

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDIAN EDUCATORS FEDERATION :
(Local 4524 of the AMERICAN FEDERATION :
OF TEACHERS, AFL-CIO), :
2301 Yale Boulevard SE, :
Albuquerque, NM, 87106, :

plaintiff, :

v. :

GALE A. NORTON, SECRETARY, :
UNITED STATES DEPARTMENT :
OF THE INTERIOR, :
1849 C Street, NW :
Washington, DC, 20240 :

defendant. :

Case No. 1:04-cv-1215 (RWR)

Second Amended
Complaint for Declaratory
and Injunctive Relief

Introduction

1. In an effort to give native Americans greater control over their own affairs, Congress adopted the Indian Reorganization Act of 1934. Among other things, the Act requires that the Secretary of the Interior grant Indian applicants a hiring preference for positions in the “Indian Office” having the primary responsibility of providing services to Indians or to Indian tribes. The Act was amended in 1979 by Pub. L. No. 96-135 in order to provide Indians with preference in the event of a reduction-in-force. At that time, Congress specifically stated that Indian preference applies to all positions in the Bureau of Indian Affairs as well as to all other organizational units in the Department of the Interior directly and primarily related to providing services to Indians. However, the

Secretary has refused to give qualified Indians preference for most positions within the Office of the Assistant Secretary for Indian Affairs and the newly created Office of Special Trustee for American Indians. This suit seeks to require the Secretary to accord such “Indian preference” to qualified Indian applicants when filling all positions within the Office of the Assistant Secretary for Indian Affairs, the Office of Special Trustee for American Indians and all other positions in the Department which directly or primarily relate to the providing of services to Indians.

Jurisdiction, Venue and Parties

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 2201 and the Administrative Procedures Act, 5 U.S.C. §§ 702 *et seq.*

3. Venue is proper within this judicial district pursuant to 28 U.S.C. § 1391(e).

4. The plaintiff Indian Educators Federation, Local 4524 of the American Federation of Teachers (AFL-CIO), is an unincorporated membership organization of employees of the Bureau of Indian Affairs and the Office of Special Trustee for American Indians in the Department of the Interior. Among the objectives of the IEF as set forth in Article III of its Constitution is to promote the welfare of its members, to “expose and fight all forms of racial discrimination” and to promote the objectives of its parent organization, the American Federation of Teachers. The stated mission of the AFT is to improve the lives of its members, to promote their professional, economic and social

aspirations, and to promote human rights. The Indian Educators Federation is the certified collective bargaining representative of the non-managerial, non-supervisory employees of the Office of Special Trustee for American Indians and the Bureau of Indian Affairs. The Indian Educators Federation is suing in its representative and associational capacity on behalf of its members and other employees it represents within the Department of the Interior.

5. The defendant Gale A. Norton is the Secretary of the United States Department of the Interior. In 1977, the Secretary of the Interior established the position of Assistant Secretary for Indian Affairs in order to elevate the importance of Indian issues within the organizational structure of the Department. The Office of Assistant Secretary for Indian Affairs (“AS-IA”) has oversight responsibility for the BIA and its programs. The Office of Special Trustee for American Indians has also been established within the Department of the Interior to provide for more effective management of, and accountability for the proper discharge of, the Secretary’s trust responsibilities to Indian tribes and individual Indians. The defendant is being sued in her official capacity.

Factual Allegations

6. The Federal policy of according hiring preference to Indians in the Indian service dates at least as far back as 1834. Section 9 of the Act of June 30, 1934, 4 Stat. 737, provides:

In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties.

25 U.S.C. § 45.

7. Since that time, Congress has enacted similar broad preference statutes. The Act of May 17, 1882, c. 163, § 6, 22 Stat. 88 and Act of July 4, 1884, c. 180, § 6, 23 Stat. 97, provide:

Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

25 U.S.C. § 46. The Act of August 15, 1894, c. 290, § 10, 28 Stat. 313, provides:

In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable *in all other employments in connection with the agencies and the Indian Service*. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

25 U.S.C. § 44 (emphasis added). The General Allotment Act of 1887 contains the following broadly worded hiring preference:

. . . And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this Act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this Act and become citizens of the United States shall be preferred.

25 U.S.C. § 348.

8. The Indian Reorganization Act of 1934 contained sweeping changes in government's relationships with Indian nations. Section 12 of the IRA restated Congress' longstanding directive that Indians should be given preference in hiring for Federal government positions which affected services to the Indian peoples. The 1934 Act went a step further by exempting the hiring of Indians from the Civil Service laws by directing the Secretary of Interior to establish separate standards by which to judge the unique qualification of Indian applicants:

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

48 Stat. 986; 25 U.S.C. § 472.

9. The purpose of such preference was to give Indians a greater participation in their own self-government and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.

10. This statutory hiring preference, commonly known as "Indian preference," applies to the selection of internal candidates for promotion as well as to the initial hiring of Indian applicants.

11. Under Indian preference, consideration can only be given to non-Indian applicants if there are no qualified applicants who are entitled to Indian preference.

