INTERIOR BOARD OF INDIAN APPEALS

Ramah Navajo School Board, Inc. v. Albuquerque Area Director,
Bureau of Indian Affairs

24 IBIA 104 (07/13/1993)

United States Department of the Interior

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

RAMAH NAVAJO SCHOOL BOARD, INC.
v.
ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-201-A Decided July 13, 1993

Appeal from a decision declining to consider an application for a planning grant.

Affirmed.

1. Indians: Financial Matters: Financial Assistance--Indians: Indian Self-Determination and Education Assistance Act: Generally

   Where a Federal Register announcement of two grant programs under the Indian Self-Determination Act, 25 U.S.C. § 450h (1988), includes a particular provision in the criteria for one of the programs, and omits that provision from the criteria for the other program, the omission is significant to show that a different intent existed.

2. Indians: Financial Matters: Financial Assistance--Indians: Indian Self-Determination and Education Assistance Act: Generally

   Although sec. 103 of the Indian Self-Determination Act, 25 U.S.C. § 450h (1988), contemplates that "tribal organizations" may receive planning grants, the Bureau of Indian Affairs' discretionary authority under this section includes the authority to limit eligibility for planning grants to Indian tribes.

APPEARANCES: Lloyd Benton Miller, Esq., and Kaye E. Maassen Gouwens, Esq., Anchorage, Alaska, for appellant; Grant L. Vaughn, Esq., Office of the Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Ramah Navajo School Board, Inc., seeks review of an April 2, 1992, decision of the Albuquerque Area Director, Bureau of Indian Affairs

(Area Director; BIA), declining to consider appellant's application for a FY 1992 planning grant. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellant submitted an application for a planning grant pursuant to the announcement of the FY 1992 Training and Technical Assistance Grant and Planning Grant programs in the Federal Register, 57 FR 160 (Jan. 2, 1992). Appellant included with its application a resolution from the Ramah Navajo Chapter supporting the application. 1/

On April 2, 1992, the Area Director wrote to the President of the Ramah Navajo Chapter, stating:

> This is to inform you that we have received your Fiscal Year 1992 application for the Planning Grant Program. The disapproval results from the lack of a tribal resolution approving the submission by the Chapter of the Planning Grant application. We are unable to consider your request for funding because the Federal Register specifically states that the funds are available for Tribes. In addition, the educational objectives contained in the application do not comport with the purposes delineated in the Federal Register for the Planning Grant Program.

The Area Director did not notify appellant directly that its application had been rejected and did not include appeal information in his letter to the Ramah Navajo Chapter. 2/ Appellant states that it received a copy of the Area Director's letter on June 1, 1992, following several requests to the Area Office.

Appellant's notice of appeal was received by the Board on July 7, 1992. In light of the Area Director's failure to give notice of his decision to

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1/ The Ramah Navajo Chapter is a local governmental unit of the Navajo Nation. According to a Nov. 3, 1992, Area Director's memorandum, "the Ramah Navajo Chapter * * * bears exclusive responsibility, with no assistance from the Navajo Nation, for providing educational, health, social and community services for the Ramah Navajo people." The Area Director's memorandum was addressed to the Deputy Commissioner of Indian Affairs and sought a determination that the Chapter could be regarded as an Indian tribe for purposes of certain Federal contract and grant programs, including the program at issue here. The parties have not advised the Board of any response to the Area Director's memorandum.

2/ The Area Director appears to have assumed that the grant application had been submitted by the Ramah Navajo Chapter. The application, however, clearly identified appellant as the applicant.

appellant and his failure to provide appeal information, both of which were required by 25 CFR 2.7, 3/ appellant's notice of appeal was deemed timely.

The appeal was docketed on October 1, 1992, following receipt of the administrative record. Both appellant and the Area Director filed briefs.

Discussion and Conclusions

Three reasons for the rejection of appellant's application may be found in the Area Director's decision: (1) a tribal resolution was required from the Navajo Nation, rather than the Ramah Navajo Chapter; (2) only Indian tribes are eligible applicants under the Planning Grant program; and (3) planning grant funds were not intended to be used for educational programs. Appellant challenges all three reasons given by the Area Director and raises other issues as well. It is apparent, however, that if the Area Director's second reason is valid, there is no need to address the other issues, because appellant clearly is not, and does not claim to be, an Indian tribe. Accordingly, the Board addresses the Area Director's second reason first.

The Federal Register notice stated that the grants being announced were authorized under section 103 of the Indian Self-Determination Act (P.L. 93-638), 25 U.S.C. § 450h (1988). 4/ Although the notice did not cite any of the several subsections of 25 U.S.C. § 450h, grants for planning purposes are authorized by both subsections (a) and (e).

