

**Department of Health and Human Services**  
**DEPARTMENTAL APPEALS BOARD**  
**Appellate Division**

Citadel Community Development Corporation  
Docket Nos. A-14-73 and A-14-74  
Decision No. 2596  
September 29, 2014

**DECISION**

Citadel Community Development Corporation (Citadel) appealed determinations by the Administration for Native Americans (ANA) rejecting applications submitted by Citadel for funding under the Native American Programs Act (NAPA). Citadel applied for a Social and Economic Development Strategies (SEDS) grant and a Sustainable Employment and Economic Development Strategies (SEEDS) grant in response to ANA funding announcements with a closing date of April 15, 2014. ANA found that both of Citadel's applications failed to demonstrate that Citadel met a regulatory requirement to "provide assurance that its duly elected or appointed board of directors is representative of the community to be served."

Under 45 C.F.R. § 1336.35, the Board hears appeals from applicants for grants under NAPA whose applications have been rejected on the grounds that the applicants or the activities they propose are ineligible for funding. The Board consolidated Citadel's appeals of ANA's determinations that Citadel was ineligible for funding since both appeals raised the same issues. For the reasons explained below, we uphold ANA's determinations.

**Background**

The purpose of NAPA, 42 U.S.C. § 2991 *et seq.*, is to "promote the goal of economic and social self-sufficiency for American Indians, Native Hawaiians, other Native American Pacific Islanders (including American Samoan Natives), and Alaska Natives." 42 U.S.C. § 2991a. NAPA authorizes ANA to provide grants of financial assistance to "public and nonprofit private agencies." *Id.* § 2991b(a). Such agencies include governing bodies of Indian tribes on Federal and State reservations and Alaska Native villages and regional corporations, as well as agencies serving Native Hawaiians and other Native American Pacific Islanders. *Id.*

Under the implementing regulations, public and nonprofit private agencies serving Native Hawaiians and native peoples from American Samoa are eligible to apply for SEDS grants. 45 C.F.R. § 1336.33(a)(1)(xi), (xii). However, any applicant other than a tribe or

an Alaska Native Village government “proposing a project benefitting Native Americans or Native Alaskans, or both, . . . must provide assurance that its duly elected or appointed board of directors is representative of the community to be served.” *Id.*

§ 1336.33(a). It is undisputed that the SEEDS program is part of the SEDS program. *See* ANA Br. e-filed 7/14/14, at 2; Citadel Br. dated 8/18/14, 2<sup>nd</sup> page, n.1; ANA Ex. 2, at 1 (SEEDS Funding Opportunity Announcement stating that the SEDS program “authorizes the SEEDS initiative”). Thus, public and nonprofit private agencies serving Native Hawaiians and native peoples from American Samoa applying for SEEDS as well as SEDS grants must provide the assurance required by section 1336.33(a).

In 2005 and 2011, ANA published in the *Federal Register* policies relating to its grant award process for SEDS and other grants that addressed, among other things, the requirement for an assurance in section 1336.33(a)(1).<sup>1</sup> The 2005 *Federal Register* notice stated that ANA would “screen applications for completeness prior to the competitive panel review” to determine if the application contained four elements, including the following: “[I]f the applicant is not a Tribe or Alaska Native Village government, the native non-profit organization submits a resolution and proof that a majority of the governing board of directors is representative of the community to be served.” 70 Fed. Reg. 6686, 6689 (Feb. 8, 2005). The notice further stated, “An application that does not contain these elements will be considered incomplete and excluded from the competitive review process.” *Id.*

The 2011 *Federal Register* notice stated that ANA was “revis[ing] for clarification” the requirement that “applicants that are not Tribes or Native Alaska villages . . . must show that a majority of board members approving the project proposal are representative of the community to be served.” 76 Fed. Reg. 1437, 1439 (Jan. 10, 2011). Specifically, ANA stated that, to “better establish board support for a project and to demonstrate a stronger link between an organization’s board and the community to be served,” it “will revise the categories of representatives of the community to be served to include: (1) Members of Federally or State recognized Tribes; (2) persons eligible to be a participant or beneficiary to the project to be funded; (3) persons who are recognized by the eligible

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<sup>1</sup> Another notice was published in the *Federal Register* in 2013 after Citadel’s grant applications were denied. 78 Fed. Reg. 23,769 (Apr. 22, 2013), adopting Notice of Public Comment at 78 Fed. Reg. 13,062, 13,065 (Feb. 26, 2013). The 2013 notice reiterated statements in the earlier notices regarding the community representation requirement.

