

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Department of Health and	)	DATE: July 14, 1994
Human Services,	)	
	)	
- v. -	)	Docket No. 93-504-1
	)	Decision No. CR322
Rosebud Sioux Tribe,	)	
	)	
Respondent.	)	

DECISION

This compliance proceeding came before me pursuant to the November 23, 1992 Answer filed by Respondent, the Rosebud Sioux Tribe (Tribe), to contest the allegations contained in the "Notice of Opportunity for a Hearing" (Notice) issued by the United States Department of Health and Human Services (HHS) on November 6, 1992.

HHS alleged in its Notice that the Tribe received various federal domestic aid grants administered by HHS. As a condition for receiving said grants, the Tribe allegedly gave HHS assurances that it would comply with section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, as amended by Pub. L. No. 93-516 and 95-602, 29 U.S.C. § 794 (Rehabilitation Act), and the agency's implementing regulations. HHS charged in its Notice that the Tribe violated the Act, HHS' implementing regulations, and the Tribe's assurance to HHS (Assurance of Compliance) by discriminating against William Bettelyoun, a tribal employee, solely on the basis of his handicap (i.e., his infection with the human immunodeficiency virus (HIV), a virus that causes Acquired Immune Deficiency Syndrome (AIDS)). This discrimination was alleged to have begun some time after his hire in June 1988 and continued until August 25, 1988, when Mr. Bettelyoun resigned from his employment due to an allegedly hostile work environment. HHS contended also that Mr. Bettelyoun was a qualified handicapped person as defined in 45 C.F.R. § 84.3(k) and that the Tribe refused to remedy its illegal actions by providing back pay to Mr. Bettelyoun and by reinstating Mr. Bettelyoun to the job from which he had resigned, as

requested by the Office for Civil Rights (OCR) of HHS.<sup>1</sup> As relief, HHS asked for authorization to terminate and deny all HHS-administered financial assistance to the Tribe.

The Tribe answered that it lacked sufficient and specific information for either admitting or denying that it was a recipient of certain federal grants administered by HHS or that it had submitted an Assurance of Compliance to HHS.<sup>2</sup> The Tribe has maintained from the outset of these proceedings that I lack jurisdiction over this action. Prior to the in-person hearing, the Tribe sought dismissal of this action based on a number of theories, including Mr. Bettelyoun's failure to file his complaint with OCR within the 180-day period specified by 42 C.F.R. § 80.7 and the Tribe's alleged right to claim sovereign immunity. Tribe Memorandum in Support of Affirmative Defenses (Mem. Supp. Aff. Def.).

For the reasons explained more fully below and in my prior rulings, I denied the Tribe's earlier filed motions to dismiss and allowed the parties to put on evidence in support of their respective positions.

During the week of May 10, 1993, I heard considerable evidence concerning what occurred during Mr. Bettelyoun's very brief employment (two months and 19 days) with the Tribe<sup>3</sup> and why such events may have occurred. I heard evidence also as to whether actions the Tribe may have taken against Mr. Bettelyoun during his employment are subject to review under the provisions of the Rehabilitation Act, the agency's implementing regulations, or any Assurance of Compliance the Tribe may

---

<sup>1</sup> The Notice also contained additional allegations concerning the Tribe's non-compliance with certain procedural requirements of the Rehabilitation Act. The parties later resolved the procedural issues by agreement. Transcript (Tr.) 6; Joint Exhibit (J. Ex.) 1.

<sup>2</sup> During its investigation, OCR found no evidence that the Tribe had submitted any Assurance of Compliance (HHS Form 641) required by section 504 of the Rehabilitation Act. HHS Ex. 31 at 11; see also, 45 C.F.R. § 80.4. Later, HHS introduced copies of four Assurances of Compliance executed by the Tribe between 1969 and 1990. HHS Ex. 18a - d.

<sup>3</sup> For the sake of convenience, I will refer to Mr. Bettelyoun's employment by or with the Tribe in discussing his work from June 6, 1988 until August 25, 1988. As discussed herein, the Resource Development Office of the Tribe hired Mr. Bettelyoun on June 6, 1988, but prior to his resignation on August 25, 1988, he was reassigned to work for another department of the Tribe.

have executed for that period of time. In addition, I heard testimony concerning the consulting work Mr. Bettelyoun performed for the Indian Health Service (IHS) of HHS while he was employed by the Tribe and after he allegedly resigned involuntarily, the work he performed for the corporation he formed after he allegedly resigned involuntarily, his reasons for filing his complaint with OCR approximately 16 months after he left the Tribe's employ, and OCR's explanations for deciding to investigate his complaint.

Also during the hearing, HHS confirmed the information introduced by the Tribe that the Social Security Administration (SSA) of HHS had determined Mr. Bettelyoun to be disabled and was paying him benefits under the Social Security Act. E.g., Tr. 1134. I recessed the hearing on May 13, 1993 to enable the parties to further develop the ensuing credibility, medical, and legal issues. Tr. 1128 - 36. See also, September 28, 1993 letter by direction of administrative law judge (ALJ).

During the following months, HHS attempted to locate the records pertaining to SSA's determination of Mr. Bettelyoun's disability and to secure Mr. Bettelyoun's consent for disclosing such records in this proceeding. Mr. Bettelyoun has not given such consent or made himself available to give further testimony which might clarify questions such as the nature of the impairments that have resulted in the agency's disability determination, the effects of his medical condition, and his ability to perform the work at issue.

Because Mr. Bettelyoun did not respond to HHS' messages, I sent a letter to Mr. Bettelyoun at HHS' request, directing him to contact counsel for HHS concerning this case. August 19, 1993 letter of ALJ. He failed to respond to my letter as well. See September 28, 1993 letter by direction of ALJ. On September 28, 1993, I ordered the record closed. Id. Even though Mr. Bettelyoun was unavailable and did not consent to release his disability records, HHS asked me to proceed to decision in this case.

I may proceed to decide the questions of how the Tribe treated Mr. Bettelyoun, and the legal effects of such treatment, only if I conclude that the Tribe was subject to the proscriptions of section 504 of the Rehabilitation Act and HHS' implementing regulations during the period in controversy. If the Tribe was not subject to the anti-discrimination provisions of said law and HHS' regulations that provide for this compliance proceeding, then I lack jurisdiction over the controversy, and this action brought by HHS must be dismissed.

In the following sections, I will first consider the evidence bearing on the issue of whether the Tribe was

subject to the requirements imposed by Section 504 during the period of time the Tribe allegedly discriminated against Mr. Bettelyoun. I conclude that HHS failed to prove by a preponderance of the evidence that the Tribe received HHS funds during the period of alleged discrimination. Therefore, HHS has failed to prove that the Tribe was obligated to conduct itself in accordance with section 504 during the relevant time period. For these reasons, I find that I lack jurisdiction over this matter, and the compliance proceeding against the Tribe must therefore be dismissed.

However, in order to expedite a resolution of all other potentially dispositive controversies in this case, I will proceed also to discuss the findings I would make if HHS had proven the Tribe's receipt of HHS funds during the period of alleged discrimination against Mr. Bettelyoun. Not making these alternative findings would be unjust to the parties each of which has devoted considerable resources to its defense over the past years. Thus, I conclude in the alternative that HHS was not precluded from bringing this compliance proceeding because Mr. Bettelyoun unreasonably delayed filing his complaint with OCR. Also, I conclude in the alternative that HHS has failed to prove by a preponderance of the evidence that the Tribe discriminated against Mr. Bettelyoun in violation of section 504 of the Rehabilitation Act or the agency's implementing regulations.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### Undisputed background facts and chronology of events<sup>4</sup>

1. The Tribe has approximately 20,000 members and is located in Rosebud, South Dakota. Tr. 1102; Tribe Response to Request for Admissions (RRA) No. 1.
2. The Tribe currently receives federal financial assistance from HHS. Tribe RRA No. 4.
3. William Bettelyoun is an enrolled member of the Tribe. Tr. 38.
4. Mr. Bettelyoun was hospitalized at the IHS Hospital in Rosebud, South Dakota, from May 27, 1988 to June 5, 1988. Tribe RRA No. 22.

---

<sup>4</sup> The headings included in my Findings of Fact and Conclusions of Law (FFCL) are intended as aids to the reader. The headings are not Findings of Fact or Conclusions of Law and they do not change the meaning of any Finding of Fact or Conclusion of Law.

5. During Mr. Bettelyoun's hospitalization he was tested for HIV infection. Tribe RRA No. 23.

6. HIV is the virus that causes AIDS. Tribe RRA No. 20.

7. Mr. Bettelyoun's test was positive for antibodies to the HIV virus. Tribe RRA No. 24; Tr. 61.

8. The Tribe's Resource Development Office (RDO) is responsible for the planning and development of programs and projects operated by the Tribe and may provide technical assistance to other Tribal departments operating programs and projects developed by RDO. Tribe RRA No. 79, 81.

9. Operation of the RDO, including the salaries of its employees, is funded by the Bureau of Indian Affairs of the United States Department of the Interior. Tribe Ex. 1.

10. Earl Bordeaux, Jr., Director of the RDO, recommended that Mr. Bettelyoun be hired for the position of Senior Planner/Assistant Director of the RDO, effective June 6, 1988. Tribe RRA No. 30.

11. Mr. Bettelyoun's education and experience qualified him to perform the essential functions of the position of Senior Planner/Assistant Director of the RDO. See Tribe RRA No. 28; Tribe Ex. 2; HHS Ex. 4.

12. Mr. Bettelyoun began work as a Senior Planner/Assistant Director of the RDO on June 6, 1988, the day following his release from the IHS Hospital. Tribe RRA No. 25.

13. On or about June 14, 1988, Dr. John Jereb of the IHS Hospital informed Mr. Bettelyoun that he had tested positive for the virus that causes AIDS. Tr. 73; Tribe Proposed Finding (PF) No. 10; HHS PF No. 22.

14. After Mr. Bettelyoun assumed his position with RDO, Mr. Bordeaux contacted a physician at the IHS Hospital to obtain information on Mr. Bettelyoun's condition. Tribe RRA No. 33.

15. Dr. Wayne Foster, a physician at the IHS Hospital, informed Mr. Bordeaux that Mr. Bettelyoun had tested positive for antibodies to HIV. Tribe RRA No. 34; Tr. 995, 997-1001.

16. By written notification dated August 25, 1988, Mr. Bettelyoun ended his employment with the RDO on that date. Tribe RRA No. 49; HHS Ex. 7.

17. On August 26, 1988, the Public Health Service (PHS) of HHS, of which IHS is a component, executed a contract

for Mr. Bettelyoun's services. HHS PF No. 77, 78; Tribe PF No. 31; Tribe Ex. 25.

18. Pursuant to the contract, Mr. Bettelyoun made speeches for PHS during the period August 31, 1988 to December 31, 1988, for which he was paid \$6,500. HHS PF No. 77, 78; Tribe PF No. 31.

19. On August 23, 1989, Mr. Bettelyoun filed a civil action against the United States, seeking to recover \$300,000 in compensatory damages and \$100,000 in punitive damages allegedly caused by the IHS Hospital's release of confidential medical information. Complaint in Bettelyoun v. U.S., No. 89-3028 (D.S.D. filed August 23, 1989) (attached to Tribe Mem. Supp. Aff. Def.).

20. Mr. Bettelyoun's suit against the United States alleged that among the damages he suffered was the loss of his job with the Tribe's RDO. Id.

21. In October 1989, Mr. Bettelyoun filed an application with SSA for disability benefits, and he was found eligible for and granted disability benefits. HHS PF No. 82.

22. At some time in December 1989, Mr. Bettelyoun met Vada Kyle-Holmes, Regional Manager, OCR, Region VIII, at an HHS-sponsored workshop in Washington, D.C., where he was making a presentation regarding AIDS and discrimination. Tr. 170; HHS PF No. 84.

23. Ms. Kyle-Holmes informed Mr. Bettelyoun that her agency investigated handicapped discrimination complaints and invited him to call her regarding his experiences. Tr. 170, 620; HHS PF No. 84.

24. By letter dated December 28, 1989, Mr. Bettelyoun filed a complaint with OCR, alleging that he had been forced to resign because of his infection with HIV. Tribe RRA No. 18; HHS Ex. 19.

25. Ms. Kyle-Holmes determined that OCR should accept Mr. Bettelyoun's complaint for investigation and that the 180-day filing deadline should be waived. Tribe RRA No. 19; HHS Ex. 28.

26. Ms. Kyle-Holmes's stated reasons for accepting Mr. Bettelyoun's complaint for filing included her concerns that the IHS Hospital was also a subject of Mr. Bettelyoun's complaint, and the public should perceive HHS as enforcing the laws within its own agencies, such as PHS. HHS Ex. 28.

27. In an Order dated September 26, 1990, the federal district court dismissed the case of Bettelyoun v. U.S., based on a settlement agreement in which the United

States agreed to pay Mr. Bettelyoun \$30,000 in exchange for his agreement to dismiss the action and to waive any other claims arising out of the incidents alleged. Attachments to Tribe Mem. Supp. Aff. Def.

28. In a letter of findings (LOF) dated September 26, 1991, OCR notified the Tribal Chairman that its investigation of the complaint filed by Mr. Bettelyoun revealed that the Tribe was not in compliance with section 504 of the Rehabilitation Act and its implementing regulations. Tribe RRA No. 57; HHS Ex. 31.

29. The LOF stated that the Tribe had discriminated against Mr. Bettelyoun solely on the basis of handicap, in violation of 45 C.F.R. §§ 84.4(a), 84.11(a)(1), and 84.11(b)(9). Tribe RRA No. 57; HHS Ex. 31.

30. The LOF stated that the Tribe had not complied with the procedural requirements of 45 C.F.R. §§ 84.7(b), 84.8, 84.52(b), and 84.52(d). Tribe RRA No. 57; HHS Ex. 31.

31. The LOF delineated the specific remedial actions, including bringing the Tribe's procedures into compliance with the regulations and reinstating Mr. Bettelyoun to his former job and making him whole with back pay, which OCR deemed necessary for the Tribe to comply with section 504 of the Rehabilitation Act and its implementing regulations. Tribe RRA No. 58, 59.

32. HHS and the Tribe attempted informally to resolve the issues raised by the LOF. HHS PF No. 93; Tribe RRA No. 60 - 62.

33. On November 6, 1992, HHS commenced this proceeding by filing a Notice of Opportunity for Hearing with the Civil Rights Reviewing Authority.

34. HHS and the Tribe subsequently negotiated a resolution of OCR's findings with respect to the Tribe's procedural violations of section 504. J. Ex. 1.

HHS has failed to establish subject matter jurisdiction.

35. Section 504 of the Rehabilitation Act prohibits subjecting an "otherwise qualified individual" with "handicaps" to discrimination solely by reason of her or his handicap under any program or activity receiving federal financial assistance. 29 U.S.C. § 794.

36. For purposes of this action, "federal financial assistance" means any grant, loan, contract, or other things of value provided by HHS to the Tribe. See 45 C.F.R. § 84.3(h).

37. HHS' right of action, the hearing procedures used, the relief sought, and my authority to adjudicate the wrongs alleged are all derived from regulations that implement and enforce section 504 of the Rehabilitation Act.

38. HHS specifically alleged and sought to prove that the Tribe received HHS funds during the period in which the acts of alleged discrimination occurred: from some time after June 14, 1988 to August 25, 1988. Notice at 4 (para. 3); HHS PF No. 14, 19, 20.

39. To establish subject matter jurisdiction in this proceeding, HHS has the burden of proving by a preponderance of the evidence that, during the period from June 14 to August 25, 1988, the Tribe was in receipt of HHS funds and used the HHS funds in a program or activity under which Mr. Bettelyoun was subjected to the alleged acts of discrimination. FFCL 35 - 38.

40. The evidence and filings of record cited by HHS do not support its contention that the Tribe conceded or admitted to the receipt of HHS funds during Mr. Bettelyoun's employment. See HHS Posthearing Brief (Posthrg. Br.) at 52 and matters cited therein.

41. The Tribe denied receiving HHS funds during federal fiscal year 1988 (October 1, 1987 to September 30, 1988). Tribe RRA No. 7.

42. HHS Reports entitled "Financial Assistance by Geographic Area," show that certain HHS funds were "obligated" to the Tribe, Tribal Council, and Indian Health Management, Inc., in Rosebud, South Dakota, during federal fiscal years 1988 through 1991. HHS Ex. 17c, d.

43. An Assurance of Compliance is signed by an applicant for federal financial assistance from HHS. 45 C.F.R. § 84.5(a), (b).

44. During OCR's investigation, it found no Assurances of Compliance filed by the Tribe as required by HHS regulations. After the present action was initiated, HHS introduced only four Assurances of Compliance signed by the Tribe since July of 1969, along with HHS publications listing many HHS grants as having been obligated to the Tribe during fiscal years 1988 through 1991. HHS Ex. 31 at 4; HHS Ex. 17a - d; 18a - d.

45. When faced with the discrepancy between the number of Assurances of Compliance and the number of grants HHS purports to have given to the Tribe, OCR did not question the accuracy of the information contained in the HHS publications; it concluded instead that the Tribe was in violation of the regulation that required the filing of Assurances of Compliance. HHS Ex. 31 at 4.



46. HHS introduced no evidence explaining why its employees attributed to the Tribe's receipt the HHS funds that were separately listed in the HHS publications as having been obligated to the Tribal Council or to Indian Health Management, Inc. HHS Ex. 17a - d; Tr. 1099; HHS Supplemental Brief (Supp. Br.) at 8.

47. In these proceedings, HHS refers to Indian Health Management, Inc., listed in its exhibit 17a - d as "Rosebud Health Management, Inc." See HHS Request for Admissions (RA) No. 8, 11.

48. The Tribe asserts that the health management corporation referenced by HHS is a privately-owned entity. Tribe RRA No. 8, 11.

49. HHS' witness who ascertained jurisdiction for the agency did not know whether "Rosebud Health Management, Inc." was a private corporation. Tr. 1099.

50. HHS failed to prove by a preponderance of the evidence that funds obligated to Indian Health Management, Inc. should be treated as having been obligated to the Tribe. FFCL 46 - 49.

51. The Tribe challenged the accuracy of HHS' conclusion that the Tribe received HHS funds during the period at issue by, among other things, asking for the audits or reports that were relied upon by HHS. Tr. 1096.

52. The Tribe did not waive objections to the accuracy of the information contained in HHS Exhibit 17c, and the regulation at 45 C.F.R. § 81.83 does not apply to bar the Tribe's challenge to the contents of said exhibit. FFCL 51; 45 C.F.R. § 81.83

53. After the Tribe specifically objected to the unreliability of HHS' compilations used to establish jurisdiction, the only audit report referenced and introduced by HHS is for the Tribe's receipt of HHS funds during federal fiscal year 1989, which began after Mr. Bettelyoun had resigned. HHS Ex. 26; Tr. 1096 - 97.

