



INTERIOR BOARD OF INDIAN APPEALS

White Mountain Apache Tribe v. Acting Phoenix Area Director,
Bureau of Indian Affairs

29 IBIA 42 (01/23/1996)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

WHITE MOUNTAIN APACHE TRIBE, : Order Affirming Decision
Appellant :
 :
 :
v. : Docket No. IBIA 95-88-A
 :
 :
ACTING PHOENIX AREA DIRECTOR, :
BUREAU OF INDIAN AFFAIRS, :
Appellee : January 23, 1996

Appellant White Mountain Apache Tribe seeks review of a May 12, 1994, decision issued by the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), denying appellant's application for a FY 1994 Planning Grant. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Pursuant to notice published in the Federal Register on December 28, 1993 (58 FR 68704), appellant applied for a planning grant for FY 1994. By letter dated May 12, 1994, the Area Director denied the application.

The Board received appellant's notice of appeal from this denial on March 13, 1995. In its notice of appeal, appellant stated that it had followed the appeal instructions given to it in the Area Director's May 12, 1994, decision, but the Area Director had failed to forward the appeal to the Board. After initial briefing on the issuance of timeliness, by order dated April 14, 1995, the Board made a preliminary determination that the appeal was timely. The Board stated that the Area Director could dispute this preliminary determination. The Area Director did not file an answer brief, and did not otherwise comment on the issue of timeliness. Therefore, the Board determines that this appeal was timely filed. 1/

1/ It is arguable that this appeal is moot based on the likely unavailability of FY 1994 or 1995 funds for the Planning Grant program. Furthermore, at this time, the Board has no knowledge of whether the program has been, or will be, funded for FY 1996. Appellant argues broadly that the Board can order the Secretary to utilize self-determination or other funds at the Area or National level.

Even if appellant were to prevail in this appeal, it would not guarantee that its application would be funded. Instead, appellant's application would have to be reviewed and rated by the Area Director against those applications which were funded by the Phoenix Area Office for FY 1994. Only if such review and rating determined that appellant's application would have received a rating high enough to have been funded in FY 1994 would there be a question about the source of funding.

For purposes of this decision, the Board assumes that there may be funds somewhere that could be used to fund appellant's application should appellant prevail in this appeal and should its application ultimately be determined to have rated high enough to have been funded.

The Area Director denied appellant's application on the grounds that it failed to document that appellant met the eligibility criterion in section C(2)(i) of the Federal Register announcement, which requires an applicant to "[s]urvey or inform its reservation or community population that the tribe wishes to plan, and carry out such plans as may be developed, to make significant changes in its programs and its service delivery to Indian beneficiaries." Appellant argues (1) such documentation was not required; (2) the determination of whether an application was complete was assigned to the Agency Superintendent, and the Area Director lacked authority to alter the Superintendent's decision on this matter; (3) appellant met the criterion; and (4) if documentation was required, appellant should have been given an opportunity to supplement its submission.

The Board cannot accept appellant's argument that documentation of its basic eligibility was not required. Section C(b)(i) states: "Upon completion of the application review process the Area Director shall rate each application based on the criteria set forth in Sections C(1) through C(5) of this Announcement." The eligibility criteria in Section C(2) are clearly part of the basis for the review of the application. It is an applicant's responsibility to show that it meets the basic eligibility requirements of the program under which it seeks funding. Accord, Chippewa Cree Tribe of the Rocky Boy's Reservation v. Acting Billings Area Director, 23 IBIA 129 (1992) (language of Federal Register announcement differed, but similarly required proof of eligibility).

The Board also rejects appellant's argument that the Agency Superintendent was responsible for determining whether the eligibility criteria were met, and that, in essence, the Area Director was bound by the Superintendent's decision. Responsibility for determining basic consistency with Sections C(1) through C(5) is assigned to both the Superintendent and the Area Director. Section C(6)(a)(iii) states that it is the responsibility of the Area Office to "conduct a review of each application for consistency with sections C(1) through C(5) of this Announcement. In this review the Area Director shall utilize the comments and recommendations from the Agency Superintendent" (emphasis added). The announcement in no way places the Superintendent's decision/recommendation beyond review. The Area Director is required to consider the Superintendent's recommendations, but he is not bound by them.

Appellant attempts to show that it met the criterion by arguing that its council meetings are open to the public and that notice of topics to be discussed is regularly published and posted. The Board makes no determination as to whether this would constitute adequate evidence of a survey or information to the reservation or community. This argument, however, was presented after the deadline for submission of applications. The Board has consistently held that, in competitive grant programs, consideration of information provided after the deadline for submission of an application violates BIA's and the Board's duty to give fair and equitable consideration to all grant applications by giving some applicants two chances to submit an acceptable application. See, e.g., Iowa Tribe of Oklahoma v. Acting Anadarko Area Director, 27 IBIA 87, 88 (1994), and cases cited therein. The Board declines to consider appellant's new information.

Finally, appellant contends that if its application was incomplete, the announcement required that it be notified and allowed to provide the missing information. The Board rejected a similar argument in Iowa Tribe, holding that the sections of the announcement requiring notification to an applicant of deficiencies in an application require such notification "only where an application is submitted sufficiently in advance of the filing deadline to allow for Agency review and submission of missing materials by the deadline" (27 IBIA at 89). The Board held that any other interpretation would allow Superintendents and/or Area Directors to extend the filing deadline for some applicants, to the disadvantage of those applicants which timely submitted complete applications.

The administrative record shows that appellant submitted its application on February 28, 1994, the deadline for submitting applications. Even if appellant had been informed within 10 days that its application was deficient, it did not have time in which to supplement the application.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Phoenix Area Director's May 12, 1994, decision is affirmed. 2/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

2/ Appellant's motion for oral argument is denied.