Pursuant to section 814 of the Native American Programs Act of 1974, as amended, 42 U.S.C. § 2991b-1, ANA is required to provide members of the public an opportunity to comment on proposed changes in interpretive rules, statements of general policy, and rules of agency procedure or practice, and to give notice of the final adoption of such changes at least 30 days before the changes become effective. The 2005, 2011, and 2013 *Federal Register* notices all indicated that ANA was issuing a “Final Policy Directive.”

community to be served as having a cultural relationship with the community to be served; and (4) persons considered to be Native American as defined in Title 45, Part 1336, Section 10 of the Code of Federal Regulations (CFR), and Native American Pacific Islander as defined in the Native American Programs Act.” *Id.* The notice also stated: “Applications that are submitted without this documentation . . . will not be considered for competition.” *Id.*

ANA issued two Funding Opportunity Announcements, SEDS Funding Opportunity Announcement HHS-2014-ACF-ANA-NA-0776 and SEEDS Funding Opportunity Announcement HHS-2014-ACF-ANA-NE-0779, pursuant to which Citadel applied for the funding at issue here. Both funding announcements state that applicants that are not tribes or Native Alaska villages must show that “a majority of board members are representative of the community be served” and “must submit documentation that identifies each board member by name and indicates his/her affiliation or relationship to at least one of ANA’s four categories of community representation, which include” the four categories listed in the January 10, 2011 notice. ANA Exs. 1, at 9; 2, at 9. The funding announcements also state that “[a]pplicants that do not include this documentation will be considered non-responsive, and the application will not be considered for competition.” *Id.*

Citadel’s grant applications were submitted by the April 15, 2014 due date for fiscal year 2014 funding.<sup>2</sup> Citadel applied for both grants as a nonprofit organization. ANA Exs. 3 (SEDS application) at 4-5 of 179; 4 (SEEDS application) at 4-5 of 193. Each application included the following “Assurance of Community Representation on Board of Directors:”

Citadel Community Development Corporation meets the requirement indicating that a majority of board members are representative of the community to be served, by virtue of its Hawaiian and Pacific Islander Committee (HPIC). As stated earlier in the proposal, in all programs, activities, and matters relating to the Native Hawaiian and Pacific Islander population, the HPIC, which is a part of the CCDC Board of Directors, becomes the governing body. Any decisions requiring a vote of the Board are made by the HPIC alone. The CCDC Board is privy to meetings and decisions, but voting is limited to HPIC Board Members only. The HPIC is comprised of five individuals, all who meet ANA’s fourth category of community representation; (persons considered to be Native American as defined in 45 CFR § 1336.10 and Native American Pacific Islanders as defined in the Native American Programs Act)]. The list of HPIC Board Members are included on the list of Board of Directors, listed in the section “Other Attachments”.

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<sup>2</sup> Both Funding Opportunity Announcements had application due dates of 4/15/2014 for fiscal year 2014, 3/4/2015 for fiscal year 2015, and 3/4/2016 for fiscal year 2016.

ANA Exs. 3, at 65 of 179; 4 at 79 of 193. Each application also included a document titled “Board of Directors” listing 14 individuals, four of whom are identified as “Low to Moderate Income Board Members” and five of whom are identified as “Hawaiian and Pacific Islander Committee Members” (with each member of the latter group specifically identified as “Native Pacific Islander (Samoan).” No affiliation or relationship to the community is shown for the remaining individuals. ANA Exs. 3, at 114-115 of 179; 4, at 132-133 of 193. In addition, each application included an organization chart that shows “Advisory Boards/Committees” in a box separate from, but on the same level as, “Board of Directors.” ANA Exs. 3, 4 (page following Assurance).

## Analysis

1. Section 1336.33(a) requires that a majority of an applicant’s full board of directors be representative of the community to be served.