54. Assuming that certain HHS funds were "obligated" to the Tribe during federal fiscal year 1988, HHS did not offer proof on the meaning of "obligated" or on whether the funds obligated to an entity during a fiscal year are also given to or used by that entity during the same fiscal year. FFCL 42; HHS Ex. 17c at 2, 4.

55. HHS did not prove by a preponderance of the evidence that the Tribe received or used HHS funds during federal fiscal year 1988. FFCL 46 - 54.

56. HHS did not offer proof on whether HHS obligated, or the Tribe received, the funds listed in HHS Exhibit 17c for the full 12 months of federal fiscal year 1988.

57. HHS did not prove by a preponderance of the evidence that the funds listed in HHS Exhibit 17c were obligated, received, or used by the Tribe during a period that covered the two months and 12 days of the Tribe's alleged discrimination (June 14 to August 25, 1988) against Mr. Bettelyoun. FFCL 51, 52, 54 - 56.

58. The Tribal Chairman signed Assurances of Compliance dated July 9, 1969, January 14, 1987, March 18, 1988, and February 28, 1990. Tribe RRA No. 16, 17; HHS Ex. 18a - d.

59. The Tribe's execution of an Assurance of Compliance does not signify that HHS has already extended federal financial assistance to the Tribe. 45 C.F.R. § 84.5(a), (b); HHS Ex. 18a, b, c at 1, d.

60. The Assurance of Compliance does not specify when, if, or for what duration HHS will extend financial assistance to the Tribe. 45 C.F.R. § 84.5(a), (b); HHS Ex. 18a, b, c at 1, d.

61. The Tribe's obligations under the Assurance of Compliance arise only if HHS extends federal financial assistance to the Tribe. 45 C.F.R. § 84.5(a), (b); HHS Ex. 18a, b, c at 1, d.

62. The Tribe's obligations under the Assurance of Compliance last only for the period during which federal financial assistance is extended by HHS to the Tribe. 45 C.F.R. § 84.5(b)(3); HHS Ex. 18a, b, c at 1, d.

63. In order to use an Assurance of Compliance as material evidence of jurisdiction, HHS needed to prove also that the Assurance resulted in HHS' extending federal financial assistance to the Tribe during the period that covered the two months and 12 days of alleged discrimination and that the funds from HHS were used by the Tribe in a program or activity under which Mr. Bettelyoun was subjected to the discrimination alleged by HHS. FFCL 58 - 62.

64. There is no evidence that any Assurance of Compliance of record corresponds with any of the funds which, according to HHS Ex. 17c, were obligated to the Tribe during federal fiscal year 1988.

65. The Assurances of Compliance of record do not show for what programs they were being submitted, the amount of HHS funds sought, or the period for which HHS funds were sought. HHS Ex. 18a - d.

66. The only grant application of record shows that, on or about May 2, 1988, the Tribe requested \$25,000 in financial assistance from HHS for the Spotted Tail Crisis Center (Spotted Tail Proposal). HHS Ex. 18c at 2.

67. The Spotted Tail Proposal stated that the Tribe intended the project to start July 1, 1988 and continue for 12 months. HHS Ex. 18c at 2.

68. HHS offered no evidence explaining what actions HHS took in response to the Spotted Tail Proposal, nor did HHS explain the significance of the notations in section III of the application form, which is labeled "Federal Agency Action" and contains a monetary amount that does not correspond to anything contained in HHS' publications of obligated funds for federal fiscal year 1988. HHS Ex. 17c, 18c at 2.

69. RDO quarterly reports for 1988 give rise to a reasonable inference that, if the Tribe received any HHS funds for its Spotted Tail Proposal, the Tribe received them after September of 1988. HHS Ex. 14a, 14b.

70. HHS failed to prove by a preponderance of the evidence that federal financial assistance, in the form of HHS funds, was extended to or received by the Tribe at any time during the period when Mr. Bettelyoun was employed by the Tribe and allegedly subjected to employment discrimination by the Tribe. FFCL 51 - 69.

71. HHS' failure to prove the Tribe's receipt of HHS funds during the period of alleged discrimination means that HHS also failed to prove that Mr. Bettelyoun was subjected to discrimination by the Tribe under a program or activity for which the Tribe was receiving HHS funds. FFCL 70.

72. I lack jurisdiction over this compliance action. FFCL 35 - 71.

If HHS had established the existence of jurisdiction, I would find that HHS is entitled to proceed to a decision on the merits of its allegations notwithstanding the unreasonable delay incurred by Mr. Bettelyoun in filing his complaint with OCR.

73. Mr. Bettelyoun's complaint to OCR was filed many months outside the 180-day period specified in the regulations. 45 C.F.R. § 80.7(b); FFCL 16, 24.

74. The Regional Manager for OCR was delegated the discretion to decide whether to waive the filing period for complaints such as Mr. Bettelyoun's. HHS Ex. 27 at 9.

75. Were I delegated the authority for determining de novo whether to waive the 180-day filing period, I would not have accepted Mr. Bettelyoun's reasons for delay at face value or found them persuasive, as did OCR's Regional Manager.

76. I lack authority to modify the OCR Regional Manager's exercise of her discretion to accept Mr. Bettelyoun's complaint for investigation. FFCL 74.

77. The 180-day period relied on by the Tribe does not apply to "other information" of noncompliance received by OCR, which can also be the basis for an OCR investigation and can result in HHS' bringing a compliance proceeding for termination of HHS funding, for example, in the present forum. 45 C.F.R. § 80.7(c); Tr. 648 - 51.

78. Whether or not OCR should have accepted Mr. Bettelyoun's complaint for filing, the Tribe has not proven that OCR and HHS were precluded from bringing this compliance action because Mr. Bettelyoun delayed filing his complaint. FFCL 73 - 77.

If I had the authority to decide the merits of the discrimination alleged by HHS, I would find that HHS has failed to prove by a preponderance of the evidence that Mr. Bettelyoun has been a qualified handicapped person at all times relevant to this proceeding.

79. Mr. Bettelyoun has a record of being infected with HIV, an impairment which substantially limits one or more of his major life activities, within the meaning of 45 C.F.R. § 84.3(j)(1). HHS Ex. 10, 11.

80. Mr. Bettelyoun is a "handicapped person" within the meaning of 45 C.F.R. § 84.3(j). FFCL 79.

81. A "qualified handicapped person" in the employment context means a handicapped individual who, with reasonable accommodation, can perform the essential functions of the job in question. 45 C.F.R. § 84.3(k)(1).

82. HHS has the burden of proving by a preponderance of the evidence that Mr. Bettelyoun has been able to perform the duties of a Senior Planner/Assistant Director of RDO during his employment and following his resignation, for which period HHS/OCR has sought job reinstatement and "make whole" back pay for Mr. Bettelyoun in its efforts to bring about voluntary compliance by the Tribe. See DHHS v. Westchester County Medical Center, DAB CR191, at 34, 51, aff'd, DAB 1357 (1992); FFCL 31.

83. HHS did not allege, prior to hearing, that Mr. Bettelyoun required reasonable accommodation or that the

Tribe failed to provide such accommodation. Notice at 5 - 7.

84. Mr. Bettelyoun testified that he has never come to the realization that he was unable to perform his RDO job due to his health. Tr. 201.

85. Mr. Bettelyoun released for use in this litigation only his medical records from the IHS Hospital for the period from January 1988 through December 1989. HHS Ex. 9.

86. The two pages of Mr. Bettelyoun's medical records in evidence do not describe Mr. Bettelyoun's symptoms, his emotional state, or his subjective responses to the disease process or the news of his HIV test results. HHS Ex. 10, 11.

87. To support Mr. Bettelyoun's asserted fitness for his prior RDO job, HHS relied also on the testimony of Dr. Harry Brown, who formed the opinion that Mr. Bettelyoun's HIV infection had remained asymptomatic until at least as late as January 1992 based on charts and other medical records not authorized by Mr. Bettelyoun for release in this proceeding. Tr. 1071 - 74.

88. Clinical symptoms of AIDS Related Complex (a disease that is less serious than AIDS but caused by the HIV virus) include loss of appetite, weight loss, fever, night sweats, skin rashes, diarrhea, tiredness, lack of resistance to infection, or swollen lymph nodes. However, the foregoing are also signs and symptoms of many other disease as well, and a physician should be consulted to make the differential diagnosis. HHS Ex. 21c at 7.

89. The medical evidence relied upon by HHS does not establish that all of the significant symptoms that caused Mr. Bettelyoun to be hospitalized from May 27, 1988 until June 5, 1988 (e.g., weight loss of 20 or more pounds, "raging fevers," loss of the ability to taste, loss of the ability to stand or walk) resulted from his HIV infection, as opposed to other impairments. See HHS Ex. 10, 11; Tr. 59 - 62, 312 - 13, 1073 - 74.

90. Individuals' reactions to the HIV virus may differ and may include significant mental health implications which will require the best efforts of mental health professionals. HHS Ex. 21c at 18; Tr. 597.

91. Mr. Bettelyoun felt depressed and under a great deal of emotional pressure after learning of his HIV-positive status and being told by Dr. John Jereb that he might have only two months to two years to live. Tr. 72 - 74; 322.

92. Mr. Bettelyoun needed time off from work after learning of his diagnosis. Tr. 412 - 13, 458.

93. The job of Senior Planner/Assistant Director of the RDO is not a physical job, but entails considerable mental stress. Tr. 1000.

94. The doctors who treated Mr. Bettelyoun and gave opinions concerning his fitness for work were not mental health experts, were not experienced in treating patients with the HIV infection, and did not address the issue of whether Mr. Bettelyoun was mentally or emotionally able to perform satisfactorily the job of Senior Planner/Assistant Director of RDO. Tr. 309, 311, 322, 1069; HHS Ex. 23 at 14.

95. HHS was aware since before the hearing that one of its agencies, SSA, had found Mr. Bettelyoun disabled and, therefore, HHS attempted to block the Tribe's introduction of evidence concerning Mr. Bettelyoun's relationship with SSA and his receipt of benefits. Tr. 376, 874, 887, 1134.

96. HHS did not obtain Mr. Bettelyoun's consent to release the SSA records pertaining to his disability either prior to or after the hearing in this case. Tr. 1134; September 28, 1993 letter by direction of ALJ.

97. Mr. Bettelyoun did not make himself available to give further testimony regarding SSA's award of disability benefits to him or to clarify the state of his health. September 28, 1993 letter by direction of ALJ.

98. In accordance with the definitions contained in the Social Security Act, the finding of disability made by SSA on behalf of the Secretary of HHS means that Mr. Bettelyoun had physical or mental impairment(s) of such severity that he was not only unable to perform his previous work, but he also could not, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. § 404.1505.

99. In accordance with the statute and the regulations promulgated by the Secretary of HHS, HHS should have in its possession and control Mr. Bettelyoun's application containing his written allegations concerning his inability to perform work, as well as the supporting medical proof provided or made available by Mr. Bettelyoun showing that he cannot perform his past work and any other substantial gainful activity of significant numbers in the national economy due to his severe medical problems. 42 U.S.C. §§ 423(a)(1), (d)(2); 20 C.F.R. §§ 404.315(b) - (d), 404.316, 404.1505, 404.1512 - .1516.

100. HHS did not specify the onset of Mr. Bettelyoun's disability as found by SSA, nor whether Mr. Bettelyoun was awarded retroactive benefits.

101. HHS argues that SSA found Mr. Bettelyoun disabled because he had a diagnosis of aseptic meningitis dated June 5, 1988 and positive HIV test results also dated June, 1988. HHS Posthrg Br. at 38; HHS Ex. 10, 11.

102. Applying HHS' theory, Mr. Bettelyoun's impairments should have rendered him unable to perform his RDO job since at least June of 1988, when he began working for RDO. FFCL 101.

103. There is no legal or factual support for HHS' contention that SSA found Mr. Bettelyoun disabled under Social Security Ruling 86-20 and the agency's instructions at POMS DI 24525.001 solely because he had tested positive for HIV and suffered from aseptic meningitis in June 1988. Attachments to HHS Posthrg. Br.

104. Mr. Bettelyoun's failure to release his SSA records and to give further testimony undermines his credibility on the issue of his ability to perform the duties of his former job. FFCL 96, 97.

105. I do not find credible Mr. Bettelyoun's testimony that his HIV infection never affected his ability to work. FFCL 84, 104.

106. I infer from the totality of the record, including the extensive absence of relevant medical evidence concerning Mr. Bettelyoun's health, that either the symptoms of Mr. Bettelyoun's HIV infection have been significantly more severe than presented by HHS, or that Mr. Bettelyoun has other impairments (either related to or independent of the HIV infection) that have rendered him mentally or physically incapable of performing his former RDO job. See, e.g., Tr. 1073 - 74; HHS Ex. 21c at 7; FFCL 21.

107. On the facts of this case, HHS is barred from introducing the theory posthearing that the Tribe discriminated against Mr. Bettelyoun because it failed to make reasonable accommodation to known mental and physical impairments of an otherwise qualified handicapped individual.

108. HHS failed to prove by a preponderance of the evidence that Mr. Bettelyoun is a qualified handicapped individual within the meaning of the Rehabilitation Act. FFCL 82 - 107.

If I had the authority to proceed to the merits of the discrimination alleged by HHS, I would find that HHS has failed to prove that the Tribe's alleged noncompliance with section 504 of the Rehabilitation Act could not be corrected by informal means.

109. To prove that the Tribe violated section 504 of the Rehabilitation Act, HHS is required to establish that it could not secure the Tribe's compliance through informal means. Westchester, DAB CR191, at 51; DAB 1357, at 8.

110. The amount of Social Security payments to Mr. Bettelyoun is relevant to the calculation of back pay required by OCR to make him "whole." FFCL 21, 31.

111. Mr. Bettelyoun's application for disability benefits and the agency's records and findings on that application are relevant to the issue of whether Mr. Bettelyoun should be reinstated to his RDO job, as required by OCR. FFCL 99.

112. HHS and OCR did not make available to the Tribe information or documents concerning the agency's disability findings and payment of benefits to Mr. Bettelyoun.

113. After initiating the compliance proceeding, HHS objected to providing the Tribe with information concerning Mr. Bettelyoun's work for IHS, which is also relevant to OCR's condition that the Tribe pay Mr. Bettelyoun back wages to make him "whole." HHS Objection to Motion for Telephonic Deposition and Information Request at 2 - 3.

114. As a practical matter, HHS' inability to produce Mr. Bettelyoun at present has rendered moot the Tribe's refusal to meet the two conditions specified by OCR for an informal resolution of the discrimination. See FFCL 31, 96, 97.

115. The means used by HHS in its informal attempts to bring about compliance were unreasonable and unfair to the Tribe, and now the conditions set by HHS are impossible for the Tribe to meet. FFCL 112 - 114.

116. HHS has failed to prove that the Tribe's alleged noncompliance with the Rehabilitation Act would not have been remedied by informal means that are fair and reasonable, as contemplated by the law. FFCL 109 - 115.



If I had the authority to decide the merits of the discrimination alleged by HHS, I would find that HHS has failed to prove by a preponderance of the evidence that the Tribe subjected Mr. Bettelyoun to adverse treatment in violation of section 504 of the Rehabilitation Act.

117. Based on Mr. Bettelyoun's testimony, HHS traces the origins of the Tribe's actions at issue to Mr. Bordeaux's allegedly unauthorized discovery and dissemination of the information concerning Mr. Bettelyoun's HIV infection. See, e.g., Tr. 76; HHS PF No. 31.

118. Mr. Bordeaux denied that he discovered Mr. Bettelyoun's medical condition without Mr. Bettelyoun's authorization, or that he had discussed the matter with others for an improper purpose. Tr. 996, 997 - 1000, 1006.

119. Mr. Bordeaux's explanations of his actions and motives are reasonable and consistent with other evidence of record, including Mr. Bettelyoun's prior disclosure concerning his medical diagnosis of Rocky Mountain Spotted Fever (Tr. 76 - 77), the chart notation entered by Dr. Jereb (Tr. 336, 344), the nature of the RDO job (Tribe Ex. 2), and guidelines issued by the federal Office of Personnel Management (HHS Ex. 21g).

120. No actionable employment discrimination is established by HHS' evidence that many Tribal people, without regard for their work relationship to Mr. Bettelyoun, heard about and discussed his HIV infection. The sources of such information, or the participants in such discussions, included Mr. Bettelyoun's aunt, IHS Hospital employees, those who drew inferences from the hospital room to which he had been assigned, and Mr. Bettelyoun himself. E.g., Tr. 403, 411 - 14, 458, 467, 470, 708 - 09, 746, 763 - 64, 767, 879; HHS Ex. 23 at 19, 30.

121. HHS uses Mr. Bettelyoun's experiences and expectations from June 6 to June 14, 1988 (prior to discovery of his HIV infection) as a baseline for measuring whether his experiences from sometime after June 14, 1988 until August 25, 1988 have changed due to his HIV infection. E.g., HHS PF No. 20; Tr. 55 - 59.

122. HHS' comparison is inappropriate due to factors such as the nature of the job orientation that took place during the first few days of work, the new creation of the RDO job assumed by Mr. Bettelyoun, his having worked without a job description at first, and the transfer of Mr. Bettelyoun to another department during July 1988. E.g., Tr. 106, 175, 183, 411 - 13, 455, 765.

123. HHS' evidence concerning Mr. Bordeaux's instructing a cleaning lady to "scrub" the restroom used by the male

RDO employees (Tr. 508; HHS Prop. FF # 7) and concerning a co-worker's spraying disinfectant on her equipment after Mr. Bettelyoun used it (Tr. 705) does not constitute persuasive proof of unlawful disparate treatment condoned or caused by the Tribe. See, e.g., HHS Ex. 12.

124. Even if true, Mr. Bettelyoun's complaints that, due to his HIV infection, Mr. Bordeaux denied him the opportunity to take non-job related trips and receive reimbursement for non-job related travel expenses (e.g., Tr. at 394 - 98) do not constitute evidence of actionable disparate treatment under 45 C.F.R. § 84.4(b)(iii), which applies only to a "qualified handicapped person."

125. Mr. Bettelyoun believed that the Tribe subjected him to harassment solely on account of his handicap by moving his desk to a corner of the RDO office. Tr. 96 - 98.

126. The evidence supporting the conclusion that Mr. Bettelyoun's desk was moved, if at all, in the course of cleaning the office is at least as strong as the evidence suggesting that Mr. Bordeaux moved the desk solely on account of Mr. Bettelyoun's HIV infection. E.g., Tr. 96 - 99, 446, 508 - 28, 712, 1022 - 26, 1047; Tribe Ex. 30.

