in which the applicant is essentially a passive receiver is actually within the intended purposes of the program.

Grayling and Alatna also object to comments questioning whether they and their employees have the ability to operate the computer systems after installation. They state that these comments are offensive, grossly underestimate the ability of the people working at the village level, and suggest a deep-seated bias. In addition, Alatna objects to a comment that, with only 28 members, it is too small to benefit from this sophisticated computer system.

Judgments as to the ability to employ technology to be purchased with grant funds and/or the level of benefit that could be anticipated from such technology are part of the expertise BIA is required to employ in reviewing discretionary grant applications. This expertise has been developed through dealing with similar problems and issues with other tribes. Although Alatna and Grayling undoubtedly believe their people are capable of working effectively with the technology, or else they would not have submitted their applications, the Board declines to substitute its--or appellants'--judgment in this area for that of BIA. See Ak-Chin, *supra*.

The remaining arguments deal with the individual scores given to each application. Most of these arguments relate to issues already discussed. In essence, appellants contend they should each have received perfect or nearly perfect scores. Part of this argument is based on the fact that some

reviewers did not provide comments under each review category. In Colville Confederated Tribes v. Acting Portland Area Director, 27 IBIA 24, 26 (1994), the Board agreed that comments should be provided. However, as in Colville, the Board concludes that the failure of the reviewers to provide comments under each review category is not enough to require that the Area Director's decision be vacated.

The Board has carefully reviewed appellants' arguments as to why their scores should be higher, but finds no basis to require that the scores be reconsidered. Based on its prior review experience, the Board finds the range of scores for each appellant remarkably consistent, 8/ suggesting that the reviewers, whether BIA or tribal officials, were in substantial agreement about the merits of the applications.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 6, 1994, decisions of the Juneau Area Director are affirmed. 9/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

8/ The ranges were: Allakaket--75, 72, and 85; Grayling--71, 87, and 75; Koyukuk--100, 80, and 77; and Alatna--90, 72, and 80.

9/ Arguments not specifically addressed were considered and rejected.