Citadel’s grant applications provided an assurance that Citadel met the requirement for community representation solely on the grounds that all five members of its Hawaiian Pacific Islander Committee fall into the fourth category of representation identified by ANA. ANA determined that Citadel failed to meet that requirement because its grant applications “identified only five of fourteen Board members as meeting the community representation criteria.” ANA Br. e-filed 7/14/14, at 5-6.<sup>3</sup>

On appeal, Citadel disputes ANA’s determination that it could not meet the community representation requirement based on the composition of its Hawaiian Pacific Islander Committee. Citadel asserts that, under its bylaws, the members of its Hawaiian Pacific Islander Committee are “legal board members with voting rights” and that “[w]hen there are concerns, issues or programs that relate to their specific community and/or area of expertise,” the remaining board members “give governing authority to that subgroup,” i.e., “we give all power, authority and decision making to that group of experts, we withdraw from any voting.” Appeal letter dated 5/27/14. Citadel argues that there “is no indication” that section 1336.33(a) means the “entire or whole Board” and points out that “Corporations and Legislature[s] manage their duties by using subcommittees, councils and advisory boards that are comprised of a subset of the General Board . . . [,] have varying delegations of duties and powers and are able to act independently of their General Board as outlined in their Bylaws.” Citadel Br. dated 8/18/14, 7<sup>th</sup> page. Citadel also argues that ANA itself interpreted the regulation to permit a subgroup to be

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<sup>3</sup> ANA also takes the position that it is not clear from the grant applications that the five individuals were members of Citadel’s Board. ANA Br. e-filed 7/14/14, at 8. We assume for purposes of this decision that the grant applications clearly identify them as Board members.

considered as the board of directors for purposes of the community representation requirement. *Id.* 3<sup>rd</sup> and 4<sup>th</sup> pages (quoting statement in the 2011 Federal Register notice that certain applicants “must show that a majority of board members *approving the project proposal* are representative of the community to be served”) (italics added by Citadel), 7<sup>th</sup> page.

ANA maintains that section 1336.33(a) “on its face” requires that a majority of the full board of directors be representative of the community. ANA Br. e-filed 7/14/14, at 7. We agree. Section 1336.33(a) states, “If the applicant, other than a tribe or an Alaska Native Village government, is proposing a project benefitting Native Americans or Native Alaskans, or both, it must provide assurance that its duly elected or appointed board of directors is representative of the community to be served.” (Emphasis added.) The plain language thus requires that the applicant’s board of directors be representative of the community to be served. As already noted, the grant applications here identified Citadel, a nonprofit organization, as the applicant. Accordingly, the board of directors of that nonprofit organization was required to be representative of the community to be served.

Contrary to what Citadel argues, moreover, the reference in the 2011 *Federal Register* notice to the “majority of board members approving the project proposal” does not show that ANA interpreted the regulation as allowing an applicant to meet the community representation requirement based on the composition of a subgroup such as Citadel’s Hawaiian Pacific Islander Committee. The policy directive elsewhere requires that an application must include “documentation . . . stating approval of the proposed project . . . in the form of a Board Resolution.” As the notice pointed out, ANA wanted to ensure that the applicant organization will support the proposed project. There is no indication that a resolution passed only by a Board committee could satisfy the requirement for a “Board resolution” approving the project. Thus, we see no basis for reading the phrase “board members approving the project proposal” as permitting an applicant to treat a Board committee as if it were the applicant’s board of directors for purposes of meeting the requirement for community representation, simply because the committee members approved the project.

The 2011 notice also requires an applicant to “submit documentation that identifies each board member by name and indicates his/her affiliation or relationship to at least one of ANA’s four categories of community representation[.]” If an applicant could meet the community representation requirement based on the composition of a subgroup of the board of directors, there would be no reason to require the application to indicate how “each board member” meets the representation requirement. This language is therefore inconsistent with Citadel’s reading of the phrase “board members approving the project proposal” in the same *Federal Register* notice.

Even if the regulation on its face did not preclude a determination by ANA that the members of Citadel's Hawaiian Pacific Islander Committee constituted Citadel's Board of Directors for purposes of the community representation requirement, we could not find on the record before us that the committee in fact constituted Citadel's Board for this purpose. Citadel alleges that "Board meeting minutes from January 16, 2014" show that "it was motioned and approved for the [Hawaiian Pacific Islander Committee] to act in the capacity of governing board for any programs funded by the ANA." Citadel Br. e-filed 8/18/14, 5<sup>th</sup> page. However, the record for this appeal does not include a copy of either the meeting minutes or Citadel's bylaws. Accordingly, we cannot determine whether Citadel's Board of Directors was authorized to delegate all decision-making relating to the SEDS and SEEDS grants to the Hawaiian Pacific Islander Committee or whether such a delegation was in fact made. Citadel concedes that if there were no such delegation, requiring a "mere subset of the Board" to be representative of the community to be served "would not accomplish the goals of ANA. . .[to] ensure[] that. . .the applicant applying for the Federal grant . . . is sufficiently representative of the Native American community to warrant ANA funding." *Id.* 8<sup>th</sup> page.