127. HHS failed to prove by a preponderance of the evidence that Mr. Bettelyoun's desk was moved for a discriminatory purpose. FFCL 126.

128. HHS failed to prove by a preponderance of the evidence that any movement of Mr. Bettelyoun's desk was done as an official act of the Tribe or with the Tribe's knowledge or acquiescence. FFCL 127.

129. Due to her need for a grant writer, Anita Whipple, director of the Tribe's Community Health Representative (CHR) department, requested Mr. Bettelyoun's reassignment to the CHR department with his consent. Tr. 413; 454.

130. Mr. Bordeaux did not request Mr. Bettelyoun's reassignment, was out of town when the reassignment occurred, and checked with Ms. Whipple on Mr. Bettelyoun's whereabouts because the personnel office did not formally note the transfer. Tr. 454 - 55, 1007 - 08, 1013.

131. HHS failed to prove by a preponderance of the evidence that Mr. Bettelyoun was transferred to the CHR office for a discriminatory purpose. FFCL 129, 130.

132. Mr. Bettelyoun's perception that the transfer resulted in adverse treatment of him due to his HIV infection was based on his contentions that he was

initially assigned to work in a storage room of the CHR department, was given no typewriter or telephone to use (Tr. 106 - 08), and that he was later moved into Ms. Whipple's office and required to use a typewriter stand in her office as his desk (Tr. 111).

133. Ms. Whipple explained that there was no private office available in the CHR building, that Mr. Bettelyoun was placed in her office initially because her office was the only office not shared with another worker at the time, that Mr. Bettelyoun used a "student desk" approximately 3.5 feet by 2 feet in size after she had removed her typewriter (Tr. 449). When Mr. Bettelyoun complained that he could not work in her office because of interruptions, she gave him the only other available space in the building, the storage room, along with her typewriter to use (Tr. 434, 449).

134. Ms. Whipple testified that another planner had previously used the storage room to work when he needed quiet time to think. Tr. 450.

135. I find credible Ms. Whipple's testimony that she did not treat Mr. Bettelyoun adversely, but attempted to help him. FFCL 129, 133.

136. The evidence of record supporting the conclusion that Mr. Bettelyoun was assigned to work in the storage room and Ms. Whipple's office due to the unavailability of alternative space in the CHR building is stronger than the evidence that might support the conclusion that he was assigned those locations solely on account of his infection with HIV. FFCL 133 - 135.

137. HHS failed to prove by a preponderance of the evidence that Mr. Bettelyoun was given his workplace assignments in the CHR building for a discriminatory purpose, or that he was given no typewriter or desk to use. FFCL 132 - 136.

138. Mr. Bettelyoun alleged that, because of his HIV infection, others made it more difficult for him to do his work by creating unnecessary and undue delays in providing to him the documents or reference materials he needed. E.g., Tr. 274, 277.

139. Ms. Whipple heard Mr. Bettelyoun say that people were not cooperative in delivering documents to him in a timely manner. E.g., Tr. 437.

140. Mr. Bettelyoun was assigned two projects to do for CHR, one of which involved a training center for AIDS. Tr. 435 - 36.

141. Mr. Bettelyoun told Ms. Whipple he could not complete the projects for CHR within the deadline because

he was having trouble obtaining the necessary statistics, he was worried about his family getting beaten up, he did not know how he felt about himself, and that the subject matter of the project involving AIDS was too close to him. Tr. 437.

142. Mr. Bettelyoun told Ms. Whipple that he planned to return to work for RDO. Tr. 436.

143. There is no evidence suggesting that the RDO work would not have entailed obtaining statistics or data from the same sources used by the CHR.

144. The Vice-Chairman of the Tribe, Vernon "Ike" Schmidt, believed that there were problems with Mr. Bettelyoun's obtaining records from Mr. Schmidt's office because Mr. Bettelyoun's aunt used to have Mr. Bettelyoun do work for her without routing her requests through official channels, and people were frustrated with her. Tr. 925.

145. HHS did not prove by a preponderance of the evidence that any delays Mr. Bettelyoun may have experienced in receiving data were solely due to his HIV infection.

146. HHS did not prove by a preponderance of the evidence that, absent the alleged delays, Mr. Bettelyoun would have been able to complete his assigned work timely and efficiently.

147. No actionable employment discrimination is established by HHS' evidence that extended well beyond the employment setting to matters such as the information related to Mr. Bettelyoun concerning what was said at a party in another town, what his niece experienced at her pre-school, what the Vice-Chairman's girlfriend said to his sister-in-law, and what Mr. Bordeaux's father reportedly said. E.g., Tr. 126, 143, 275, 538.

148. I accord little probative weight to Mr. Bettelyoun's testimony regarding allegedly discriminatory incidents which he did not personally witness, but heard about from others. FFCL 147.

149. I accord little probative weight to the impressions of other people who did not personally witness allegedly discriminatory events, but heard them described by Mr. Bettelyoun, his relatives, or others. FFCL 147.

150. Native Americans often deal with very sad, upsetting, or frightening matters with laughter or jokes. Tr. 486, 501 - 02.

151. Even if true, HHS' evidence concerning Alex Lunderman's (the Tribal Chairman's) laughter and Mr.

Bordeaux's jokes about "gay" people at a bar does not constitute persuasive proof of hostility or proscribed discrimination towards Mr. Bettelyoun. Tr. 481, 806; FFCL 150.

152. Mr. Bettelyoun's testimony concerning how others were harassing him at work ensued from his unique and unreasonable definition of "harassment" and showed, at the very most, that he kept silent in response to both the well-intentioned efforts and lapses in thoughtfulness of others who conducted themselves in accordance with moods that were not in synchronization with his moods. See, e.g., 113, 115, 117 - 19, 122 - 24, 130 - 31, 135, 238 - 41, 273, 456 - 57, 924 - 25.

153. Having alleged that Mr. Bettelyoun was subjected to employment discrimination solely due to his handicap, HHS established several other reasons that can reasonably account for the events he attributed to employment discrimination: (a) the fluctuation of his own emotional state in the death and dying process, the emotional fluctuations of those around him, and the absence of synchronization between such fluctuations (e.g., Tr. 354 - 55); (b) "Indian Politics" (e.g., Tr. 143. 363 - 64); (c) his suspected homosexuality (e.g., Tr. 420 - 21, 461, 584); and (d) his distorted perceptions of other's behavior caused by his emotional reaction to the HIV diagnosis (e.g., Tr. 597 - 98; HHS Ex. 21c at 18).

154. Mr. Bettelyoun testified that "Indian Politics" is where people use rumors or the oral medium to accentuate the negative in order to "get evil or political gain." Tr. 143, 363 - 64.

155. Mr. Schmidt believed there was friction between Mr. Bordeaux and Mr. Bettelyoun because of professional jealousy. Tr. 938 - 941.

156. Mr. Schmidt believed that, as a result of the pre-existing professional jealousy between the two men, Mr. Bordeaux may have seized upon Mr. Bettelyoun's HIV infection as a pretext for advancing Mr. Bordeaux's personal interest in ousting Mr. Bettelyoun from the RDO. Tr. 941.

157. The possible nexus between Mr. Bordeaux's alleged actions and his jealousy of Mr. Bettelyoun's talents is consistent with Mr. Bettelyoun's perception that he was a victim of "Indian Politics." E.g., Tr. 143; FFCL 154.

158. In late June 1988, Mr. Lunderman held a meeting with the RDO staff at which he told everyone present that the rumors must stop, the staff needed to work together, and the staff needed to behave professionally. Tr. 101.

159. The staff meeting held by Mr. Lunderman was appropriate to addressing the circulation of gossip and rumors that distressed Mr. Bettelyoun and Mr. Bettelyoun's belief that people should limit their workday to those tasks contained in their job descriptions. FFCL 158.

160. On July 19, 1988, a few days after a second meeting with Mr. Bettelyoun, Mr. Lunderman issued directives requiring all tribal employees to attend at least one of three designated training sessions on AIDS. Tribe Ex. 14, 15; Tr. 715 - 17.

161. Mr. Lunderman's efforts to educate the tribal employees on AIDS were appropriate and lawful. HHS Ex. 21g, 21c at 18; Tr. at 585.

162. After the meeting with Mr. Bettelyoun on July 13 or 14, 1988, Alex Lunderman authorized Mr. Bettelyoun's reassignment to the CHR department, headed by Ms. Whipple. Tr. 106, 411 - 15.

163. HHS did not prove by a preponderance of the evidence that the Tribe took, condoned, or authorized any adverse treatment of Mr. Bettelyoun solely due to his HIV infection. FFCL 117 - 162.

If I had the authority to decide the merits of discrimination alleged by HHS, I would find that HHS has failed to prove by a preponderance of the evidence that the Tribe forced Mr. Bettelyoun to resign in violation of section 504 of the Rehabilitation Act.

164. Mr. Bettelyoun testified that Mr. Bordeaux repeatedly asked for his resignation between June 20 and July 15, 1988. Tr. 90.

165. Mr. Bordeaux denied under oath that he ever asked for Mr. Bettelyoun's resignation. Tr. 1004.

166. No one other than Mr. Bettelyoun testified to having heard Mr. Bordeaux request that Mr. Bettelyoun resign.

167. According to Mr. Bettelyoun's testimony, Mr. Bordeaux last asked for his resignation on or about July 15, 1988, more than a month before Mr. Bettelyoun resigned. Tr. 90, 147.

168. Mr. Bettelyoun believed that Mr. Bordeaux had a drinking problem which caused Mr. Bordeaux to be gone from the office for long periods of time and exacerbated the situation with Mr. Bettelyoun's being HIV-positive. Tr. 196.

169. HHS has not proved by a preponderance of the evidence that, even if Mr. Bordeaux did seek Mr. Bettelyoun's resignation, he did so solely on account of Mr. Bettelyoun's HIV-positive status. FFCL 155, 156, 168.

170. When Mr. Bordeaux said he did not want to work with Mr. Bettelyoun, Mr. Schmidt and Alex Lunderman told Mr. Bordeaux to protect Mr. Bettelyoun's rights and to protect the Tribe's interests. HHS Ex. 25b; Tr. 921, 939.

171. Mr. Bettelyoun never heard Alex Lunderman say that Mr. Bettelyoun should be fired or should resign. Tr. 227 - 28, 231.

172. HHS introduced no credible evidence that Mr. Lunderman or any official of the Tribe authorized, directed, or agreed with any request Mr. Bordeaux may have made for Mr. Bettelyoun's resignation. See, e.g., Tr. 802, 810 - 14.

173. Mr. Bettelyoun's perception that Mr. Lunderman wanted him to resign was based on the observation that Mr. Lunderman issued no memorandum to Mr. Bordeaux instructing him to stop requesting a resignation. Tr. 227 - 28.

174. HHS did not prove that Mr. Lunderman's failure to issue such a memorandum caused Mr. Bettelyoun's resignation. FFCL 173.

175. HHS has not proved by a preponderance of the evidence that any request Mr. Bordeaux may have made for Mr. Bettelyoun's resignation constituted an official act on behalf of the Tribe. FFCL 170 - 174.

176. Mr. Bettelyoun testified that during the latter period of his employment with the Tribe, he had permission to work 50 percent of his time at home, 25 percent in the field, and 25 percent at the CHR office. Tr. 141.

177. Ms. Whipple did not know where Mr. Bettelyoun went after working approximately two weeks in the CHR building. Tr. 448.

178. Ms. Whipple believed Mr. Bettelyoun had returned to work at RDO because "he was still around." Tr. 448 - 49.

179. Mr. Bordeaux did not recall seeing Mr. Bettelyoun again in the RDO and thought he was traveling out of town on business for RDO. Tr. 1009, 1015.

180. Before he resigned from his job with the Tribe, Mr. Bettelyoun was away from his job with the Tribe for some

periods of time to make AIDS presentations for IHS. Tr. 150, 152 - 53, 661, 721, 752.

181. Mr Bettelyoun did not consistently appear for work for the Tribe from some time in July 1988 until he resigned on August 25, 1988. FFCL 177 - 180.

182. A week or more before August 25, 1988, Mr. Bettelyoun told Arvella Haukaas,<sup>5</sup> secretary in the RDO, that he had given his oral resignation and planned to do consulting work for IHS. Tr. 721, 724 - 26.

183. Mr. Bettelyoun testified that he never pursued other job possibilities while he was employed with the Tribe. Tr. 398.

184. Shortly before Mr. Bettelyoun resigned from the Tribe, he and Roger Follas of IHS discussed the possibility of Mr. Bettelyoun's continuing to make speeches regarding AIDS for IHS. Tr. 663.

185. The day after Mr. Bettelyoun resigned, Mr. Follas executed a purchase order to pay Mr. Bettelyoun for his services. Tribe Ex. 25.

186. I do not find credible Mr. Bettelyoun's testimony that he never pursued other job possibilities while he was employed with the Tribe. FFCL 182 - 185.

187. On accepting Mr Bettelyoun's resignation, Mr. Bordeaux gave Mr. Bettelyoun the name of Dr. Wayne Foster of the IHS Hospital. Tr. 147.

188. After resigning from his RDO job and obtaining Dr. Foster's name, Mr. Bettelyoun filed suit against the United States for the IHS's unauthorized release of his medical information and received \$ 30,000 in settlement. FFCL 19, 27.

189. Mr. Bettelyoun's lawsuit not only sought damages he attributed to his allegedly involuntary resignation from the RDO job, but also damages he attributed to his allegedly involuntary resignation from a part time job he had concurrently held in a video store managed by his brother. FFCL 19; Tr. 798.

190. On or about September 13, 1988, 19 days after his resignation, Mr. Bettelyoun submitted a claim to IHS for \$2281 for having completed 19 presentations. HHS Ex. 39.

---

<sup>5</sup> Ms. Haukaas' name appears in a number of different spellings in the record, including "Hawkass" and "Haukass." I have used the spelling which she apparently used in signing her name. HHS Ex. 25o at 2, 3.



191. In November, 1988, Mr. Bettelyoun asked IHS to pay \$250 for each presentation he had made in October, and he asked that IHS pay him an additional \$3018.40 for his future presentations. E.g., HHS Ex. 39.

192. Even the \$6500 IHS paid Mr. Bettelyoun under his contract from August 31 through December 31, 1988 (Tr. 379, 666; R. Ex. 25) exceeded the gross amount Mr. Bettelyoun could have earned during the same four month period from the RDO job, which paid \$7.75 per hour (R. Ex. 5).

193. In September 1988, Mr. Bettelyoun, his brother, and others formed a corporation through which Mr. Bettelyoun also gave presentations similar to the ones he was then making for IHS, but over a larger multi-state area. HHS Ex. 37; Tr. 149, 301, 358, 872, 875.

194. Mr. Bettelyoun's brother became the business manager of the corporation and, in 1989, the Tribe was asked to pay \$500 for Mr. Bettelyoun's presentation. See, Tr. 300 - 01, 358, 879.

195. Mr. Bettelyoun's resume and his testimony reveal a pattern in his job history of leaving jobs after periods of less than one year, for reasons that included disagreements with superiors or dissatisfaction with his hours of work or pay. HHS Ex. 4; Tr. 39 - 43.

196. On the basis of the record as a whole, I do not find Mr. Bettelyoun to be a credible witness. FFCL 84, 97, 104, 105, 183, 186.

197. HHS failed to prove by a preponderance of the evidence that Mr. Bettelyoun's resignation was involuntary. FFCL 164 - 196.

## ANALYSIS

### I. HHS has failed to establish subject matter jurisdiction.

A. HHS was aware that subject matter jurisdiction turned on the Tribe's receipt of HHS funds during the period of alleged discrimination against Mr. Bettelyoun, and HHS had ample opportunity to prove the existence of that jurisdictional fact.

I begin my analysis of the jurisdictional issue with the language of the statute itself. Section 504 of the Rehabilitation Act provides, in relevant part:

No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, . . . be subjected to

discrimination under any program or activity  
receiving Federal financial assistance. . . .

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (emphasis added); see also, 45 C.F.R. § 84.4(a).

HHS defines "Federal financial assistance" as any grant, loan, contract, or other arrangement by which HHS makes available funds, services of Federal personnel, or real and personal property. 42 C.F.R. § 84.3(h). Also, as aptly summarized by the Regional Director of OCR in her testimony explaining the agency's role under section 504 of the Rehabilitation Act:

[O]ur responsibility is to ensure that the government's money [distributed by HHS] is not used in a discriminatory way. That the programs and activities are operated in a non-discriminatory manner.

Tr. 645. Therefore, the regulations authorize effectuating compliance with section 504 of the Act by terminating, or refusing to grant or continue, financial assistance from HHS. 45 C.F.R. § 80.8(a).

HHS initiated this compliance proceeding against the Tribe pursuant to regulations that implement section 504 of the Rehabilitation Act. Notice at 1. I was designated to hear and decide this case pursuant to 45 C.F.R. Parts 81 and 84. The hearing procedures utilized to date, the remedy sought, as well as my authority to preside over the case, all ensued from HHS' contention that the Tribe had failed in its duty to comply with section 504 of the Rehabilitation Act with respect to its treatment of Mr. Bettelyoun. See 45 C.F.R. §§ 80.8(c) and 80.9.

As the statute and regulations make clear, the present compliance proceeding cannot be used to regulate or remedy all instances of discrimination against handicapped individuals. No prohibited discrimination exists under section 504 of the Rehabilitation Act if, for example, an accused employer was not a recipient of HHS funds when the alleged acts of discrimination occurred. Absent receipt of HHS funds during the period in controversy, the employer could not have operated any program or activity within the purview of section 504 of the Rehabilitation Act. In such a situation, HHS would have no enforceable legal interest in the employer's actions, and any action the employer may have taken against a handicapped employee would not be reviewable or remediable by me, pursuant to the delegation made under the regulations that implement and enforce Section 504.

HHS is in apparent agreement with this construction of subject matter jurisdiction. In the section of its Notice titled "Parties and Jurisdiction," HHS alleged:

During the period in which the actions of the recipient giving rise to this Notice occurred, the Tribe received Federal financial assistance. Among other Federal financial assistance from DHHS received by the Tribe in 1988, RSTA [Rosebud Sioux Tribal Administration] received Federal funds in the form of Low Income Home Energy Assistance Program block grants.

The Tribe responded that it lacked sufficient and specific information to admit the allegation and therefore denied it. Answer at 12.

It is well settled that subject matter jurisdiction may be raised at any time during a proceeding, and, further, the parties cannot confer subject matter jurisdiction by stipulation or waiver. In this case, the Tribe has repeatedly asserted that I lack authority over the Tribe and the subject matter of this action. However, until the posthearing briefing, its jurisdictional arguments had not focused on the issue of funding from HHS, and I had denied the Tribe's previously filed motions to dismiss.

