CLIFTON W. SKYE
v.
ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-104-A Decided August 9, 1994

Appeal from the denial of management and technical assistance funds in connection with an application for assistance under the Indian Financing Act.

Affirmed as modified.

1. Indians: Generally--Regulations: Waiver

The Department of the Interior lacks authority under 25 CFR 1.2 to waive a statutory restriction in the guise of waiving regulations in 25 CFR Chapter I.

APPEARANCES: Clifton W. Skye, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Clifton W. Skye seeks review of an April 8, 1994, decision of the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), declining two requests for management and technical assistance funds. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision as modified in this opinion.

Background

It appears that on April 5, 1993, appellant submitted an application for financial assistance to the Aberdeen Area Office. The application sought $407,621.50 for research and development costs for the "Sioux Entertainment Proposal," which involved several separate, but related, entertainment businesses. It appears that this application was approved on September 24, 1993.

Appellant's first request for management and technical assistance funding was contained in a letter to the Aberdeen Area Office dated February 22, 1994. Appellant requested

> a Budget Waiver. This waiver will compensate me for my full-time and on-going professional services, costs and expenses from the BIA Management & Technical Assistance funds, as specified in the enclosed "Sioux Entertainment Proposal."

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> The "Sioux Entertainment Proposal" has been in development since November, 1992. I applied for technical assistance from the Aberdeen Area, [BIA,] on April 5, 1993. This assistance is authorized by the Indian Financing Act of 1974.
>
> Since this economic development project requires my professional time on a full-time, daily and on-going basis, I respectfully request compensation for these efforts which precludes other employment. * * * Total Funds Requested in Waiver . . . $53,000.28.
>
> These funds are used only to assist and facilitate in the successful development of five corporate projects and six plans. All funds are used as technical assistance in obtaining a guaranteed loan as provided in the Indian Financing Act of 1974. [1/ Emphasis in original.]

Because authority to waive the regulations has not been delegated to BIA Area Directors, by memorandum dated March 4, 1994, the Area Director transmitted the waiver request to the Director, Office of Economic Development (OED Director), in BIA's Central Office in Washington, D.C. The OED Director denied the request for waiver on March 10, 1994, stating that BIA's "Management and Technical Assistance Program was not designed to compensate applicants for their efforts in developing projects."

The Area Director informed appellant of this decision in the April 8, 1994, letter, and provided appellant with a copy of the OED Director's decision.

Appellant's second request for funds was contained in a March 14, 1994, letter. In this letter appellant

> requested $28,802.00 * * * [as a Management and Technical Assistance grant] for additional professional training through a series of workshops held in Rockport, Maine. All costs are itemized in a March 10, 1994, letter from the International Film & Television workshop budget. The Rockport budget does not include airfare or weekly stipend which has been listed in my request for technical training.
>
> * * * * * *
>
> The purpose of this added professional training is to assist me in the completion of my story. At the end of the workshop technical training period, I expect to have a finished story or screenplay property. [Emphais in original.]

1/ In a Mar. 1, 1994, letter, appellant provided a progress report and repeated his request for a waiver of the regulations.

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The Area Director denied this request in his April 8, 1994, letter, stating:

> Funds from the Management and Technical Assistance Program are not intended to provide for training of the applicant. Other sources, such as the Adult Vocational Training Program and educational loan programs, are available on a limited basis for these purposes. One necessary element that must be present in any business is the need for the business owner to have already gained sufficient experience in the field prior to proposing a business venture. If the proposed business owner does not already possess this experience and training, the likelihood of success is minimized. You may need to reconsider the logic for developing this type of business without this training or experience. In any event, we will not provide funding for these training expenses.

Appellant sought review of these denials by the Board. No briefs were filed in this appeal.

Discussion and Conclusions

Appellant's arguments are set forth in his notice of appeal. As to his February 22, 1994, request, appellant contends:

> [E]ntrepreneurs/applicants working with government programs and grants must wait many months or years before bureaucratic decisions are made. In this situation, any available development or operating capital is soon expended * * *. **The Budget Waiver was a request to the temporary suspension of BIA policy in favor of a Sioux Indian entrepreneur/applicant who wishes to recoup his financial losses wasted on bureaucratic down time**. [Emphasis in original.]

(Notice of Appeal at 1).

Concerning his March 14, 1994, request, appellant states:

> In regard to motion pictures, film companies are divided between the studio executives and the production staff . * * * The studio is the business side and the production staff is the creative side of the motion picture industry. Very rarely does a studio executive understand or involve himself with the production staff, in terms of technical production. **The Technical Assistance Training Waiver was a request to the temporary suspension of BIA policy in favor of the entrepreneur/applicant (studio, executive) to receive technical training in the actual art (production staff) of filmmaking**. [Emphasis in original.]

(Notice of Appeal at 2).

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BIA is authorized to provide management and technical assistance to applicants under the various Indian Financing Act programs by 25 U.S.C. 1541 (1988). 2/ This statute provides:

> Prior to and concurrent with the making or guaranteeing of any loan under subchapters I and II of this chapter [the Indian Revolving Loan Fund and Loan Guaranty and Insurance programs, 25 U.S.C. §§ 1461-1469 and 25 U.S.C. §§ 1481-1498, respectively] and with the making of a grant under subchapter IV of this chapter [the Indian Business Development program, 25 U.S.C. §§ 1521-1524], the purpose of which is to fund the development of an economic enterprise, the Secretary shall insure that the 1oan or grant applicant shall be provided competent management and technical assistance for preparation of the application and/or administration of funds granted consistent with the nature of the enterprise proposed to be or in fact funded. [Emphasis added.]

Regulations implementing this statute are found in 25 CFR 101.3, for the revolving loan fund; 25 CFR 103.4, for the loan guaranty program; and 25 CFR 286.11, for the Indian Business Development Program. Repeating the language of 25 U.S.C. § 1541, each of these regulations states that management and technical assistance is provided to help an applicant in preparing an application or administering any funds that might be approved. Appellant's requests for waiver of the regulations implicitly acknowledge that his funding requests did not fall under the normal scope of the regulations.

The Area Director referred appellant's February 22, 1994, request for a waiver of the regulations to BIA's Central Office. For the first time on appeal, appellant states that the March 14, 1994, funding request also sought a waiver of the regulations. Ordinarily, the Board would either remand a request for waiver of regulations to the Area Director for appropriate processing, or refer it to the Assistant Secretary - Indian Affairs for the exercise of her discretionary authority. Under the circumstances of this case, however, the Board concludes that remand or referral is pointless because the Department of the Interior lacks authority to waive the regulations as appellant requests.

[1] 25 CFR 1.2 permits the Secretary to waive regulations in 25 CFR Chapter I "in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians." The converse of this statement is that the Department lacks authority to waive the regulations when they are directly based on or required by law. The regulations governing management and technical assistance under the various Indian Financing Act programs are all based directly on 25 U.S.C. § 1541, which establishes the situations under which management and technical assistance can be made available. Those situations are (1) "for preparation of the application," and (2) for "administration of funds granted."

2/ All further citations to the United States Code are to the 1988 edition.

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Appellant seeks funds to reimburse him for "bureaucratic down time" in the processing of his application, and training in the technical aspects of the enterprise for which he received funding. Neither of these requests falls within either of the two statutory categories. In actuality, appellant seeks a waiver of 25 U.S.C. § 1541, not just of the regulations based on that statute. The Department of the Interior lacks authority to waive a statute in the guise of waiving a regulation.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 8, 1994, decision of the Aberdeen Area Director is affirmed as modified in this opinion.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

_____
Anita Vogt
Administrative Judge

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