Accordingly, we conclude that ANA properly determined, based on Citadel's applications for the two grants, that Citadel did not meet the community representation requirement in section 1336.33(a).

2. There is no basis for finding that ANA was estopped from enforcing the community representation requirement here.

Citadel takes the position that it "should be deemed eligible" for the grants at issue because it "followed directions as provided by the Technical Assistance Specialist" regarding the community representation requirement. Appeal letter dated 5/27/14. On March 13, 2014, Citadel's Executive Director sent an e-mail to an ANA mailbox listed in the funding announcements as a "Program Office Contact," stating as follows:

I'm writing to submit a question regarding board composition for the SEDS & SEEDS grants. We currently serve the Pacific islander community and have an advisory board comprised of native Pacific islanders that the general board succeeds [*sic*] to as the governing board in all matters relating to that population. This is stipulated in our bylaws. Will this suffice or do we need to add the Pacific islander advisory board to our general board?

*Id.* 2<sup>nd</sup> attachment; *see also* ANA Exs. 1, at 43; 2, at 45. The following day, the Executive Director received a reply by e-mail stating "Please contact our Training and Technical provider at 1-888-788-8466 for further assistance." *Id.* On March 19, Citadel's Program Director sent an e-mail to a Technical Assistance Specialist in the Western Region T/TA Center (an ANA contractor) which was nearly identical in content

to the Executive Director's March 13 e-mail. (The March 19 e-mail used the word "yields" instead of "succeeds.") *Id.* 3<sup>rd</sup> attachment. The Technical Assistance Specialist replied by e-mail on the same date, stating: "As long as you make note of this, you should be okay." *Id.* The reply does not give any basis for this opinion, nor provide any definitive assurance that ANA will accept the described arrangement as meeting the representation requirement.

Citadel nonetheless in effect asks us to estop ANA from applying the community representation requirement in section 1336.33(a) based on the ANA contractor's reply to Citadel's March 19 e-mail. Even if the ANA contractor's reply more clearly indicated that Citadel did meet the community representation requirement based on the composition of its Hawaiian Pacific Islander Committee, we conclude that this reply would not estop ANA from finding Citadel ineligible for the grants at issue.

It is well-established that "the government cannot be estopped absent, at a minimum, a showing that the traditional requirements for estoppel are present (i.e., a factual misrepresentation by the government, reasonable reliance on the misrepresentation by the party seeking estoppel, and harm or detriment to that party as a result of the reliance) and that the government's employees or agents engaged in 'affirmative misconduct.'" *Oaks of Mid City Nursing & Rehab. Ctr.*, DAB No. 2375, at 31 (2011), citing *Office of Personnel Management v. Richmond*, 496 U.S. 414, 421 (1990), and *Pacific Islander Council of Leaders*, DAB No. 2091 (2007), at 12 ("[e]quitable estoppel does not lie against the federal government, if indeed it is available at all, absent at least a showing of affirmative misconduct."). The traditional elements of estoppel were not met here because Citadel could not reasonably rely on any alleged advice that Citadel could meet the community representation requirement based on the composition of its Hawaiian Pacific Islander Committee. As discussed above, such advice would be inconsistent with the plain meaning of the regulation, and is not supported by any language in either the 2005 or the 2011 *Federal Register* notice. Moreover, Citadel does not claim that the email reply by the Technical Assistance Specialist constituted affirmative misconduct, nor does there appear to be any basis for such a claim. *See, e.g., Huron Potawatomi, Inc.*, DAB No. 1889, at 5 (2003) ("An allegation that incorrect advice was provided by the Division of Payment Management is not evidence of affirmative misconduct.")<sup>4</sup>

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<sup>4</sup> Apparently in response to ANA's assertion that there could be no estoppel because the Technical Assistance Specialist was a contractor rather than a government employee (ANA Br. dated 7/14/14, at 8-9), Citadel argues that a statement made by an ANA employee after ANA determined that Citadel was ineligible for the grants is evidence of affirmative misconduct. Citadel Br., e-filed 8/18/14, 9<sup>th</sup> page. That statement could not be a basis for estoppel since Citadel obviously did not rely on it in submitting its grant applications.