The Tribe first asked for dismissal of the action in its Answer. Answer at 6. Its Answer asserted, inter alia, that the Tribe had never consented to participate in any administrative proceeding. Answer at 1. In its Memorandum in Support of Affirmative Defenses, the Tribe relied on the doctrine of sovereign immunity to argue that I should dismiss the action because I lack the authority to compel the Tribe to rehire Mr. Bettelyoun or pay back wages to him from its treasury. Tribe Mem. Supp. Aff. Def. at 2 - 3, 13.

HHS opposed the Tribe's motion and supporting arguments by pointing out that the remedy provided by law and sought by HHS in this action is limited to the termination of HHS' funding to the Tribe. HHS Prehearing Brief (Prehrg. Br.) at 2 - 4. In addition, HHS attached a copy of an Assurance of Compliance signed by an official of the Tribe on January 14, 1987 and argued that, by signing this document, the Tribe had expressly agreed to comply with the substantive and procedural requirements of the law and subject itself to compliance proceedings.<sup>6</sup> HHS Prehrg. Br. at 3.

---

<sup>6</sup> The January 14, 1987 Assurance of Compliance was admitted in evidence at hearing as HHS Ex. 18b.

At that time, the Tribe did not challenge the materiality of the executed Assurance of Compliance appended to HHS' brief. Also before me at the time of the Tribe's first motion to dismiss were certain issues concerning the Tribe's technical compliance with certain procedural requirements of the Act and regulations during years prior to 1987, to which the January 14, 1987 Assurance of Compliance relied upon by HHS could have been applicable. These issues concerning technical compliance were later resolved by agreement of the parties at hearing. J. Ex. 1.

I denied the Tribe's motion to dismiss during a prehearing conference on May 4, 1993. I ruled that HHS had the right to present evidence at hearing on all disputed issues because sovereign immunity is subject to waiver, and the Tribe's execution of an Assurance of Compliance is evidence of such a waiver. May 21, 1993 Confirmation of Rulings on Motions. I ruled that HHS was not precluded from maintaining this compliance action as a matter of law. Id.

Later at hearing, but prior to the introduction of any testimony, the Tribe filed another motion to dismiss, again arguing that the proceeding was barred as a matter of law. The Tribe reasoned that Congress did not make the Rehabilitation Act applicable to sovereign entities such as Indian tribes. May 10, 1993 Motion to Dismiss. However, by this point in the proceeding, the Tribe had stipulated to the admissibility of those HHS exhibits containing various copies of the Assurances of Compliance executed by the Tribe. See, HHS Ex. 18a - d and J. Ex. 2 at 4. Even though it denied the legal effect of an Assurance of Compliance because it "spoke for itself," the Tribe had admitted to HHS that its Chairman signed Assurances of Compliance on January 14, 1987, March 18, 1988, and February 28, 1990. Tribe RRA No. 16, 17.

I denied the Tribe's second motion to dismiss and allowed HHS to proceed with its case. Tr. 10 - 11. The Tribe's underlying legal theory was defective and the Assurances of Compliance signed by the tribal Chairman, along with other information then before me, appeared to give HHS the authority to proceed against the Tribe. The Tribe was not entitled to dismissal of the proceeding without an evidentiary hearing.

During hearing, counsel for the Tribe specifically asked the HHS employee who ascertained OCR's jurisdiction over the Tribe (HHS Ex. 17b) to disclose the whereabouts of those documents that show the Tribe's receipt of HHS funds during the period of Mr. Bettelyoun's employment. Tr. 1094, 1096. Counsel for HHS referred to an audit report for the period from October 1, 1988 through September 30, 1989 and sought to rely on the official nature of HHS' publications. Tr. 1096 - 98. Counsel for

the Tribe contended that these were "poor records" to show the Tribe's receipt of federal funds. Tr. 1098.

After I closed the evidentiary record, both parties addressed the issue of whether the evidence of record establishes that the Tribe received HHS funds during the period when the disputed acts took place. HHS argued that the evidence established the Tribe's receipt of federal funds from HHS during the period of Mr. Bettelyoun's employment:

Although at times vacillating in its position on whether the Tribe received FFA [federal financial assistance] from the Department while Mr. Bettelyoun was employed with it, RST [the Tribe] conceded during the hearing and in responding to DHHS' Requests for Admissions, that such funds did then and do now subsidize its operations.

HHS Posthrq. Br. at 51 - 52 (emphasis added and citations omitted). The Tribe argued that no credible evidence established the Tribe's receipt of any monies from HHS during the relevant time period, and "[w]ithout establishing receipt of money, the government's burden on the other elements cannot be established." Tribe Posthrq. Br. at 58.

In reply, HHS cited additional evidence of record to show that the Tribe had received federal funds from HHS in 1988, and argued that its proof was reliable. HHS Reply at 44 - 45. HHS argued also that two tribal officials gave testimony that acknowledged the receipt of such funds. *Id.* at 45. The Tribe, in turn, asserted in reply that HHS did not prove by a preponderance of the evidence that the Tribe received HHS-administered grants during 1988, when Mr. Bettelyoun was employed and allegedly subjected to unlawful discrimination by the Tribe. Tribe Reply at 18.

Because the parties had settled the issues involving the Tribe's failure to follow certain procedural requirements of the law (J. Ex. 1), the only remaining issues of discrimination relate to the manner in which the Tribe conducted itself towards Mr. Bettelyoun during the time period identified by HHS. If the Tribe was legally obligated to conduct itself during that period in a manner consistent with the anti-discrimination provisions of the Rehabilitation Act and HHS' regulations, then there exists a cause of action for HHS to pursue in this compliance proceeding, and I would have the authority to adjudicate the merits of the allegations presented by HHS. Otherwise, I must dismiss the proceeding against the Tribe.

The record is clear that Mr. Bettelyoun was employed by the Tribe as RDO's Senior Planner/Assistant Director for a total period of two months and 19 days: from June 6, 1988 until he resigned on August 25, 1988. Tribe Ex. 6, 8. HHS has alleged no discrimination by the Tribe or its agents from the starting date of Mr. Bettelyoun's employment until June 14, 1988, when Mr. Bettelyoun received the results of his test for HIV. HHS PF No. 14, 19, 20. HHS alleged and attempted to prove at hearing that acts of employment discrimination took place from some time after June 14, 1988 until August 25, 1988, a period of two months and 12 days at the very most. HHS PF No. 14, 19, 20, 71. HHS seeks no finding of fact or conclusions of law that the Tribe had engaged in discrimination after August 25, 1988. HHS PF No. 77 - 97. In arguing specifically that the Tribe had admitted to the receipt of HHS funds "while Mr. Bettelyoun was employed with it" (HHS Posthrg. Br. at 52), HHS recognized the significance of this small window of time.

On March 8, 1994, I issued an order authorizing the parties to submit supplemental briefs on the issues of jurisdiction and the allocations of the burden of proof. Order Authorizing Supplemental Briefing on Jurisdictional Issue. I directed the parties' attention to the controlling time period of approximately two months and 12 days and explained my concerns as follows:

Because subject matter jurisdiction cannot be waived and may preclude my deciding the merits of the other controversies between the parties, I am giving the parties the opportunity to further argue the question of whether the evidence proves HHS' contention that certain employment actions that were allegedly taken by the Tribe or its agents against Mr. Bettelyoun during 1988 (that is, those actions that allegedly began some time after June 14, 1988, when the HIV-positive diagnosis was made, and allegedly lasted until his resignation on August 25, 1988) are reviewable in this compliance proceeding because the Tribe had signed the Assurances of Compliance of record or received the funding identified by HHS.

Id. at 2.

Thereafter, both parties filed supplemental briefs on the issues I raised.

I have reviewed the submissions of both parties together with the evidentiary record before me. I conclude that I am without jurisdiction over the merits of the controversy and the Tribe is not subject to this compliance proceeding as a consequence of any action it may have taken against Mr. Bettelyoun from some time

after June 14 until August 25, 1988. The record as a whole supports the Tribe's contention that HHS has failed to prove that jurisdiction exists in this case. There is insufficient proof that, during the two months and 12 days of 1988 when the Tribe allegedly discriminated against Mr. Bettelyoun, the Tribe was subject to the provisions of the Act and HHS' implementing regulations.

B. There is no support in the record for HHS' contention that the Tribe has admitted to the receipt of HHS funds during Mr. Bettelyoun's employment.

As noted above, HHS claimed that the Tribe admitted to receipt of HHS funds while Mr. Bettelyoun was employed from June 6 to August 25, 1988. HHS Posthrg. Br. at 51 - 52. I have reviewed the citations provided by HHS, and I find no admission by the Tribe to that effect. Nor does the evidence relied upon by HHS show that the Tribe received any federal funds from HHS during the period in controversy, beginning with June 14, 1988 and ending with August 25, 1988.

In support of its contention that the Tribe received HHS funds while Mr. Bettelyoun was employed by the Tribe, HHS relied on the Tribe's responses to Requests for Admissions No. 9 - 15. HHS Posthrg. Br. at 52. The cited admissions do not support that contention. In those requests for admissions, HHS asked about certain HHS funds allegedly received by the Tribe, Tribal Council, or Rosebud Health Management, Inc. from October 1, 1988 to September 30, 1991, the months and years after Mr. Bettelyoun had resigned from his job. Moreover, the Tribe not only denied all of the foregoing requests to admit, it also informed HHS that Rosebud Health Management, Inc., is a private company and that the Tribal Council does not receive federal funds but acts as a body on behalf of the Tribe. The Tribe stipulated to having received the HHS funds shown in the audits only for the fiscal years that ended on September 30 of 1989, 1990, and 1991. Tribe RRA No. 9, 10, 12, 14, 15. The Tribe's stipulations did not pertain to the period in 1988 when Mr. Bettelyoun was allegedly subjected to discrimination by the Tribe.

When HHS asked the Tribe to admit that it received certain enumerated HHS funds "[f]or fiscal year October 1, 1987 to September 30, 1988," the Tribe's response was "Denies." Tribe RRA No. 7. There is no written admission by the Tribe that it received any funds from HHS during Mr. Bettelyoun's employment, i.e., from June 6 to August 25, 1988.

There is also no support for HHS' contention that the Tribe admitted at hearing that it received HHS funds while Mr. Bettelyoun was employed at RDO. See HHS Posthrg. Br. at 51 - 52. In so contending, HHS

erroneously relied on the testimony of Jean Battistoni (Tr. 1086 - 88), the OCR employee who prepared a document for OCR's file stating that the Tribe received Low Income Home Energy Assistance funds from October 1, 1987 to the 1991 winter season. HHS Ex. 17b. Ms. Battistoni gave testimony concerning HHS' Exhibits 17a through 17d. The transcript pages cited by HHS do not contain any admission by the Tribe that it received HHS funds during Mr. Bettelyoun's employment. Tr. 1086 - 88.

HHS notes that Ms. Battistoni authored HHS' Exhibit 17b, and HHS contends that the exhibit shows the Tribe's receipt of Low Income Home Energy Assistance from HHS for the fiscal years 1987 to 1991. HHS Supplemental Brief (Supp. Br.) at 8. However, Ms. Battistoni's authorship and opinions do not create jurisdictional facts. Ms. Battistoni is the Equal Opportunity Specialist for OCR who investigated Mr. Bettelyoun's complaint against the Tribe, and she was charged with "establish[ing for OCR] funding jurisdiction with respect to" the Tribe. Tr. 1084, 1086. In that capacity, Ms. Battistoni authored a report to OCR stating that the Tribe received the Low Income Home Energy Assistance funds. HHS Ex. 17b. However, the source material she cited in her report indicates that the Tribal Council (not the Tribe) received said funds. HHS Ex. 17b - d. Moreover, the source material cited in her report indicates that the Tribe received different HHS funds, which Ms. Battistoni did not attribute to the Tribe. Id.

Ms. Battistoni did not explain in her report or in her testimony why she had equated the Tribal Council with the Tribe, whereas the source documents listed them separately. Nor did Ms. Battistoni explain why, as the investigator for OCR attempting to establish "funding jurisdiction" over the Tribe, she did not find that the Tribe had received any of the 13 HHS grants listed in HHS' Exhibit 17c, for example, as having been obligated to the Tribe. HHS introduced no evidence or argument to explain such apparent inconsistencies in its position even after the Tribe had put HHS on notice that it was not conceding the accuracy of the information contained in HHS' official publication or the conclusions derived by HHS. Tribe RRA No. 6<sup>7</sup>; Tr. 1097.

---

<sup>7</sup> HHS contends that the Tribe cannot object to HHS's Exhibits 17c and 17d, since it filed no written objection to their authenticity before hearing, as required by 45 C.F.R. § 81.75. HHS Supplemental Brief (Supp. Br.) at 7. I find that the Tribe did provide written objections prior to hearing in its responses to HHS's Requests for Admission. The Tribe specifically denied the truth of the information contained in HHS' Exhibits 17c and 17d. Tribe RRA No. 6 - 14. In  
(continued...)



Also, the Tribe gave notice before hearing that it was disputing HHS' attributing to the Tribe those funds that were obligated to Rosebud Sioux Health Management, Inc.. Tribe RRA No. 8, 11.<sup>8</sup> (The Tribe said it was not able to admit or deny whether Rosebud Sioux Health Management, Inc., received HHS funds because the corporation was privately owned.) However, at hearing, Ms. Battistoni testified for HHS that she was attributing the money received by Rosebud Sioux Health Management, Inc., to the Tribe. Tr. 1099. Even though her original report to OCR did not contain this conclusion, the report prepared by another employee of OCR did contain this conclusion and Ms. Battistoni apparently decided to adopt it. HHS Ex. 17a<sup>9</sup> and 17b.

In answer to questioning by counsel for the Tribe, Ms. Battistoni admitted that she did not know whether Rosebud Sioux Health Management, Inc., is a private corporation. Tr. 1099. In addition, the source material relied upon by HHS does not equate the management company with the tribe. HHS Ex. 17c, 17d. Nowhere in the record is there any evidence that the Tribe owns or operates the health management company.

While Ms. Battistoni was still on the witness stand, counsel for the Tribe readily acknowledged that the Tribe has received "federal funds." Tr. 1098 - 99. Such an acknowledgement is consistent with the Tribe's evidence that it received funding from the U.S. Department of

---

<sup>7</sup>(...continued)

addition, the problem here is not that HHS's Exhibits 17c and 17d are not the things they purport to be. (They indeed appear to be accurate reproductions of pages from HHS publications.) Rather, the dispute is over the truth or accuracy of the information contained in the original publications. Admitting documents into evidence does not obligate me to accept the information contained therein as true or accurate; nor would the Tribe's failure to file written objections to their authenticity have required me to find the documents dispositive on the issue of subject matter jurisdiction.

<sup>8</sup> HHS refers to Indian Health Management, Inc., listed in its exhibit 17a - d as "Rosebud Health Management, Inc." FFCL 47.

<sup>9</sup> In its brief, HHS relies also upon this report, prepared by another Equal Opportunity Specialist, to support its arguments on jurisdiction. HHS Supp. Br. at 8 (citing HHS Ex. 17b). This employee's report merely summarizes what is contained in HHS's Exhibit 17c. Thus, the report does not establish jurisdiction or corroborate the accuracy of the information contained in HHS's Exhibit 17c.

Interior, Bureau of Indian Affairs, in order to operate the RDO and pay for Mr. Bettelyoun's salary from June 6 until August 25, 1988. Tribe Ex. 1; Tr. 191 - 92; 984 - 85, 1005. However, the Tribe never conceded the receipt of federal funds from HHS or the receipt of HHS funds during Mr. Bettelyoun's employment. To the contrary, the Tribe specifically pointed out at hearing that HHS has not placed before me any audit report showing the Tribe's receipt of HHS funds during Mr. Bettelyoun's employment. Tr. 1096.

C. The Tribe did not waive objections to the accuracy of the documents relied upon by HHS.

HHS argued that 45 C.F.R. § 81.83 applies to bar the Tribe from challenging the accuracy of the information contained in HHS' official publications (HHS' Exhibits 17c and 17d), because the Tribe had failed to avail itself of the opportunity to make a contrary showing before or at hearing. HHS Supp. Br. at 7. I reject this argument for several reasons.

First, even if HHS were correct in its assertion that the Tribe failed to challenge the contents of the HHS Exhibits before or at hearing, the absence of subject matter jurisdiction may be raised by a party or by me at any time during the proceedings. Moreover, the procedural regulation cited by HHS applies only to official notice taken (or to be taken) of a material fact not appearing in the evidence of record. The material fact asserted to be true by HHS, that the Tribe received HHS funds, appears in HHS' Exhibits 17c and 17d, which were admitted into the record on HHS' motion. In addition, the record contains the Tribe's prehearing denials, along with all the previously discussed conflicts in the evidence involving the HHS publications at issue.

The record shows also that the Tribe attempted to prove the contents of the HHS publications untrue at hearing through its questioning of Ms. Battistoni, the witness HHS had chosen to testify on the subject:

Q: [W]here is the audit on the Rosebud Sioux Tribe for the period of time covering Mr. Bettelyoun's employment? Where is the audit by their auditors that is provided to you?

Do you have one at all?

A: No. No. The audit that was provided to me that was in our region, that was being considered at the time, is the audit that's in the book.

Q: So you have no audit. You have no audit for the Tribe's general --

A: They are done only every two years.

Tr. 1096.

To exacerbate the problems created by these non-responsive answers from HHS' witness, HHS' counsel interjected an audit report that did not cover the period of Mr. Bettelyoun's employment and was clearly not responsive to the Tribe's question on the existence and whereabouts of any audit covering the period of Mr. Bettelyoun's employment. Id.<sup>10</sup> After such exchanges, counsel for the Tribe argued: "these [HHS publications] are merely compilations by somebody in the Department of Health and Human Services .... a compilation that somebody put together without any reliance or any support in any particular audit." Tr. 1097.

The Tribe's concerns are legitimate, given the foregoing testimony from Ms. Battistoni, her counsel's interjection of an audit report not done for the period of Mr. Bettelyoun's employment, the discrepancies between Ms. Battistoni's written opinion and the contents of her cited sources, and Ms. Battistoni's failure to attribute to the Tribe any of the HHS funds which, according to her cited sources, were obligated to the Tribe. See HHS Ex. 17b - d. HHS' continued advocacy of Ms. Battistoni's bald conclusion that Low Income Home Energy Assistance funds were received by the Tribe is inconsistent with HHS' concurrent position that the source documents containing different information (HHS Ex. 17c, 17d) are also accurate. HHS Supp. Br. at 8. Inconsistencies such as these, created by HHS, call into question the accuracy of its exhibits.