25 U.S.C. § 450h(a) provides:

> The Secretary of the Interior is authorized, upon the request of any Indian tribe * * * to contract or make a grant or grants to any tribal organization for—
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> * * * * * *

3/ 25 CFR 2.7 provides:

"(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

"(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

"(c) All written decisions * * * shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it nay be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal."

4/ Prior to the 1988 amendments to P.L. 93-638, what is now section 103 of the Act was section 104.

All further references to the United States Code are to the 1988 edition.

> (2) the planning, training, evaluation of [sic] other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 450f of this title and the additional costs associated with the initial years of operation under such a contract or contracts.

25 U.S.C. § 450h(e) provides: "The Secretary is authorized, upon the request of an Indian tribe, to make a grant to any tribal organization for * * * (2) the planning, designing, monitoring, and evaluating of Federal programs serving the tribe, including Federal administrative functions." 5/

Both of these provisions authorize the Secretary to make grants to any tribal organization as long as the grant is requested by an Indian tribe. There is no doubt that appellant is a tribal organization as defined in P.L. 93-638. See the definition of "tribal organization" in 25 U.S.C. § 450b(l), quoted infra. Accordingly, under the statute, appellant is an entity eligible to receive a planning grant, again assuming that a request is made by an Indian tribe.

Regulations implementing subsection 450h(a) were promulgated in 1975 and now appear in 25 CFR Part 272. There are as yet no regulations implementing subsection 450h(e), which was added by the 1988 amendments to P.L. 93-638.

25 CFR Part 272 clearly appears to restrict eligibility for planning grants under subsection 450h(a) to Indian tribes. For example, section 272.11, "Eligibility requirements," provides: "The governing body of any Indian tribe or tribes may apply for a grant under this part." Section 272.12 provides:

> Grants are for the purpose of:
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> * * * * * *
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> (b) Planning, training, evaluation or other activities designed to improve the capacity of an Indian tribe to enter into a contract or contracts pursuant to section 102 of [P.L. 93-638]. * * * Examples of use of grants by Indian tribes, as indicated in this paragraph, are as follows: * * *.

BIA's intent to restrict these grants to Indian tribes is confirmed in the preamble to the final rulemaking document:

> Many comments pertained to "tribal organizations" and recommended that "tribal organizations" be permitted to apply for or

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5/ From the description of the planning grant program in the Federal Register notice, it appears likely that BIA intended to implement the subsection (e) authority. It is possible, however, that BIA intended to implement both subsections.

> request grants on the same basis as tribal governing bodies as per §§ 272.11 and 272.16. The Bureau's position in this regard is that a tribal governing body should be the prime grantee with all of the authority and responsibility this designation infers. In effect, the Bureau believes that "tribal organizations" should not have equal status with tribal governing bodies in this grant program and that the regulations as written reaffirm the basic authority and responsibility of tribal governing bodies for tribal business affairs. Tribal governing bodies may, of course, subgrant or subcontract with tribal organizations as per § 272.26. [6/]

40 FR 51282, 51286 (Nov. 4, 1975). The Board concludes that 25 CFR Part 272 limits eligibility for planning grants, to the extent they are authorized by 25 U.S.C. § 450h(a), to Indian tribes. For purposes of this decision, however, the Board assumes that the FY 1992 Planning Grant program is based, at least in part, on subsection 450h(e).

The Federal Register notice, as appellant concedes, speaks throughout of "tribes" and "tribal governments" as the intended recipients and beneficiaries of grants under both the Training and Technical Assistance and Planning Grant programs. Appellant contends, however, that the term "tribe" was intended to incorporate "tribal organizations" throughout the announcement. Appellant supports its argument by reference to section B(2) of the notice, which concerns eligibility criteria for the Training and Technical Assistance Grant program. That section begins: "To receive a training and technical assistance grant, a tribe, including an authorized tribal organization, must be able to document * * *." (Emphasis added.) Appellant argues that, while Part C of the notice, which governs the Planning Grant program, "does not contain an express reference to 'tribal organizations,' the consistently inclusive use of the word 'tribe' in the preceding sections can leave little doubt that it was used in the same sense there" (Appellant's opening Brief at 13).