Citadel also asserts:

Public interest for the community we serve has already suffered undue damage by the denial of eligibility. This region of Southern California is flooded with poverty, underrepresented minority such as Native Hawaiians and Pacific Islander in jobs that allow them to be self-sufficient [*sic*]. This population spent many hours planning and getting approval from elders as is the practice in this population. The planning for this program had provided hope for change and opportunity for the population. The elders were outraged when they learned of the denial of eligibility. Client attendance has waned, since learning of the denial. Citadel had begun to offer services that would prepare the community for the new programs.

Citadel Br. e-filed 8/18/14, 9th and 10th pages.<sup>5</sup> To the extent Citadel intends this as an argument for reversing ANA's determination of ineligibility, that argument is unavailing. The Board is bound by all applicable laws and regulations (45 C.F.R. § 16.14) and has no authority to render decisions unsupported by a legal basis, notwithstanding any equitable considerations.

3. Citadel's allegations on appeal that the majority of its Board of Directors met the community representation requirement are not an adequate basis for reversing ANA's finding that Citadel was ineligible for the FY 2014 grants.

Citadel argues that “[w]hen considering our entire board we would still meet the [community representation] requirement” because three Board members in addition to the five Board members on the Hawaiian Pacific Islander Committee, or a total of eight of the 14 Board members, fell into one of the four categories of representatives of the community served specified in the 2011 policy directive. Citadel Br. e-filed 7/14/14, 10<sup>th</sup> page.<sup>6</sup> This is not an adequate basis for reversing ANA's finding that Citadel was ineligible for the grants at issue.

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<sup>5</sup> Citing *Perez-Mejia v. Holder*, 663 F.3d 403 (9th Cir. 2011), ANA stated that a “party seeking to raise estoppel against the government must establish affirmative misconduct going beyond mere negligence; even then, estoppel will only apply where the government’s wrongful act will cause a serious injustice, and the public’s interest will not suffer undue damage by imposition of the liability.” ANA Br. e-filed 7/14/14, at 9 (emphasis added). Citadel appears to have misread this statement to mean that the affirmative misconduct must cause harm to the non-federal party’s interests.

<sup>6</sup> In its initial submission, Citadel stated that two Board members in addition to the five Board members on the Hawaiian Pacific Islander Committee, or a total of seven of the 14 Board members, fell into one of the four categories. Appeal letter dated 5/17/14. As ANA pointed out, however, 50% does not comprise a majority of the Board. ANA Br. e-filed 7/14/14, at 9.



Section 1336.33(a) requires that “the applicant . . . must provide assurance that its . . . board of directors is representative of the community to be served.” As already noted, the 2005 and 2011 *Federal Register* notices as well as the SEDS and SEEDS funding announcements clearly indicated that applications submitted without documentation showing that the applicant met the community representation requirement would not be considered. For the reasons discussed above, the “Assurance of Community Representation” in Citadel’s grant applications did not demonstrate that Citadel met the community representation requirement. Even if the information about the affiliation of additional Board members provided in Citadel’s brief establishes that Citadel met that requirement when it applied for the grants, ANA reasonably interpreted the regulation to preclude consideration of documentation of community representation that is provided after the application due date in determining an applicant’s eligibility. To read the regulation otherwise would make it difficult, if not impossible, for ANA to process grant applications and award grants in a timely fashion. Indeed, the regulations provide that if we determine that an applicant is eligible, “such eligibility shall not be effective until the next cycle of grant proposals are considered by the Administration for Native Americans.” 45 C.F.R. § 1336.35(h).

As ANA notes, however, Citadel may apply for both SEDS and SEEDS grants in the next grant cycle and could at that time make a “showing of community representation” based on “a listing of all Board members showing that a majority of such members meet the community representation criteria.” ANA Br. e-filed 9/8/14, at 7.

### **Conclusion**

Based on the foregoing reasons, we uphold ANA’s determination that Citadel was ineligible for the FY 2014 SEDS and SEEDS grants.

\_\_\_\_\_/s/  
Leslie A. Sussan

\_\_\_\_\_/s/  
Constance B. Tobias

\_\_\_\_\_/s/  
Judith A. Ballard  
Presiding Board Member