In addition, I note that OCR's investigators initially found no evidence that the Tribe filed Assurances of Compliance with HHS, which are required by HHS' regulations as a condition for the receipt of HHS grants. HHS Ex. 31, OCR Report of Findings at 11; 45 C.F.R. § 84.5. Later, HHS found one from 1969, one from 1975, and one from March 1988. HHS Ex. 18a - c. None of the three was for Low Income Home Energy Assistance, however, nor do they correspond to any of the information contained in HHS' Exhibits 17c and 17d. Assuming that HHS follows and enforces its own regulations, the absence or shortage of Assurances of Compliance from the Tribe over the years could reasonably imply that the HHS funds listed in HHS'

---

<sup>10</sup> "Ms. Golightly-Howell: Wait just a minute. I don't understand this question. Exhibit 26 -- here is a copy of the audit. . . . Ms. Battistoni has identified and testified regarding the audit." Tr. 1096.

Exhibits 17c and 17d were either not received at all by the Tribe or not received in the frequency suggested by Ms. Battistoni and the HHS publications. At the very least, the absence or shortage of Assurances of Compliance calls into question also the accuracy of the information contained in HHS' publications.<sup>11</sup>

Instead of making available the underlying audits or offering other witnesses' testimony to address these issues, HHS chose to argue that the publications were officially prepared by a responsible component of HHS. Tr. 1097 - 98. Such arguments do not prove the accuracy of the information contained in the publications. HHS' arguments have merely reinforced the fact that its publications were properly admitted into evidence because, even if the Federal Rules of Evidence had been strictly applied in this administrative proceeding, HHS' publications are public reports within the hearsay exceptions and do not require authentication or identification as a condition precedent to their admissibility. See Fed. R. Evid. 803(8), 902. The contents of the publications were offered by HHS as evidence of a material fact on the disputed issue of subject matter jurisdiction. The admission of these publications and the many dozens of documents submitted by both parties in this case does not mean that the contents of all such documents are true, accurate, or impervious to challenge.

HHS described the Tribe's objections on jurisdiction as relating to HHS' not having presented "any audit of the Tribe's financial operations for 1988." HHS Supp. Br. at 8. By contending also that the one audit report presented by HHS (HHS Ex. 26) was based on the financial statements submitted by the Tribe, HHS reasoned that the Tribe could have and should have submitted its own financial statements to refute the information contained in HHS' publications: "The burden is on the Tribe to present contradictory evidence and the financial statements of the Tribe clearly would be in its possession." HHS Supp. Br. at 9.

HHS' narrow characterization of the Tribe's objection is inappropriate in the context of the exchange with Ms. Battistoni, wherein the Tribe was attempting to ascertain which, if any, audit report was used in the preparation of the HHS publications in evidence. Moreover, the Tribe never equated its references to "audit" with HHS' Exhibit 26. Counsel for HHS interjected that equation at hearing

---

<sup>11</sup> During its investigation, OCR dealt with the issue by simply concluding that the Tribe was a recipient of HHS funds that was not in compliance with the filing requirement. HHS Ex. 31, OCR Report of Findings at 11.

and then incorrectly attributed that equation to the Tribe.

In addition, I find HHS' arguments inappropriate to a moving party seeking an administrative order against the other party. At the very least, HHS has the burden of coming forward with evidence to prove that I have jurisdiction to review the discriminatory acts alleged. See HHS Supp. Br. at 3 - 5. HHS is aware that I am permitted to draw inferences or presumptions from a party's failure to explain facts that are exclusively in its possession. HHS Br. at 4. HHS is aware also that the hearing process is intended to assure the production of the most credible evidence available. Id. at 5.

HHS' attempt to place the burden of production on the Tribe, could raise the inference that HHS does not have audits or like reports of the federal funds it has obligated during given periods, or that HHS has prepared its publications (HHS Ex. 17c and 17d) based only on information provided by the recipients of its funds. However, I have been given no reason to believe that HHS has prepared the publications under consideration without having conducted reviews or audits of its own records on the obligation of its own funds. These audits, reports, and records should be in HHS' possession. It is not the Tribe's burden in these proceedings to acquire all such documents from HHS.

HHS specifically alleged in the jurisdictional section of the Notice that, "[d]uring the period in which the actions of the recipient giving rise to this Notice occurred, the Tribe received Federal financial assistance." Notice at 4 (para. 3). In the context of HHS' regulations, "Federal financial assistance" means assistance from HHS. 45 C.F.R. § 84.3(h). Therefore, the inferences arising from the non-production of relevant evidence are against HHS.

Under all of the foregoing circumstances and to the extent 45 C.F.R. § 81.83 is applicable, I find that the Tribe had not waived its objections to HHS' evidence. The Tribe has made a sufficient contrary showing in challenging the truth and accuracy of the information contained in HHS Exhibits 17b, c, and d.

D. The audit report and HHS publications of record do not establish that the Tribe received HHS funds during the period from June 14 to August 25, 1988.

I agree with the Tribe that HHS' reliance at hearing on its Exhibit 26, an audit report that covers a period after Mr. Bettelyoun had resigned, is misplaced since the audit fails to address whether the Tribe received HHS funds during Mr. Bettelyoun's employment. See Tr. 1096. In addition, HHS' arguments on the official nature of the

HHS publication excerpted in its exhibit 17c (Tr. 1097 - 98 and HHS Reply at 44 - 45) do not compensate for the fact that the information contained in the publication shows only that HHS funds were "obligated" to the Tribe during the U.S. Government's 1988 fiscal year (the period from October 1, 1987 to September 30, 1988). HHS Ex. 17c at 1.

The publication does not give the precise dates of obligation or the precise periods within the 1988 fiscal year that are covered by the funds obligated by HHS. Nor does the publication purport to list only those funds that were obligated by HHS for the entire 12 months of the 1988 federal fiscal year. Therefore, I cannot equate HHS' having obligated funds for the Tribe during a 12-month long fiscal period with HHS' having obligated or given funds to the Tribe during or for the specific two month and 12 day period in which the Tribe allegedly engaged in unlawful discrimination against Mr. Bettelyoun.

I find no basis in the law for concluding that, if the Tribe received HHS funds during a period predating the alleged acts of discrimination, the Tribe thereby incurred a continuing prospective obligation to conduct itself in accordance with section 504 of the Rehabilitation Act at all times in the future. Nor do I find any basis for concluding that, if HHS provided funding to the Tribe after Mr. Bettelyoun left the Tribe's employ, HHS would then acquire the right to apply the proscriptions of section 504 retroactively and require the Tribe to remedy actions that were taken when no HHS money was involved. One of the controlling phrases in Section 504 is "subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794. This means that, for the discrimination to be actionable and reviewable in this proceeding, the discrimination must have taken place when the Tribe was in receipt of HHS funds -- even if the Tribe had received HHS funds for a prior or subsequent period. Thus, the publications introduced by HHS miss the mark and fail to prove jurisdiction.

E. Other witness testimony cited by HHS also fails to establish jurisdiction.

HHS argues that the testimony of the RDO's director, Earl Bordeaux, Jr., and the Tribal Chairman, Alex Lunderman, supports its contention that the Tribe received HHS funds during Mr. Bettelyoun's employment. HHS Posthrq. Br. at 52; HHS Reply at 45. The cited testimony does not support HHS' position.

The portion of Mr. Bordeaux's testimony relied on by HHS did not address when HHS funds were received by the Tribe. For example, Mr. Bordeaux testified that his

office had been seeking funding from HHS. Counsel for HHS then asked him if the Tribe actually received HHS funds for a particular grant proposal for the homeless mentioned in Tribe Exhibit 6 (a quarterly report prepared by Mr. Bordeaux on July 20, 1988, concerning the activities of the RDO). Tr. 983 - 84. Mr. Bordeaux answered in the affirmative and explained that 1988 was the first year such funds had been requested. Tr. 984 - 85.

However, HHS did not then ask when the funds for the homeless were received by the Tribe. The exhibit merely indicates that Mr. Bordeaux did not expect to know the status on the proposal until August of 1988. Tribe Ex. 6 at 2. Mr. Bordeaux's subsequent quarterly report, covering the period from July to September 1988, announced Mr. Bettelyoun's resignation and the receipt of federal funds from agencies other than HHS; it did not indicate that the Tribe had received HHS funds for the homeless as of September 1988. Tribe Ex. 7 (duplicated by HHS Ex. 14b<sup>12</sup>). No evidence of record shows the dates during which HHS provided funds for this homeless program.

Mr. Bordeaux's testimony also does not establish that the Tribe was receiving Low Income Home Energy Assistance Program (LIHEAP) funds, administered by HHS, during Mr. Bettelyoun's employment. Tr. 985 - 86. The report indicates that Mr. Bordeaux's department was drafting a grant proposal for certain components of the Tribe: "Currently we are assisting LIHEAP and Alcohol Rehab with a proposal to request additional funding." Tribe Ex. 6 at 2 (emphasis added). Counsel for HHS asked Mr. Bordeaux if the requested funding was from "the Department of Health and Human Services." Tr. 985. Mr. Bordeaux answered, "Yes. That's the local funding program." Id. (emphasis added).

Without asking Mr. Bordeaux for clarification (and without explaining to him that the question had referred to the federal agency, not a state or local agency with

---

<sup>12</sup> HHS used this document to support its contention that the Tribe received grants and assistance from HHS from September 30, 1988 to the present. HHS Posthrg. Br. at 52. This document, prepared by Mr. Bordeaux, does cover RDO's activities during September 1988. However, Mr. Bettelyoun was not the Tribe's employee in September 1988, and Mr. Bordeaux mentioned only a request for funding from HHS and his expectation that the request would be successful. HHS Ex. 14b.

the same name),<sup>13</sup> HHS proceeded to ask if it would be correct to think that the Tribe was "already receiving such funding as of July 20th, 1988." Tr. 985 - 86 (emphasis added). Mr. Bordeaux answered as follows:

Yes.

\* \* \*

Our LIEAP program, we currently get funding through the State, which is never enough. So we always have to look for more.

Tr. 986 (emphasis added). Such testimony by Mr. Bordeaux also does not give support to HHS' contention that the Tribe received any funds from HHS for "LIEAP" during Mr. Bettelyoun's employment.

However, after referring to such testimony from Mr. Bordeaux concerning "LIEAP" (Tr. 986; Tribe Ex. 6 at 2), HHS proceeded to argue:

The Tribe received LIHEAP block grants amounting to \$413,476.00 between October 1, 1987 and September 30, 1988. DHHS Ex. 17(a).

HHS Posthrg. Br. at 52 (emphasis added). I was not persuaded that Mr. Bordeaux's references to "LIEAP" (made in conjunction with "Alcohol Rehab") were related to the "LIHEAP" cited by HHS. The two acronyms are different. Moreover, as earlier discussed, the publication relied upon by HHS indicates that LIHEAP funds were given to "Rosebud Sioux Tribal Council," while other funds were given to "Rosebud Sioux Tribe." HHS Ex. 17c at 4. The Tribe denied that the Tribal Council received LIHEAP or other funds. Tribe RRA No. 6. HHS has not proven by a preponderance of the evidence that, during Mr. Bettelyoun's employment, HHS gave LIHEAP funds to the Tribal Council, or that the Tribe received such LIHEAP funds.

Perhaps realizing that Mr. Bordeaux's references to "LIEAP" should not be equated with HHS' "LIHEAP" program, HHS next argued in its reply brief that Mr. Bordeaux had testified to the Tribe's having received alcohol rehabilitation funds from HHS. HHS Reply at 45. As I have already noted, the context in which Mr. Bordeaux discussed "LIEAP" makes it possible that alcohol

---

<sup>13</sup> Elsewhere in the record, counsel for the Tribe referred to a South Dakota Department of Health and Human Services when cross-examining Mr. Bettelyoun. Tr. 375. The existence of such a State entity could explain Mr. Bordeaux's answer to HHS's question concerning funds from a Department of Health and Human Services.



rehabilitation funds were involved. However, Mr. Bordeaux's testimony did not indicate that such funds were solicited or obtained from HHS, the federal entity, during the two month and 12 day period of alleged discrimination against Mr. Bettelyoun. See Tr. 983 - 86.

In addition, HHS' contention that Mr. Lunderman confirmed the accuracy of the information contained in HHS' Exhibit 17c and the Tribe's receipt of LIHEAP funds is not supported by the record. HHS Reply at 45 (citing Tr. 1125 - 26). Viewing Mr. Lunderman's testimony in context, I find that Mr. Lunderman did not confirm either proposition for HHS. Upon being shown HHS' Exhibit 17c, he acknowledged that he had had an opportunity to look at it and stated,

There is no question where the money comes from. What's the big deal?

Tr. 1125. On being asked if the Tribe received the money, his answer was,

Not the Tribe, but IHMI [Indian Health Management, Inc.] did.

Id. Then Mr. Lunderman answered "yes" to this ambiguous question posed by HHS:

This [HHS Ex. 17c] says the Rosebud Sioux Tribal Council and this says the Rosebud Sioux Tribe. Did they get these -- you receive low income energy assistance?

Id. Mr. Lunderman's "yes" answer could have indicated his personal receipt of low income energy assistance, his receipt of it on behalf of the Tribe, his receipt of it on behalf of the Tribal Council, all of the foregoing possibilities, or a combination of some of the foregoing possibilities. Moreover, Mr. Lunderman's affirmative response does not establish the Tribe's receipt of any HHS funds during the two months and 12 days of alleged discrimination against Mr. Bettelyoun. At best, the response HHS elicited from Mr. Lunderman to its ambiguous question created the possibility that the Tribe might have received low income energy assistance from HHS at some time during the 12-month federal fiscal accounting period.

As already discussed, HHS' Exhibit 17c, even if its accuracy had been confirmed by Mr. Lunderman, does not show that HHS had given funds to the Tribe during or for the two months and 12 days from June 14 to August 25, 1988. Since HHS does not contend that the Tribe had discriminated against Mr. Bettelyoun during any other time in the 1988 federal fiscal year, HHS cannot prove the existence of jurisdiction over the alleged acts of

discrimination against Mr. Bettelyoun by merely showing that at some time within the 12-month period specified in its Exhibit 17c, HHS had given money to the Tribe.

F. The Assurances of Compliance of record do not establish jurisdiction.

HHS relies upon the fact that the Tribe signed the four Assurances of Compliance of record to argue that there exists jurisdiction over the Tribe's actions against Mr. Bettelyoun from approximately June 14 to August 25, 1988. HHS Supp. Br. at 8 - 9. There is no dispute that the Tribe signed each of the Assurances of Compliance relied upon by HHS. HHS Ex. 18a - d. The Tribe had so admitted while placing HHS on notice that it disputed the legal effect HHS has attributed to these documents. Tribe RRA No. 16, 17.

Before the hearing, HHS contended:

In signing the Assurance and accepting Federal funds, [the Tribe] clearly obligated itself to comply with Section 504 and its implementing regulations and was put on notice that HHS reserved the right to enforce its terms through lawful means.

HHS Prehrg. Br. at 5 (emphasis added). Yet, HHS has introduced no evidence to correlate any of the four Assurances it has introduced to any HHS grant the Tribe is alleged to have received during the disputed two months and 12 days in 1988. See HHS Ex. 18 a - d. HHS has submitted no evidence or arguments on why or how the Assurances of Compliance the Tribe signed on July 9, 1969, July 7, 1975, March 18, 1988, and February 28, 1990 should be construed as establishing jurisdiction over the alleged acts of discrimination that took place between June 14 and August 25, 1988. See HHS Ex. 18a - d. Instead, HHS argued that the documents plainly state that they were submitted "for the purpose of obtaining any and all federal grants, loans, contracts ..., property, discounts, or other federal financial assistance extended by the Department of Health and Human Services." HHS Supp. Br. at 8 (quoting HHS Ex. 18a - d).

I do not read these Assurances of Compliance as having created an obligation for the Tribe to be bound by section 504 of the Rehabilitation Act and HHS' implementing regulations since at least July 9, 1969, the earliest date shown on the Assurances of Compliance submitted by HHS. In the context of the total record containing the many other conflicts in HHS' evidence on jurisdiction, I particularly do not find that any of these Assurances of Compliance establishes that the Tribe received HHS funds during the period from June 14, 1988 to August 25, 1988.

By itself, an Assurance of Compliance does not prohibit discrimination on the basis of handicap and does not enable HHS to seek enforcement of its provisions. The document is subject to the following caveats and conditions that are readily apparent from the face of the Assurances of Compliance executed by the Tribe and the clear language of the relevant regulations:

- an Assurance of Compliance is to be signed by an applicant for federal financial assistance from HHS;
- the Tribe's execution of an Assurance of Compliance does not signify that HHS has already extended federal financial assistance to the Tribe;
- an Assurance of Compliance does not specify when, if, or for what duration HHS will extend financial assistance;
- the Tribe's obligations under the Assurance of Compliance arise only if HHS extends federal financial assistance;
- the Tribe's obligations under the Assurance of Compliance last only for the period during which federal financial assistance is extended by HHS to the Tribe.

45 C.F.R. § 84.5(a), (b); HHS Ex. 18a, b., c - 1, d. The Tribe has no duty to comply with the terms of any Assurance it has executed unless, until, and for only so long as HHS extends financial assistance to the Tribe. Such limitations are in accord with section 504 of the Rehabilitation Act, which prohibits only subjecting an otherwise qualified handicapped individual to discrimination, solely by reason of handicap, "under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794.

Here, HHS appears to rely on Assurances of Compliance to establish jurisdiction, but it failed to submit credible and reliable proof that HHS actually awarded federal assistance to the Tribe that would give rise to the Tribe's obligations under a particular Assurance of Compliance for the period June 14 to August 25, 1988. None of the Assurances of Compliance relied upon by HHS identifies the program, activity or application for which they were submitted. HHS has never attempted to show that the Assurances of Compliance of record accompanied applications that were successful. Consequently, I cannot find that any of the Assurances of Compliance of record obligated the Tribe to refrain from taking the actions that HHS alleges discriminated against Mr. Bettelyoun.

Even if I were to assume that the Tribe's Chairman signed the Assurance of Compliance dated March 18, 1988 in support of the Tribe's grant application to HHS dated May 2, 1988 (HHS Ex. 18c at 1, 2),<sup>14</sup> the evidence is still insufficient for me to conclude that the Tribe thereby became obligated to refrain from engaging in those acts of employment discrimination proscribed by section 504 of the Rehabilitation Act and the agency's implementing regulations during the period from June 14 to August 25, 1988. HHS' evidence concerning the March 18, 1988 Assurance of Compliance and the May 2, 1988 grant application is ambiguous, incomplete, and conflicting.