[1] The Board does not agree. Neither the general discussion in Part A of the notice, nor the specific discussion of the Planning Grant program in Part C, manifests an intent to include tribal organizations within the term "tribe" for purposes of the Planning Grant program. Section C(2), concerning eligibility criteria for the Planning Grant program, omits the parenthetical phrase "including an authorized tribal organization" and employs only the unembellished term "tribe." Under well established rules of construction, the omission of a particular provision from one section of a regulation, where such a provision is included in a parallel section of the same regulation, is significant to show that a different

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6/ 25 CFR 272.26 provides: "The grantee may make subgrants or subcontracts under this part provided that such subgrants or subcontracts are for the purpose for which the grant was made and that the grantee retains administrative and financial responsibility over the activity and the funds."

intent existed. ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, 23 IBIA 228, 234 (1993). No reason appears why this rule of construction should not apply as well to the Federal Register notice at issue here. Under this analysis, the omission of a reference to tribal organizations in Part C, where such a reference was included in the immediately preceding Part B, governing a different grant program, is significant to show that BIA did not intend to include tribal organizations within the term "tribe" for purposes of the Planning Grant program.

Further, the Board is reluctant to construe the term "tribe" to include tribal organizations, in places where such an intent is not made explicit, because the two terms are separately defined and have distinct meanings under P.L. 93-638. 25 U.S.C. § 450b provides:

> For purposes of this Act, the term--
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> * * * * * *
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> (e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act * * * which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;
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> * * * * * *
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> (1) " tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant.

Clearly, under the statute, the term "Indian tribe" does not incorporate the term "tribal organization." 7/

7/ In fact, it is arguable that the above-quoted provision from section B(2) of the Federal Register notice, which seemingly equates the two terms, is in violation of the statute, because it appears to dispense with the statutory requirement that the request for a grant be made by an Indian tribe, i.e., an "Indian tribe" as defined by the statute. It is possible that, despite the language of section B(2), BIA requires a request from an Indian tribe (as defined by the statute) before awarded a training and technical assistance grant to a tribal organization.

The Board concludes that BIA did not intend, in the Federal Register notice of the FY 1992 program, to authorize the award of planning grants to tribal organizations.

Appellant contends, however, that an across-the-board exclusion of tribal organizations from the planning grant program is invalid because it is contrary to the authorizing statute. Appellant argues:

> The choice whether to provide services directly or through [a tribal] organization is central to a tribe's self-determination, and tribes employing the tribal organization option should not be disadvantaged simply because of that choice. The grant at issue here contains numerous eligibility standards that enable the agency to award grants to those particular applicants--whether they are tribal governments or other tribal organizations--that are most in need or most capable of using the funds effectively. To further restrict eligibility on a categorical basis to "tribes" is contrary to the purposes of the statute.
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> Any attempt by the agency to make non-governmental tribal organizations categorically ineligible for the grant therefore cannot be upheld under the statute.

(Appellant's opening Brief at 15-16).

[2] Again, the Board does not agree. In light of the discretionary nature of the Planning Grant program and the limited funds available under that program, BIA has the authority to restrict eligibility for the program by means of a reasonable classification. Morton v. Ruiz, 415 U.S. 199, 230-31 (1974). BIA's decision to limit eligibility to tribes was explained when the classification was first adopted in 1975, at which time BIA also suggested a method by which tribes could provide grant funds to their subsidiary tribal organizations. Although BIA has not published any further explanation of the limitation, it has also not published a repudiation of the policy it announced in 1975. 8/ Under these circumstances, and given the continued shortfall of funds for this program, the Board finds that BIA acted within its authority in restricting eligibility for FY 1992 planning grants to Indian tribes.

For the reasons discussed, the Board concludes that only Indian tribes were eligible for FY 1992 planning grants. Therefore, the Area Director's

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8/ Appellant does not contend that the 1988 amendments to P.L. 93-638 effected any change in the limitation adopted by BIA. The Board is not aware of anything in the 1988 amendments or their legislative history which evidences congressional disapproval of BIA's limitation. In fact, consistent with BIA's practice, the Senate report on the bill speaks of tribes as intended grant recipients, although the bill itself authorized grants to tribal organizations. S. Rep. No. 274, 100th Cong., 1st Sess. 23 (1987). See 25 U.S.C. § 450h(e), supra.

decision may be affirmed on the basis that appellant was not eligible to receive a planning grant. In light of this conclusion, the Board does not reach appellant's other arguments. 9/

Appellant requests that the Board, if it finds appellant ineligible for a planning grant, refer this matter to the Assistant Secretary - Indian Affairs for a waiver of the regulations. Although the Board declines to make such a referral, appellant may of course seek a waiver on its own.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's April 2, 1992, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

9/ The Board specifically declines to address the issue of whether the Ramah Navajo Chapter should be deemed a tribe for purposes of the Planning Grant program. This is an issue with broad policy implications, as is apparent from the Area Director's Nov. 3, 1992, memorandum, which lists a number of programs in which the issue has arisen.

Moreover, if the Board were to address this issue, the Navajo Nation would first have to be given notice and an opportunity to participate. There is no indication that the Navajo Nation has been informed of any of the proceedings in this appeal.