12. The term "Indian Office" is not defined in the Indian Reorganization Act, nor is it the official name of any agency within the Department of the Interior. The Department of the Interior, the Civil Service Commission, the Office of Personnel Management and the Comptroller General have traditionally interpreted the term "Indian Office" broadly to include all positions within the Department which directly and primarily relate to the providing of services to Indians, including the Office of Assistant Secretary for Indian Affairs.

13. In Pub. L. No. 96-135, 93 Stat. 1056 (1979), Congress amended the Indian preference laws by requiring the Secretary to give Indians preference, not only in hiring, but also when "applying reduction-in-force procedures . . . with respect to positions within the Bureau of Indian Affairs." "Bureau of Indian Affairs" was defined to encompass any organizational units with the Department that directly and primarily services to Indians:

For purposes of this section--

(3) The term "Bureau of Indian Affairs" means (A) the Bureau of Indian Affairs and (B) *all other organizational units in the Department of the Interior directly and primarily related to providing services to Indians and in which positions are filled in accordance with the Indian preference laws.*

25 U.S.C. § 472a(e) (emphasis added) In adopting this definition, Congress statutorily sanctioned the Civil Service Commission's, OPM's and the Comptroller General's interpretation of §12 as applying not only to the Bureau of Indian Affairs, but also to "all other organizational units in the Department of the Interior directly and primarily related to providing services to Indians."

14. Since as early as 1968, regulations issued annually by the Office of Personnel Management have stated that Indian preference applies throughout the Department to *all* positions which primarily and directly service Indians. OPM annually publishes a list of positions that are excepted from civil service regulations concerning appointment through competitive procedures. The most recently annual inventory of those positions was published at 68 FED. REG.71,176 (December 22, 2003). Section 213.3112 lists the positions within the Department of Interior which have been exempted from the competitive civil service and includes:

All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to providing services to Indians when filed by the appointment of Indians. The Secretary of the Interior is responsible for defining the term "Indian."

68 FED. REG.71,181 (emphasis added).

15. Title III of the American Indian Fund Management Reform Act of 1994 created the Office of Special Trustee for American Indians ("OST"). The OST is charged with oversight and reform the Department's efforts to manage lands held in trust for

American Indians and to manage and account for the income derived from the sale or lease of land held in trust, such as timber stumpage, oil, gas and mineral royalties, and agricultural fees.

16. On July 12, 1996, the Secretary published in the Federal Register a proposed rule that would, for the first time, limit the applicability of Indian preference to the Bureau of Indian Affairs and to those office units that have been transferred intact from the Bureau of Indian Affairs to a Bureau or Office within the Department of the Interior and that continue to perform the functions formerly performed as part of the Bureau of Indian Affairs.

17. The Secretary established a 60 day notice and comment period for these proposed regulations.

18. The Secretary has never issued a final regulation based on the regulations proposed on July 12, 1996, nor has the Secretary responded to the comments the Secretary has received in response to the notice of proposed rule making.

19. Nonetheless, the Secretary has implemented the proposed rule by limiting the applicability of Indian preference to certain discrete office units within the OST that were transferred intact from the Bureau of Indian Affairs. The Secretary has failed to grant preference to qualified Indian applicants for positions within newly created offices within the OST, and for other positions in the OST that were transferred from the Bureau of Indian Affairs.

20. There are approximately 550 positions with the OST.

21. On June 2, 2003, OST notified the IEF that as a result of a reorganization of the OST, Indian preference would now be limited to positions in the Office of the Deputy Special Trustee - Trust Services and in the Office of Appraisal Services in the Office of Deputy Special Trustee - Field Operations. As a result of this decision to limit the applicability of Indian preference, the Secretary is now according qualified Indians with preference when filling only approximately 170 positions within the OST.

22. Almost all of the IEF members within the OST are Indians and would be eligible for Indian preference.

23. Indian IEF members, and other Indian employees within the OST whom the IEF represents, have applied for promotions to higher graded positions within the OST for which they have been found to be qualified.

24. Non-Indian applicants have been selected for promotion or hiring in lieu of these qualified Indian applicants for promotion.

25. These Indian applicants would have been selected for promotion if the Secretary had applied Indian preference when filling these vacant positions because the non-Indian applicants would not have been considered.

26. Indian IEF members, and other Indian employees within the OST whom the IEF represents, continue to apply on a regular basis, and will apply in the future, for promotion to positions within the OST for which they are qualified and for which they

would be selected but not for the Secretary's failure to apply Indian preference to the filling of all vacancies within the OST.

27. Indian IEF members, and other Indian employees within the OST whom the IEF represents, have been denied their entitlement to Indian preference in the event of a reduction-in-force. Under the 1994 Trust Reform Act, the OST is not a permanent organization and will be terminated at a later date and reductions-in-force will take place as positions with continuing functions are transferred back to BIA or elsewhere in the Department.