First, HHS has submitted nothing that establishes HHS' extension of financial assistance to the Tribe pursuant to the May 2, 1988 grant application or the March 19, 1988 Assurance of Compliance. The grant application seeks \$25,000 for a program called "Runaway and Homeless Yt," which lists a proposed starting date of July 1, 1988 (HHS Ex. 18c at 2); the HHS publication indicates an obligation of \$25,000 in HHS funds during the 1988 fiscal year for "ADM CHILD YOUTH & FAM. - RUNAWAY & HOMELESS YOUT." HHS Ex. 17c at 4. However, the HHS publication does not show the dates during which HHS extended the \$25,000 to the Tribe.

Inferences from other evidence also introduced by HHS conflict with the possibility that the Tribe's May 2, 1988 application resulted in funding from HHS on or before August 25, 1988. HHS introduced Mr. Bordeaux's quarterly annual report dated July 20, 1988, in which he stated that he did not yet have a reply to the grant proposal his office submitted to HHS concerning a program for the homeless. HHS Ex. 14a at 2. (I assume he is referring to the program identified in the Tribe's application dated May 2, 1988. HHS Ex. 18c at 2.) Mr. Bordeaux expected to receive a reply to that proposal in August of 1988; however, in another report also submitted by HHS, covering the period from July through September, 1988, Mr. Bordeaux did not mention having received approval for the proposal. HHS Ex. 14b. The omission in Mr. Bordeaux's second report implies that no funds for the homeless project had been received by the Tribe prior to Mr. Bettelyoun's resignation on August 25, 1988. HHS made no attempt to show that the Tribe's application dated May 2, 1988 was in fact funded by HHS during the period from June 14 to August 25, 1988.

Also, other evidence introduced by HHS supports a conclusion that the "Runaway and Homeless Yt" program

---

<sup>14</sup> HHS has not made this contention. As earlier noted, HHS did not attempt to correlate any of the Assurances of Compliance with any of the HHS grants allegedly made to the Tribe.

proposed by the Tribe in its May 2, 1988 application was never approved for funding. There are two different amounts of federal funds listed on the Tribe's application form: \$25,000 appears to be the amount sought by the Tribe, and \$7074 appears to be the amount approved by HHS. HHS Ex. 18c at 2. However, the amount of \$7074 does not appear anywhere in the HHS publication of funds obligated during the 1988 federal fiscal year (October 1, 1987 to September 30, 1988). See HHS Ex. 18c at 2, 17c at 4. HHS did not explain the meaning of the \$7074 amount or why that amount does not appear in the publication introduced by HHS to establish jurisdiction.

In addition to the previously-discussed shortcomings in HHS' proof concerning the issue of whether the Tribe received HHS money during the two month and 12 day period of alleged discrimination, I note that the publication relied upon by HHS is reporting on the funds "obligated" by HHS during the 12-month period of the 1987 federal fiscal year, whereas the regulation specifies compliance with the non-discrimination provisions of the law "for the period during which Federal financial assistance [from HHS] is extended pursuant to the application." HHS Ex. 17c at 2 (emphasis added); 45 C.F.R. § 80.4(a) (emphasis added). The HHS publication does not define the term "obligated," and it does not state for what period of time any of the HHS funds remained "obligated."

HHS has not explained what is meant by "obligated," as opposed to "extended." There is no evidentiary basis in the record for me to conclude that, when HHS funds are "obligated," within the meaning of HHS Ex. 17c, they are also simultaneously "extended" to the grant applicant within the meaning of the regulation. Nor is there any evidence of record which suggests that HHS only "obligates" its funds for all 12 months of each federal fiscal year. HHS offered no proof that the funds identified in the HHS publications were actually "obligated" or "extended" to the Tribe for each of the 12 months from October 1, 1987 to September 30, 1988. HHS offered nothing to show that it will only approve grant applications for full 12-month periods or that the duration of the programs that receive HHS funds must coincide with the federal fiscal year. HHS failed to submit any proof in support of its apparent theory that, as long as HHS funds were "obligated" during the 12 months of the 1988 federal fiscal year, then HHS money was "extended" to and received by the Tribe during the two months and 12 days of alleged discrimination against Mr. Bettelyoun.

For all of the above reasons, I conclude that the compliance proceeding must be dismissed.

II. If HHS had established the existence of jurisdiction, I would find that HHS is entitled to proceed to a decision on the merits of its allegations notwithstanding the unreasonable delay incurred by Mr. Bettelyoun in filing his complaint with OCR.

If the Tribe were obligated to conduct itself in accordance with section 504 of the Rehabilitation Act during the period in controversy, I would need to decide whether this compliance proceeding is time-barred.

HHS' present enforcement action against the Tribe was precipitated by the written complaint Mr. Bettelyoun sent to OCR some 16 months after he had allegedly suffered discrimination in a job he had held for less than three months. HHS Ex. 19; Tribe Ex. 5, 8. At a prehearing conference, I denied the Tribe's motion to dismiss due to the timing of Mr. Bettelyoun's complaint. See May 21, 1993 letter confirming ruling. The parties therefore introduced evidence on the timeliness issue.

Having now reviewed OCR's authority to pursue investigations in the context of all the evidence introduced by the parties on the timeliness issue, I reaffirm my earlier ruling that this proceeding is not barred because of Mr. Bettelyoun's delay in filing his complaint with OCR. I modify my ruling only to the extent of adding the following:

- The Tribe has proven its assertion that Mr. Bettelyoun's complaint to OCR was filed many months outside the 180 day period specified in the regulations.
- Were I delegated the authority for determining de novo whether to waive the 180-day filing period, I would not have accepted Mr. Bettelyoun's reasons for delay at face value or found them persuasive.
- The Regional Manager for OCR was delegated the discretion to decide whether to waive the filing period for complaints such as Mr. Bettelyoun's.
- I lack authority to modify the OCR Regional Manager's exercise of her discretion to accept Mr. Bettelyoun's complaint for investigation.
- Whether or not OCR should have accepted Mr. Bettelyoun's complaint for filing, the Tribe has not proven that OCR was without authority to take action against the Tribe by treating the contents of Mr. Bettelyoun's complaint as "other information" of non-compliance under 42 C.F.R. § 80.7(c).

A. OCR accepted Mr. Bettelyoun's complaint for investigation without having seriously analyzed the reasons he gave for his delay.

There is no dispute that Mr. Bettelyoun filed a complaint with OCR more than 16 months after he resigned from his job with the Tribe.

Mr. Bettelyoun testified at hearing that his complaint to OCR was triggered by a meeting with an OCR official in December of 1989. In mid-December 1989, he met Ms. Vada Kyle-Holmes, Regional Manager for OCR's Region VIII, at an HHS workshop in Washington, D.C., where he was making a presentation to top government leaders on the topic of AIDS and discrimination with the then Secretary of HHS, Dr. Louis Sullivan. Tr. 169. According to Mr. Bettelyoun, Ms. Kyle-Holmes approached him after his presentation, asked if he knew of section 504 of the Rehabilitation Act, and asked him to call her to discuss the possibility of his civil rights having been violated. Tr. at 170, 620. After holding such a discussion with her, Mr. Bettelyoun sent OCR a written complaint dated December 28, 1989. HHS Ex. 19.

HHS introduced the testimony of Ms. Kyle-Holmes, who said she accepted Mr. Bettelyoun's allegations of delay at face value. Tr. 630 - 31; 634 - 35.

As relevant here, waiver of the 180-day filing period is appropriate under OCR's published criteria where "[t]he complainant could not reasonably be expected to know the act complained of was discriminatory within the 180 days," or "[o]ther reasons for which the Regional Manager provides appropriate justification." HHS Ex. 27 at 9. Ms. Kyle-Holmes decided to exercise her delegated discretion by accepting Mr. Bettelyoun's reasons for the delay at face value in waiving the 180 day filing deadlines for him. Tr. at 630 - 31, 634 - 35; HHS Ex. 19, 27, 28. Ms. Kyle-Holmes felt herself capable of rendering an impartial determination and did not believe she had any personal involvement in Mr. Bettelyoun's case. Tr. at 630, 634 - 35.<sup>15</sup>

Ms. Kyle-Holmes' "Justification for Waiver of Timeframe for Filing of Complaint" incorrectly attributed to the complaint an allegation that Mr. Bettelyoun was unaware of the law prohibiting discrimination on the basis of

---

<sup>15</sup> OCR's manual states that "[s]taff members must conduct unbiased investigations and make known to their supervisors any situation where objectivity may be influenced or impaired." HHS Ex. 27 at 4. The foregoing provision was not made specifically applicable to the situation of a Regional Manager who is deciding whether to waive the filing deadline.

handicap until he appeared at the HHS-sponsored conference in December 1989. HHS Ex. 28 at 1. Mr. Bettelyoun did not allege in his complaint to OCR that he was unaware of section 504 of the Rehabilitation Act until he attended the HHS-sponsored conference. HHS Ex. 19. In fact, his testimony indicated that he was generally aware of his rights under the law and could have made inquiries concerning the enforcement of such rights if he had wished.<sup>16</sup>

In his complaint, Mr. Bettelyoun alleged that he did not take any "direct action" (e.g., file a complaint with OCR) against the Tribe at the time the discrimination took place because he feared banishment by the Tribe's former administration. HHS Ex. 19. Ms. Kyle-Holmes accepted this allegation as a justification for the delayed filing of his complaint. HHS Ex. 28.

If Ms. Kyle-Holmes had had the benefit of Mr. Bettelyoun's testimony at hearing and of the other evidence presently of record, she should have found not credible his allegation that fear of banishment by the prior Tribal administration deterred him from filing a complaint with OCR for 16 months. For example, the hearing evidence shows that, as early as June 28, 1988, Mr. Bettelyoun had retained counsel for possible litigation against the Tribe and had so informed his supervisor. Tr. 82 - 84. Before and after his resignation from his job with the Tribe, he had been making speeches in public to describe his experiences after he was diagnosed with the HIV infection. Tr. at 151 - 53, 379, 647, 661, 666, 721; HHS Ex. 39. Such speeches included allegations that he was subjected to discrimination while employed by the Tribe. Tr. 1017.

In addition, Mr. Bettelyoun filed a lawsuit that publicized the Tribe's alleged discrimination against him. During August of 1989, four months before Mr. Bettelyoun filed his complaint with OCR, he sued the federal government to recover several hundred thousand dollars in damages that allegedly resulted from the release of his medical information by the IHS hospital in Rosebud (IHS Hospital). Complaint in Bettelyoun v. U.S. attached to Tribe's Mem. Supp. Aff. Def. Mr. Bettelyoun alleged, inter alia, that he was caused to feel humiliation, shame, and emotional distress, and to lose two jobs (his full time one with the Tribe and his part

---

<sup>16</sup> At hearing, Mr. Bettelyoun claimed that he did not know section 504 of the Rehabilitation Act. Tr. at 170. However, Mr. Bettelyoun admitted that, through his work as a writer of grant proposals to the federal government, he had become familiar with the contents of the civil rights "assurance clause" submitted by federal grant applicants and recipients. Tr. at 186 - 87.



time one with a video store<sup>17</sup>) and to become unemployable. Id. Mr. Bettelyoun's undertakings to publicize the Tribe's alleged discrimination against him belie his allegation that he feared banishment by the Tribe if he filed a complaint with OCR.

Also contradicting Mr. Bettelyoun's alleged fear of banishment by the Tribe's former administration is the fact that the Tribe's former administration awarded him a sole source consulting contract of \$4000 during May of 1989, after Mr. Lunderman, the Tribe's Chairman and one of the officials who allegedly discriminated against Mr. Bettelyoun, voted in favor of the action. Tribe Ex. 9. Mr. Bettelyoun testified that, twice in 1989, he applied for jobs with the Tribe on his attorney's advice to mitigate damages for his lawsuit. Tr. 160 - 63. (Mr. Bettelyoun said he was motivated also by a desire to work. Id. at 163.) The Tribe awarded him the sole source contract notwithstanding his allegations in court and at public seminars that the Tribe had discriminated against him. His alleged fear of banishment is further undercut by the fact that, in either October of 1989 or 1990 (Mr. Bettelyoun could not recall which one), members of the tribal community where he resided elected him to be their leader, the Chairman of Corn Creek Community. Tr. 372 - 73, 385. Such actions by the Tribe's former administration and the residents of his community do not suggest that they would have attempted to banish him from the Tribe had he filed his complaint of discrimination with OCR within the 180 days specified by regulation.

B. HHS brought this compliance proceeding after investigating IHS's involvement and attempting to obtain a conviction against the IHS physician who disclosed Mr. Bettelyoun's medical condition to Mr. Bettelyoun's supervisor.

Ms. Kyle-Holmes' reasons for accepting Mr. Bettelyoun's complaint for investigation included her concern that another component of HHS, the Public Health Service (PHS), may have been involved in a criminal violation of Mr. Bettelyoun's privacy rights. HHS Ex. 28 at 2. Mr. Bettelyoun's complaint alleged that IHS, a component of PHS, had released medical information to the Tribe without his authorization and thereby precipitated the employment discrimination he then experienced from the Tribe. HHS Ex. 19. She made a policy determination that, due to the involvement of PHS and IHS, the 180-day filing period should be waived for Mr. Bettelyoun's complaint.

---

<sup>17</sup> The video store was managed by Mr. Bettelyoun's brother. Tr. 798.

In response to Mr. Bettelyoun's allegations against IHS and its doctors, HHS' Inspector General conducted a criminal investigation, and OCR decided to await the Inspector General's findings before investigating Mr. Bettelyoun's allegations against the Tribe. HHS Ex. 29.

On July 17, 1990, seven months after Mr. Bettelyoun filed his complaint with OCR, the government reached a settlement with Mr. Bettelyoun concerning IHS's alleged infringements of his privacy rights. The government paid \$30,000 in exchange for Mr. Bettelyoun's seeking dismissal of the lawsuit and waiving any other right of recovery arising out of the incidents he alleged. Attachment to Tribe's Mem. Supp. Aff. Def.<sup>18</sup>

OCR conducted its investigations of the Tribe from at least February of 1991 until some time before September 26, 1991. E.g., HHS Ex. 25, 31. On September 26, 1991, HHS, by Ms. Kyle-Holmes of OCR, notified the Tribe that its investigation found discrimination against Mr. Bettelyoun "on the basis of [his] handicap"<sup>19</sup> and required the Tribe to take corrective actions that included reinstating Mr. Bettelyoun and making him "whole." HHS Ex. 31. There followed several months of failed negotiations between the Tribe and OCR on matters that included reinstating Mr. Bettelyoun and making him "whole" with back pay. Tribe Ex. 10 - 13; Notice at 9 - 11.

On October 14, 1992, the United States failed to obtain a conviction under the Privacy Act against Dr. Wayne Foster, the IHS physician who had released medical information concerning Mr. Bettelyoun's HIV infection to Mr. Bordeaux. Tribe Ex. 29. The court ordered acquittal of the physician because it found Mr. Bordeaux more credible than Mr. Bettelyoun. *Id.* at 7 - 8. The judge cited his personal observations of the witnesses, as well as the written medical records that corroborate Mr. Bordeaux's testimony. *Id.* The court therefore concluded

---

<sup>18</sup> The Tribe contended that the present proceeding was barred by the doctrine of res judicata. However, as I previously ruled, the doctrine of res judicata is inapplicable because HHS and the Tribe were not parties to the prior lawsuit; nor did Mr. Bettelyoun's lawsuit seek relief under Section 504 of the Rehabilitation Act. See May 21, 1993 Confirmation of Rulings on Motions.

<sup>19</sup> HHS Ex. 31. However, after HHS acknowledged its payment of Social Security disability benefits to Mr. Bettelyoun, HHS described OCR's investigative finding as follows: "William Bettelyoun was a person with a disability on the basis of his HIV infection." HHS PF No. 89.

that Mr. Bettelyoun had given his consent for Dr. Foster to release the medical information at issue.

Less than one month after the court ordered acquittal of the IHS physician, HHS declared that its negotiations with the Tribe had failed and, on November 6, 1992, filed its Notice of Opportunity for Hearing. Notice at 9 - 10; HHS PF No. 31, 32.

C. OCR had the authority to conduct investigations based on information of non-compliance, and HHS' authority to initiate compliance proceedings does not depend on timely filed complaints by individuals.

Even though I would have reviewed Mr. Bettelyoun's waiver request differently and, with benefit of the record now before me, reached a different determination on whether to accept his complaint against the Tribe for investigation, the discretion to decide these issues was delegated to the Regional Manager of OCR, not to me. In addition, the Regional Manager properly considered the policy question of public perception should OCR reject a complaint that included allegations against a PHS/IHS employee. HHS Ex. 28. Her approach was consistent with her authority to grant a waiver of the 180-filing period for the reasons she believes to be justified. HHS Ex. 27 at 9.

Whether or not OCR had waived the 180-day filing period for Mr. Bettelyoun's complaint, OCR could have conducted an investigation and brought an enforcement proceeding against the Tribe by construing Mr. Bettelyoun's allegations as information of the Tribe's non-compliance with Section 504. See, 45 C.F.R. § 80.7(c). The filing period identified by the Tribe does not apply to "other information" of non-compliance. Id. OCR's Regional Manager, Ms. Kyle-Holmes, described the "compliance review" that can be initiated by OCR based on information derived from newspapers and other sources. Tr. 648 - 49. She testified that the processes are basically the same for OCR's compliance reviews and for investigations of complaints filed by individuals. Tr. 649. If OCR found violations and injured parties pursuant to its compliance review, it would seek relief in much the same manner as in like cases involving an individual's complaint. Tr. 650. Pursuant to a compliance review, OCR has the authority to initiate enforcement proceedings like the one before me. Tr. 650 - 51.

The Tribe has not shown that the Regional Manager of OCR acted outside the scope of her authority. Nor has the Tribe shown that an investigation or enforcement proceeding could not have been brought had OCR refused to accept Mr. Bettelyoun's submission as a complaint and, instead, construed it as "other information" of non-compliance with section 504 of the Rehabilitation Act.

Therefore, even though there exists factual support for the Tribe's allegations of untimeliness concerning Mr. Bettelyoun's complaint, the Tribe is not entitled to dismissal of this enforcement action as a consequence.

III. If I had the authority to proceed to the merits of the discrimination alleged by HHS, I would find that HHS has failed to prove by a preponderance of the evidence that Mr. Bettelyoun has been a qualified handicapped person at all times relevant to this proceeding.

A. Despite ample opportunity to overcome the evidentiary deficiencies on the issue, HHS has failed to do so.

HHS acknowledges that, to prevail on a claim of handicap discrimination under section 504 of the Rehabilitation Act, HHS must show that Mr. Bettelyoun has a handicap and is otherwise qualified for the employment at issue. HHS Posthrg. Br. at 27.

HHS' regulation defines a "handicapped person" as an individual who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 45 C.F.R. § 84.4(j). A "qualified handicapped person" in the employment context means an individual who, with reasonable accommodation, can perform the essential functions of the job in question. 45 C.F.R. § 84.3(k)(1).

In answer to HHS' requests for admissions, the Tribe denied that Mr. Bettelyoun was "a qualified handicapped person." Tribe RRA No. 28, 29. The Tribe denied also that infection with HIV constitutes a handicap under section 504 of the Rehabilitation Act or that, from June of 1988 to the present, Mr. Bettelyoun has remained a handicapped person within the meaning of the regulations. Tribe RRA No. 21, 26, 27.

There is no dispute that Mr. Bettelyoun was diagnosed with the HIV infection while employed by the Tribe. HHS Ex. 11; Tribe RRA No. 23, 24. HHS' evidence shows that there is no cure for the HIV infection, that persons with the HIV infection should take precautions in their sexual contacts to avoid transmitting the virus to others, that people with the infection may develop symptoms such as memory loss, loss of coordination, partial paralysis, or mental disorders due to the virus's effects on their central nervous system, and people with the infection may experience life-threatening illnesses, such as pneumonia, meningitis, and cancer. See, e.g., HHS Ex. 21c at 7, 8. Thus, as in The Matter of Westchester County Medical Center, DAB 1357 (1992), there is sufficient evidence of record to support HHS' contention that Mr. Bettelyoun has a "handicap" within the meaning of the law because, at

the very minimum, he has a record of one impairment (HIV infection) that has substantially and continuously limited his major life function of sexual contacts since June of 1988. However, I find that HHS has failed to satisfy its burden of proving that Mr. Bettelyoun has been a "qualified handicapped person" within the meaning of the regulation at all times relevant to this proceeding.<sup>20</sup>

On May 13, 1993, I recessed the hearing and held the record open for the receipt of additional evidence from the parties concerning, among other matters, the issues of Mr. Bettelyoun's credibility and whether Mr. Bettelyoun has continued to be able to perform his job for the Tribe. Tr. 1132 - 36. I did so after one of the Tribe's witnesses, Mary Janis, testified that Mr. Bettelyoun had received a retroactive award of federal disability benefits. Tr. 892. After Ms. Janis gave such testimony, HHS acknowledged that one of its agencies, SSA, had found Mr. Bettelyoun disabled on the basis of an application he filed in October of 1989. See, e.g., Tr. 1134; HHS Posthrg. Br. at 33.

HHS' actions throughout the hearing process, including the evidence it chose to offer to prove Mr. Bettelyoun's health and ability to work, indicate to me that HHS was not surprised by the testimony concerning SSA's payment of Social Security benefits to Mr. Bettelyoun. Even though my pretrial order required the parties to exchange prior statements of witnesses, HHS gave no indication that Mr. Bettelyoun had filed an application for disability benefits with SSA. To the contrary, HHS attempted to keep out all evidence concerning Mr. Bettelyoun's contacts with SSA. At hearing, HHS had, at first, successfully blocked the Tribe's efforts to question Mr. Bettelyoun concerning SSA's treatment of

---

<sup>20</sup> To establish a violation under section 504 of the Rehabilitation Act, HHS must show also that the alleged noncompliance with the Act could not be corrected by informal means. Westchester, DAB CR191, at 51; DAB 1357, at 8. As further discussed below, the informal means of resolving the alleged noncompliance failed in HHS's view because OCR required the Tribe to reinstate Mr. Bettelyoun to his former job with appropriate provisions for making him "whole" (HHS Ex. 31 at 17), and the Tribe failed to do so (Notice at 11, 12). For these reasons, it was incumbent upon HHS to show that Mr. Bettelyoun has been a qualified handicapped person within the meaning of the law from June of 1988 until the present. HHS is apparently aware of this evidentiary requirement, as it affirmatively argues that Mr. Bettelyoun "is" a qualified handicapped person. E.g., HHS Posthrg. Br. at 27.

him. Tr. 376<sup>21</sup>. Later, HHS attempted to bar Ms. Janis from testifying on Mr. Bettelyoun's receipt of Social Security benefits; HHS confirmed SSA's determination of disability for Mr. Bettelyoun only after I overruled HHS' objection to Ms. Janis's testimony. Tr. 874, 1134.

HHS brought this compliance proceeding only because OCR had failed in its informal efforts to obtain job reinstatement and back pay for Mr. Bettelyoun. Notice at 10 - 11, 12. Yet, neither prior to nor during the hearing did HHS secure Mr. Bettelyoun's consent to release all relevant medical records and Social Security payment records. Instead, HHS obtained Mr. Bettelyoun's consent to use in this proceeding only those medical records from the IHS Hospital for the period from January 1988 through December 1989. HHS Ex. 9.

To support its contention in this compliance proceeding that Mr. Bettelyoun is a qualified handicapped employee, HHS chose to further curtail the already limited medical records made available by Mr. Bettelyoun. From the IHS Hospital's records covered by Mr. Bettelyoun's release form, HHS chose to introduce only two pages as evidence: (1) a one-page face sheet to his hospitalization records for the period from May 27 to June 5, 1988 (titled "Clinical Record Brief" and summarizing the established diagnosis and medical procedures used); and (2) a one-page undated pathology report stating that Mr. Bettelyoun "should be considered to be infected with HIV and therefore potentially infectious." HHS Ex. 10, 11.

Neither of these two pages describes Mr. Bettelyoun's symptoms, his emotional state, or his subjective responses to the disease process or the news of his test results. Medical records containing these and like descriptions may be highly probative on issues such as whether Mr. Bettelyoun was sufficiently healthy, recovered, or mentally fit to perform his work for the Tribe reliably and properly after he learned of his HIV infection. See, e.g., HHS Ex. 21c at 18; Tr. 597.

---

<sup>21</sup> HHS did not object to the Tribe's asking Mr. Bettelyoun about the treatment he received from IHS, the U.S. Bureau of Indian Affairs, the South Dakota Department of Social Services, and the South Dakota Department of Health and Human Services. Tr. 374 - 76. However, HHS objected when the Tribe proceeded to ask about the "United States Social Security Department" because Mr. Bettelyoun had not testified to having been discriminated against by the SSA. Tr. 376. (Neither had he testified to having been discriminated against by any of the other agencies.) I sustained the objection because, at that point in the hearing, the relationship between the Social Security Administration and Mr. Bettelyoun had not yet been revealed. Tr. 377.

Instead, as also discussed elsewhere in this decision, HHS sought to establish Mr. Bettelyoun's good health and fitness for work by using his own statements and the opinions of physicians who reviewed medical records and charts not released by Mr. Bettelyoun. See, e.g., Tr. 1071 - 72. By not securing Mr. Bettelyoun's consent to make available all relevant underlying medical records, HHS precluded the Tribe from seeking opinions from other experts concerning Mr. Bettelyoun's health or limitations. Also, HHS' omission (or Mr. Bettelyoun's refusal) insulated the testimony and opinion evidence favorable to HHS from being challenged with use of documented medical signs or findings.

Given HHS' evidence on Mr. Bettelyoun's health and ability to work, I had serious concerns about the soundness of HHS' assertion that Mr. Bettelyoun is a qualified handicapped individual, especially after hearing the information concerning Mr. Bettelyoun's receipt of disability benefits. Such information strongly implies that HHS has in its possession Mr. Bettelyoun's allegations and proof to the Social Security Administration that he has been unable to perform his past work as well as all other work, as specified by the definition of disability at 42 U.S.C. § 423(d)(2). The Social Security Act and the regulations would not have permitted the Secretary to make an award of disability benefits to Mr. Bettelyoun if he had not filed a written application for such benefits and satisfied his burden of proving to the agency that he has been unable to work. See, e.g., 42 U.S.C. § 423(a)(1); 20 C.F.R. §§ 404.315(b)-(d), 404.316, 404.1505, 404.1512 - .1516.

Therefore, to give Mr. Bettelyoun and HHS the benefit of the doubt, I allowed HHS additional time specifically to develop the issue of how Mr. Bettelyoun's receipt of disability benefits from HHS under the Social Security Act might affect HHS' contention in this compliance proceeding that Mr. Bettelyoun has remained able to perform his past work for the Tribe notwithstanding his HIV infection. Tr. 1128 - 1136.

Even though HHS did not explain why it had not previously obtained Mr. Bettelyoun's written release and testimony on these issues, HHS anticipated that Mr. Bettelyoun would give HHS his consent to release his Social Security records for review by the Tribe and me and that he would also give additional testimony thereafter. Id. HHS was wrong in its predictions.

I ordered the evidentiary record closed on September 28, 1993. The letter of that date summarizes the parties' unsuccessful efforts to supplement the record, including HHS' inability to secure Mr. Bettelyoun's consent to release his Social Security records and HHS' inability to contact Mr. Bettelyoun.

In its posthearing submissions, HHS asks me to accept as true the testimony by Mr. Bettelyoun and Dr. Jereb that Mr. Bettelyoun was able to work without restrictions at his job with the Tribe beginning on June 6, 1988, despite his having experienced symptoms that were so severe that he was admitted to the IHS Hospital through its emergency room on May 27, 1988 and remained hospitalized there until June 5, 1988, the day before he began working for the Tribe. HHS PF No. 16, 17, 24. HHS asked me also to accept as true Mr. Bettelyoun's contention that his HIV infection has never affected his ability to work and that he has never felt unable to work due to his health. HHS PF No. 23. Mr. Bettelyoun so testified even though he also recalled Dr. Jereb's prognosis on June 14, 1988 that he might live for only two more months. Tr. 72, 74.

With respect to Mr. Bettelyoun's disability status, HHS argues that Mr. Bettelyoun's receipt of Social Security disability benefits does not negate his status as a qualified handicapped person under the Rehabilitation Act. HHS Posthr. Br. at 33 - 39. HHS posits, inter alia, that Mr. Bettelyoun "is" presently a qualified handicapped person under the Rehabilitation Act (Id. at 27) because: (1) he is qualified for the position of Assistant Director/Senior Planner, and (2) he satisfies the objective criteria for said position. Id. at 27 - 39.

HHS contends that the Social Security Administration's instructional manual "required SSA claims adjusters to construe HIV infection as equivalent to conditions included in SSA's regulatory Listing of Impairments so as to render an applicant with HIV presumptively disabled and eligible for benefits, without inquiry into the applicant's ability to work." HHS PF No. 83. According to HHS, Mr. Bettelyoun would have been "conclusively presumed to be disabled under the Act, and thus, entitled to benefits without inquiry into his ability to work." HHS Posthr. Br. at 34. HHS then uses the term "disability" and "handicap" interchangeably in discussing the Rehabilitation Act and OCR's actions. Id. at 27;<sup>22</sup> HHS PF No. 84 - 91.

The Tribe lodges various objections to the assertions made by HHS, including the absence of any evidence concerning what SSA in fact did (e.g., whether or when SSA made a factual determination concerning Mr. Bettelyoun's ability to perform his past work for the Tribe), and the absence of an opportunity to independently verify the accuracy of HHS' facts and

---

<sup>22</sup> For example, HHS states, "[A] plaintiff must show that she or he is, apart from her or his disability, otherwise qualified for employment." HHS Posthr. Br. at 27.



conclusions. Tribe Reply at 13 - 15. The Tribe points out also that Mr. Bettelyoun's receipt of Social Security disability benefits calls into question his ability to perform the essential job functions of the RDO work, and that HHS has provided no evidence that he was or remains able to perform such functions. Id. at 15.<sup>23</sup> The Tribe asks that I draw adverse inferences from Mr. Bettelyoun's failure to cooperate with HHS to permit disclosure of the relevant records in these proceedings. Id. at 13 - 14. The Tribe's arguments have merit.

I agree that HHS' contentions about Mr. Bettelyoun's disability do not substitute for evidence. Even without considering the legal merit of HHS' arguments on Mr. Bettelyoun's disability status, I find that HHS' proof of Mr. Bettelyoun's continued good health on and after June 6, 1988 is suspect and not fully consistent with other evidence of record.<sup>24</sup> Mr. Bettelyoun has always had an interest in the outcome of this compliance action. The proceeding was brought by HHS only after the Tribe refused to reinstate him to his former job and provide him with back pay, and a finding of discrimination could induce the Tribe to meet such demands in lieu of having all HHS funds denied or terminated. Under these circumstances, Mr. Bettelyoun's failure to authorize the release of his Social Security records and his subsequent unavailability as a witness further undercut his own credibility and give rise to negative inferences concerning his state of health.

In addition, Dr. Jereb acknowledged his inexperience and lack of training in treating patients with the HIV infection. HHS Ex. 23 at 14; Tr. 322. Prior to treating Mr. Bettelyoun, Dr. Jereb's only AIDS patients had been hemophiliac children of very young ages in Los Angeles when AIDS was being discovered. Id. He cared for these very young children without knowing why they became

---

<sup>23</sup> HHS alleged in the Notice that, "Mr. Bettelyoun is a qualified handicapped person . . . in that he can perform the essential functions of the job . . . [as] a Senior Planner/Assistant Director. . . ." Notice at 5. HHS argues in its brief: "William Bettelyoun Is A Qualified Handicapped Person." HHS Posthrg. Br. at 27.

<sup>24</sup> In analyzing why Mr. Bettelyoun's supervisor investigated the nature of Mr. Bettelyoun's medical condition and whether Mr. Bettelyoun took time off from work, I will discuss also the evidence concerning Mr. Bettelyoun's emotional state after he learned of his HIV diagnosis and the prognosis of a much shortened life expectancy. Such evidence does not preponderate in favor of HHS's position that at no time was Mr. Bettelyoun's ability to perform his work for the Tribe affected by his diagnosis. See HHS PF No. 23.

sicker; he later learned that they had been infected with the HIV virus from contaminated blood. Id. Even though Dr. Jereb may have been of the opinion that Mr. Bettelyoun was physically capable of working after June 6, 1988, Dr. Jereb did not address the possible limitations that may have resulted from Mr. Bettelyoun's mental condition. The Surgeon General's Report introduced by HHS shows that there tend to be significant mental health implications, such as anxiety and depression, associated with the HIV infection. HHS Ex. 21c at 18.<sup>25</sup> Dr. Mark Babitz, a witness for HHS, testified that the mental or psychological conditions of people with the HIV infection vary from mild concern to major depression and even suicide. Tr. 597. Dr. Jereb is not a mental health practitioner. He is a medical epidemiologist currently employed by HHS' Centers for Disease Control, in the division of Tuberculosis Elimination. Tr. 309. When he cared for Mr. Bettelyoun in 1988, Dr. Jereb was the general medical officer and pediatrician for the Rosebud IHS Hospital. Tr. 311.

HHS' medical evidence even fails to establish credibly whether Mr. Bettelyoun's HIV infection had become symptomatic before he began his job with RDO. For example, the Surgeon General's Report notes that AIDS-Related Complex (ARC) is a condition caused by the HIV virus, and it has a specific set of clinical symptoms, such as loss of appetite, weight loss, fever, night sweats, skin rashes, diarrhea, and fatigue. HHS Ex. 21c at 7. The Surgeon General warns that the foregoing are also signs and symptoms of other diseases. Id. Here, Mr. Bettelyoun testified that he was experiencing several of these symptoms when he was admitted to the IHS Hospital in June of 1988. E.g., Tr. 59 - 62. The doctor gave a diagnosis of aseptic meningitis before he received Mr. Bettelyoun's test results for HIV. HHS Ex. 10. The medical evidence of record does not rule out the

---

<sup>25</sup> According to the Surgeon General's Report, "[t]he AIDS virus in all infected people is essentially the same; the reactions of individuals may differ." HHS Ex. 21c at 8. Also, according to the Surgeon General:

Our society will also face an additional burden as we better understand the mental health implications of infection by the AIDS virus. Upon being informed of infection with the AIDS virus, a young, active, vigorous person faces anxiety and depression brought on by fears associated with social isolation, illness, and dying. Dealing with these individual and family concerns will require the best efforts of mental health professionals.

possibility that he was in fact suffering from ARC as early as June 1988. There is no accurate account of Mr. Bettelyoun's medical impairments and their resulting effects to support HHS' contention that Mr. Bettelyoun has been a qualified handicapped individual at all times relevant to this proceeding.

HHS has failed also to introduce any evidence to eliminate the glaring logical inconsistency that exists between its position concerning Mr. Bettelyoun's status as a qualified handicapped person and its finding that he is disabled from working. I am aware that HHS has not disclosed the onset date of Mr. Bettelyoun's disability as determined by the agency, and HHS has not confirmed Mr. Bettelyoun's receipt of retroactive benefits under Title II of the Social Security Act pursuant to his October, 1989 application. HHS Posthrg. Br. at 33 & n. 16. (Ms. Janis's testimony indicated a retroactive award. Tr. 892.) However, HHS relied on the diagnosis of aseptic meningitis, made on June 5, 1988, and the positive HIV test results, also dated June 1988, as dispositive evidence of Mr. Bettelyoun's disability due to AIDS. HHS Posthrg. Br. at 38;<sup>26</sup> HHS Ex. 10, 11. Disability, as acknowledged by HHS, denotes the individual's inability to engage in any substantial gainful activity by reason of a medically determinable impairment. HHS Posthrg. Br. at 36, n. 18.

Accepting HHS' theory, Mr. Bettelyoun should have been incapable of working, due to his medical problems, since June 1988, when he was still working for the Tribe. Yet, after introducing the diagnoses of HIV infection and aseptic meningitis that have allegedly rendered Mr. Bettelyoun incapable of performing any kind of substantial gainful activity since June of 1988, HHS has been advocating Mr. Bettelyoun's good health, fitness for work, and entitlement to reinstatement by the Tribe. Especially in the face of the very strong contrary implication of its own creation, the evidence HHS did introduce was not sufficient to prove that Mr. Bettelyoun has at all times been able to perform the essential functions of the RDO job, such that he may be regarded as a qualified handicapped person within the meaning of section 505 of the Rehabilitation Act.

---

<sup>26</sup> "Thus, by virtue of Mr. Bettelyoun's 1988 diagnoses with HIV and aseptic meningitis, he would have been viewed as having AIDS under the criteria used by SSA in 1989 to evaluate disability claims. Hence, Mr. Bettelyoun would have been presumed disabled, and eligible for disability benefits." HHS Posthrg. Br. at 38.

B. HHS cannot prove that Mr. Bettelyoun is a qualified handicapped individual by intimating, posthearing, that the Tribe should have made reasonable accommodations for him, or by contending that its Social Security Administration determined Mr. Bettelyoun to be disabled without having inquired into his ability to work.