28. Many of the higher graded positions to which these qualified Indian applicants aspire are managerial or supervisory positions outside of the IEF bargaining unit. Further, the OST has refused to bargain over the application of Indian preference to all positions within the OST. Consequently, the IEF does not have an adequate administrative remedy through collective bargaining or resort to the collectively bargained grievance and arbitration procedure.

29. In 1988, the Solicitor of the Department of the Interior determined that Indian preference should no longer apply to positions in the Office of the Assistant Secretary for Indian Affairs.

30. In 2000, many of the program responsibilities and positions in the headquarters of the Bureau of Indian Affairs, including the BIA's Office of Congressional Affairs, Office of Public Information, Executive Secretariat, Office of

Equal Employment Opportunity, Office of Chief Financial Officer, and the Office of Chief Information Officer, were transferred, on paper, to Office of the Assistant Secretary for Indian Affairs, ostensibly to “strengthen management and accountability for Indian Affairs matters.” The result was to reduce the number of positions to which Indian preference applied.

31. The IEF represents the non-supervisory, non-managerial employees of the BIA nationwide. As a result of the transfer of many positions from the BIA to AS-IA, qualified and eligible IEF members no longer benefit from Indian preference when applying for promotion to positions for which they would have received preference had those positions remained in the BIA. For example, an IEF member employed by the BIA in Reston and who qualifies for Indian preference recently applied to be the Director of the Division of Financial Management, in the Office of the Chief Financial Officer of AS-IA. This office was part of the BIA and covered by Indian preference prior to the 2000 reorganization. Although this Indian applicant was found qualified for the position, a non-Indian applicant was selected instead.

Cause of Action

32. The Administrative Procedures Act, 5 U.S.C. § 703, provides that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by

agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. § 703.

33. The Administrative Procedures Act, 5 U.S.C. § 706, provides that the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and shall compel agency action unlawfully withheld.

34. The Secretary's failure to utilize Indian preference when filing positions within the Office of the Assistant Secretary for Indian Affairs and when filing all vacant positions within the Office of Special Trustee for American Indians violates the various laws Congress enacted which give Indian preference in employment: Section 9 of the Act of June 30, 1834, 25 U.S.C. § 45; the Act of May 17, 1882 and the Act of July 4, 1884, 25 U.S.C. § 46; the General Allotment Act of 1887, 25 U.S.C. § 348; the Act of August 15, 1894, 25 U.S.C. § 44; §12 of the Indian Reorganization Act of 1934, 25 U.S.C. § 472, and Section 2 of Pub. L. No. 96-135, 25 U.S.C. § 472a.

35. The Secretary's departure from the Department of the Interior's past interpretation of §12 of the Indian Reorganization Act of 1934 as being applicable to all positions within the Department which directly and primarily relate to the providing of services to Indians is arbitrary and capricious.

36. The Secretary has unlawfully withheld the application of the Indian preference provisions of Section 9 of the Act of June 30, 1834, 25 U.S.C. § 45; the Act of

May 17, 1882 and the Act of July 4, 1884, 25 U.S.C. § 46; the General Allotment Act of 1887, 25 U.S.C. § 348; the Act of August 15, 1894, 25 U.S.C. § 44; §12 of the Indian Reorganization Act of 1934, 25 U.S.C. § 472, and Section 2 of Pub. L. No. 96-135, 25 U.S.C. § 472a to all positions within the OST and AS-IA.

37. The Secretary's failure to accord Indian preference to all positions in the AS-IA and OST is contrary to regulations of the Office of Personnel Management, 68 FED. REG. 71,181.

38. The Administrative Procedures Act, 5 U.S.C. § 553, requires agencies to publish proposed rules in the Federal Register at least 30 days in advance of their adoption, and to provide interested persons an opportunity to participate in the rule making through submission of written data, views or arguments on the proposed rule. The agency is required to consider these comments before promulgating a final version of the rule, and to publish in the Federal Register a response to the significant comments received and a notice of the final adoption of the rule.

39. The Secretary has violated these rule making provisions of the Administrative Procedures Act by implementing the proposed rule of July 12, 1996 without considering the comments received from interested persons, by failing to publish a response to the significant comments received, and by failing to publish a final version of the rule and notice of its adoption.

Prayer for Relief

Wherefore, Plaintiff respectfully prays that the Court grant judgment in its favor, and that the Court grant the following relief:

a. Declare that the Secretary's policy of not providing qualified Indians with preference when filling all vacant positions within the Office of Special Trustee for American Indians, the Office of the Assistant Secretary for Indian Affairs and all other positions in the Department which directly or primarily relate to the providing of services to Indians is unlawful;

b. Declare that the Secretary's implementation of the rule proposed on July 12, 1996 violated the rule making provisions of the Administrative Procedures Act;

c. Enjoin the Secretary, her agents, subordinates and employees from failing to provide qualified Indians with preference when filling all vacant positions within the Office of Special Trustee for American Indians and the Office of the Assistant Secretary for Indian Affairs and all other positions in the Department which directly or primarily relate to the providing of services;

d. Grant such further and additional relief as the Court may deem just and proper.

_____/s/_____
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