1. There is no legitimate issue of reasonable accommodation in this case.

HHS argued that Mr. Bettelyoun's receipt of Social Security disability benefits does not negate his status as a qualified handicapped person, for whom recipients of federal funds must "'make reasonable accommodation to known physical or mental limitations of an otherwise qualified handicapped ... employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.'" HHS Posthr. Br. at 39 (citing 45 C.F.R. § 84.12(a)).

I note that before the close of the evidentiary record, there was not even a hint from HHS that Mr. Bettelyoun might have been in need of some reasonable accommodation to perform the essential elements of his planner job for the Tribe. Nothing in OCR's investigative findings indicated that the Tribe may have violated the Rehabilitation Act by failing to provide reasonable accommodation to Mr. Bettelyoun. Nothing of record suggests that OCR or the Tribe had considered this issue when they discussed the possibility of having the Tribe make Mr. Bettelyoun "whole" by providing him with back pay and reinstatement to his prior job. During hearing and before Ms. Janis testified about Mr. Bettelyoun's receipt of disability benefits, HHS had elicited and underscored Mr. Bettelyoun's testimony that he has never come to the realization that he was unable to perform his former planning job for the Tribe because of his health. Tr. 201. Also, HHS introduced the testimony of Dr. Harry Brown, who last treated Mr. Bettelyoun in January of 1992 and found him still in the asymptomatic phase of HIV development. Tr. 1073 - 74. Dr. Brown said that in January of 1992, he last provided standard treatment to Mr. Bettelyoun for a respiratory infection of the kind that any person would get from time to time. Tr. 1074. HHS elicited Dr. Brown's opinion that Mr. Bettelyoun was not precluded by his medical condition from performing the functions of the job he had held with the Tribe. Tr. 1073 - 74.<sup>27</sup>

---

<sup>27</sup> HHS introduced Dr. Brown's opinions concerning Mr. Bettelyoun's condition as of 1992 even though Mr. Bettelyoun limited his authorization for release of his medical records from the IHS Hospital to those entries by doctors, laboratories, and nurses from the period of  
(continued...)

In addition, much of HHS' theory of discrimination in this case is built on Mr. Bettelyoun's contention that he objected to his supervisor's inquiries concerning the nature of his medical condition, that he never confirmed or denied his HIV diagnosis for his employer, and that he construed people's remarks about his condition and their offers to help him as "harassment." See, HHS PF No. 31, 35, 36; Tr. 76, 113, 117 - 19, 239 - 41, 271. He had sued the United States Government because one IHS doctor had revealed his diagnosis to his supervisor. Mr. Bettelyoun's apparent unwillingness to make known the true nature and extent of his handicapping condition makes unreasonable any expectation of "reasonable accommodation." Given also that Mr. Bettelyoun has never consented to the release of all relevant medical records, there is no accurate information by which I or the Tribe can evaluate his limitations or needs at the workplace.

Under the foregoing circumstances, HHS is barred from introducing the theory that Mr. Bettelyoun is a qualified handicapped individual because the Tribe has an obligation to make reasonable accommodation to known mental or physical limitations of an otherwise qualified handicapped individual. Mr. Bettelyoun does not become a qualified handicapped individual merely because the Rehabilitation Act requires reasonable accommodation, if appropriate, and the Social Security Act does not prohibit an employer from making available reasonable accommodation to any individual. Since no real reasonable accommodation issue was ever present in this case, and since HHS has not produced the relevant records on Mr. Bettelyoun's disability, I find inapposite the distinction HHS draws between the disability provisions of the Social Security Act and the handicap provisions of the Rehabilitation Act.

2. HHS has not proven that Mr. Bettelyoun's impairments are limited to his HIV infection

---

<sup>n</sup>(...continued)

January 1988 through December 1989. HHS Ex. 9. Dr. Brown rendered his opinions as a physician who had treated Mr. Bettelyoun at the IHS Hospital from Spring of 1991 to January of 1992. Tr. 1070 - 74. Dr. Brown formed his opinions on the basis of charts that were not made a part of this record and were not subject to review by the Tribe or me due to the restrictions Mr. Bettelyoun had placed in his release form. Tr. 1071; HHS Ex. 9. I note, in addition, that Dr. Brown is not an expert in treating patients with the HIV infection, nor is he a mental health expert. Tr. 1069 - 70. Also, Dr. Brown did not express an opinion about Mr. Bettelyoun's mental fitness to perform the duties of the RDO job. See Tr. 1074 - 75.

and the aseptic meningitis he suffered in June of 1988.

I am not persuaded that HHS correctly characterizes the disability laws and the Secretary's implementing rulings and regulations in its attempt to show that Mr. Bettelyoun has remained a qualified handicapped individual. HHS notes that "disability," as defined by the Social Security Act, means the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death which has lasted or can be expected to last for a continuous period of not less than 12 months." HHS Posthrg. Br. at 36, n. 18 (quoting 42 U.S.C. § 423(d)(1)(A)). However, another section of the Social Security Act not quoted by HHS states:

For purposes of paragraph (1)(A) -- (A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d)(2).

HHS has no authority to issue regulations, rulings, or adjudicative instructions that contravene this statutory definition of disability. 42 U.S.C. § 405(a).<sup>28</sup> In administering the disability program, HHS must take actions that are consistent with the statute. *Id.* Therefore, by whatever methods or steps the agency may have determined that Mr. Bettelyoun was disabled under the Social Security Act, the determination means that Mr. Bettelyoun has been declared by HHS to be unable to perform his prior work as well as all other work of significant numbers in the national economy for reasons that include, at the very minimum, his physical or mental impairment(s).

---

<sup>28</sup> Congress delegated to the Secretary of HHS the authority to administer the disability program and "to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions. . . ." 42 U.S.C. § 405(a).

HHS argues that SSA found Mr. Bettelyoun disabled and entitled to benefits at the third step of the sequential evaluation process mandated by HHS' regulations. HHS Posthrg. Br. at 37. According to HHS, agency adjudicators found Mr. Bettelyoun disabled at the third step of the sequential evaluation process,<sup>29</sup> under the Listing of Impairments, without inquiry into his ability to work. HHS Posthrg Br. at 34; HHS PF No. 83. Also, according to HHS, when Mr. Bettelyoun's application was adjudicated in 1989, SSA was applying Social Security Ruling (SSR) 86-20 and its field instructions at POMS DI 24525.095, and, therefore, SSA would have found Mr. Bettelyoun disabled due to AIDS because he has been diagnosed with HIV and aseptic meningitis. HHS Posthrg. Br. at 37 - 38 and attachments 1 and 2.

I find HHS' arguments defective as a matter of law.

Even assuming that SSA had found Mr. Bettelyoun disabled at the third step of the sequential evaluation process as alleged by HHS, I note that the medical conditions (and their equivalents) described in the third step's Listing of Impairments are those the Secretary considers severe enough to prevent an individual from doing any substantial gainful activity whatsoever. 20 C.F.R. § 404.1525(a). The Secretary, pursuant to the rulemaking process, inquired into and established the correlation between the listed impairments (or their equivalents) and the inability to perform all substantial gainful activity. Therefore, a disability determination at the third step of the sequential evaluation process means that, on the basis of the severity of the individual's medical impairments, the individual is unable to perform any substantial gainful activity, including whatever past work of a gainful nature he or she might have held. A disability determination made at the third step does not mean that the individual's work capabilities were irrelevant or never considered.

In addition, in order to proceed to the third step of the sequential evaluation process, SSA must first find at the second step that an individual has an impairment or a combination of impairments (i.e., "severe impairment(s)") which imposes more than a minimal degree of limitation upon his mental or physical ability to perform the basic activities required of most jobs. 20 C.F.R. §§ 404.1520(c), 404.1521. Such basic work-related activities include the use of judgement, responding appropriately to supervisors, co-workers, and usual work situations, and dealing with changes in a routine work setting. 20 C.F.R. § 404.1521. Absent limitations of these or like work-related capabilities, Mr. Bettelyoun's

---

<sup>29</sup> The sequential evaluation process is explained at 20 C.F.R. § 404.1520.

impairments would have been found "not severe," and his disability application would have been denied at the second step of the sequential evaluation. 20 C.F.R. § 404.1520(c).

HHS misstates the law also in arguing that, at the third step, "the eligibility for benefits are presumed on the basis of the diagnosis." HHS Posthrg. Br. at 39. HHS regulations state unequivocally that SSA will not consider an impairment to be of Listing level severity merely because it has a diagnosis contained in the Listing. The impairment also must have the requisite medical findings that consist of symptoms, signs, and laboratory findings. 20 C.F.R. § 404.1525(c), (d).

I find also that HHS' summary of Social Security Ruling 86-20 is not in accord with the plain language of the ruling. Whereas HHS contends that Mr. Bettelyoun was found disabled under the ruling because he has been diagnosed with HIV, the ruling states that a positive HTLV-III/LAV<sup>30</sup> test "does not indicate AIDS" absent one of the other diseases enumerated in the Ruling. SSR 86-20 (HHS Posthrg. Br. attach. 1, at 90). Before Ms. Janis disclosed SSA's payment of benefits to Mr. Bettelyoun and while HHS was still attempting to show that Mr. Bettelyoun has remained capable of performing his prior job notwithstanding his HIV diagnosis, HHS did not allege that Mr. Bettelyoun experienced any of the other diseases; nor did the evidence introduced by HHS contain reference to any such diseases. Furthermore, while HHS posits that "disability and eligibility for benefits are presumed on the basis of the diagnosis" (HHS Posthrg. Br. at 39), HHS introduced no evidence showing a medical diagnosis of AIDS for Mr. Bettelyoun, and SSR 86-20 requires a "documented" diagnosis of AIDS that is "supported by signs, symptoms and laboratory findings." HHS Posthrg. Br. attach. 1, at 91 - 92.

In addition, HHS has confused Mr. Bettelyoun's June 1988 diagnosis of "aseptic [free from infection] meningitis" with the requirement for "[b]acterial infections: ... meningitis ..." specified in the POMS section quoted by HHS. HHS Posthrg. Br. at 38. However the mistake was caused, HHS' quotation from the POMS on "[b]acterial infection: ... meningitis ..." is incorrect, incomplete, and misleading at the very least. The section partially quoted by HHS reads in its full text:

- a. Bacterial infections, multiple or recurrent  
(any combination of at least two within a 2-

---

<sup>30</sup> Mr. Bettelyoun was given the HTLV-III test for the human immunodeficiency virus while hospitalized in May 1988. Tr. 61.



year period), of the following types, affecting a child less than 13 years of age:

Septicemia, pneumonia, meningitis, bone or joint infection, or abscess of an internal organ or body cavity ... caused by Haemophilus, Streptococcus (including pneumococcus), or other pyogenic [pus producing] bacteria.

POMS DI 24525.001.D.1.a. (HHS Posthrg. Br. attach. 2) (emphasis added in bold type). There is no valid basis for HHS to apply to Mr. Bettelyoun that part of the agency's criteria which is used to adjudicate claims on behalf of children under the age of 13. In addition, nowhere in the ruling or POMS directive cited by HHS is there any support for HHS' contention that SSA is authorized to find disability at the third step of the sequential evaluation process due to AIDS merely because the individual has tested positive for HIV and has suffered aseptic meningitis.

Even though I reject HHS' arguments that Mr. Bettelyoun was found disabled only because of his HIV diagnosis and his having suffered aseptic meningitis in June of 1988, I do not thereby conclude that SSA misinterpreted the body of medical evidence in its possession when it adjudicated Mr. Bettelyoun's disability claim. The full extent of the evidence used by SSA to make its disability determination was not made available for this proceeding because Mr. Bettelyoun did not consent to its release and HHS did not require such consent from Mr. Bettelyoun prior to initiating this enforcement action against the Tribe. In the absence of SSA's records, I have no basis for concluding that SSA misapplied the regulations, rulings, and instructions of the Secretary when it found Mr. Bettelyoun disabled.

However, applying the law correctly to reach the disability outcome for Mr. Bettelyoun means that he must have some medically determinable impairment(s) in addition to his HIV diagnosis and his bout with aseptic meningitis in June 1988. HHS did not introduce any evidence on the nature or effects of the additional impairment(s) that have rendered him unable to perform all substantial gainful activities. The inferences arising from the disability determination by SSA are not overcome by Dr. Brown's testimony that Mr. Bettelyoun's HIV infection had remained asymptomatic, Mr. Bettelyoun's HIV infection did not present a direct threat to the health or safety of others in the workplace, and Mr. Bettelyoun possessed the credentials to perform the job for the Tribe when he was hired in June 1988. See HHS Posthrg. Br. at 27 - 29. Therefore, I am unable to conclude, as urged by HHS, that Mr. Bettelyoun was and has remained a qualified handicapped employee.

For all of the foregoing reasons, I find that HHS has not proved by a preponderance of the evidence that Mr. Bettelyoun is a qualified handicapped individual.

IV. If I had the authority to proceed to the merits of the discrimination alleged by HHS, I would find that HHS has failed to prove that the Tribe's alleged noncompliance with section 504 of the Rehabilitation Act could not be corrected by informal means.

A multi-step process is involved in determining whether there is a violation of section 504 of the Rehabilitation Act. Westchester, DAB 1357, at 6. For me to find a Section 504 violation, HHS also must establish, among other requirements, that it could not secure compliance with the Rehabilitation Act through informal means. Westchester, DAB CR191, at 51; DAB 1357, at 8. HHS has not satisfied this requirement for establishing a section 504 violation.

In seeking compliance from the Tribe through informal means, OCR imposed two conditions on the Tribe: reinstating Mr. Bettelyoun to his former job and making Mr. Bettelyoun "whole." HHS Ex. 31 at 17. OCR related a formula for the Tribe to use in computing a back pay award to Mr. Bettelyoun, and OCR told the Tribe that it should reinstate Mr. Bettelyoun without first determining the amount of his back pay award. Notice at 10. Informal resolution of the alleged noncompliance failed precisely because the Tribe did not give back pay to Mr. Bettelyoun or reinstate him. Notice at 11.

The Tribe points out that damages must be proven, not presumed. Tribe Posthrq. Br. at 59. It argues that Mr. Bettelyoun cannot receive back pay when he is receiving money from the Social Security Administration for his inability to work, and he cannot be reinstated into his prior job when he cannot work. Id. The specific amount of money Mr. Bettelyoun received from the Social Security Administration is relevant to calculating any back pay to which he may be due from the Tribe. Tribe Reply at 15.

I agree that such information is material to the issues of whether Mr. Bettelyoun should be reinstated and given an amount in back pay to make him "whole" as required by OCR. Yet, there is nothing in the record to suggest that HHS had even mentioned to the Tribe the existence, nature, or consequences of Mr. Bettelyoun's disability. As already noted above, Mr. Bettelyoun has never executed a release for such disclosures, and HHS expended considerable time to locate Mr. Bettelyoun's Social Security records after their existence was made known at hearing. While I recognize the agency's duty to preserve Mr. Bettelyoun's privacy rights, I find it unreasonable also that OCR conditioned the informal resolution of the

dispute on the Tribe's reinstating Mr. Bettelyoun to his former job and making him "whole," as if SSA had not determined him disabled or made payments to him. When the regulation authorizes a compliance proceeding only when HHS/OCR has been unable to secure compliance by use of informal means (45 C.F.R. § 80.8(a)), the regulation does not contemplate the agency's proceeding to hearing after failing to make material disclosures to the employer or after setting unreasonable or unfair conditions for the employer to meet.

Here, OCR failed to disclose to the Tribe not only the Social Security information that was material to the Tribe's consideration of whether Mr. Bettelyoun should be reinstated and how much back pay, if any, he should receive, but OCR apparently also took the same approach with respect to the payments made by IHS to Mr. Bettelyoun after he resigned from his job with the Tribe. Even after it initiated this compliance proceeding against the Tribe, HHS objected to having an IHS witness answer the Tribe's questions concerning Mr. Bettelyoun's work relationship with IHS, and HHS objected to having IHS furnish records to the Tribe concerning that work relationship. See HHS' Objection to Motion for Telephonic Deposition and Information Request at 2 - 3. HHS contended that such testimony and documents were irrelevant. Id. In overruling HHS' objections, I found the information and records relevant at least as to the issue of Mr. Bettelyoun's reasons for resigning from his job with the Tribe. See May 21, 1993 Confirmation of Ruling at 2. I now find such information and records from IHS relevant also to any calculation of possible back pay for Mr. Bettelyoun. Moreover, the failure to disclose such information and records to the Tribe while OCR was insisting that the Tribe make Mr. Bettelyoun "whole" rendered OCR's efforts to achieve voluntary compliance unreasonable and unfair.

I note, too, that Mr. Bettelyoun's unavailability has now rendered moot the two conditions specified by OCR in its informal efforts to achieve compliance. HHS itself has been unable to produce Mr. Bettelyoun for the purposes of giving further testimony. This action is being maintained by HHS against the Tribe even though Mr. Bettelyoun has failed to cooperate with the proceedings and has not come forward as directed by me or requested by HHS.

Under all of the foregoing circumstances, the two conditions specified by OCR (reinstatement and making Mr. Bettelyoun "whole") were unreasonable and unfair, and they are now impossible for the Tribe to satisfy. I therefore conclude that HHS has failed to establish that the Tribe's alleged noncompliance with section 504 of the Rehabilitation Act could not have been corrected by informal means.

V. If I had the authority to decide the merits of the discrimination alleged by HHS, I would find that HHS has failed to prove by a preponderance of the evidence that the Tribe subjected Mr. Bettelyoun to adverse treatment in violation of section 504 of the Rehabilitation Act.

To prove that the Tribe violated section 504 of the Rehabilitation Act, HHS must show that Mr. Bettelyoun was subjected to discrimination solely by reason of his handicap. See Norcross v. Sneed, 755 F.2d 113, 117 (8th Cir. 1985);<sup>31</sup> Westchester, DAB 1357, at 8.

Having considered, in the alternative, the evidence concerning the alleged acts of employment discrimination, I find that HHS has not proven this essential element of its case by a preponderance of the evidence. HHS' position is based on many diffuse, unsubstantiated, or objectively unreasonable allegations by Mr. Bettelyoun, and HHS' evidence includes many possible causes for the allegedly adverse treatment perceived by HHS. While individual pieces of Mr. Bettelyoun's testimony may suggest employment discrimination when they are viewed in isolation, the totality of the record evidence on this critical issue fails to persuade me that the Tribe, as an employer, caused or engaged in discrimination against Mr. Bettelyoun solely on account of his HIV infection.

A. HHS failed to prove that Mr. Bordeaux gained access to Mr. Bettelyoun's medical information without Mr. Bettelyoun's consent or that Mr. Bordeaux disseminated that information for an unlawful purpose.

One of HHS' contentions in this proceeding is that Mr. Bettelyoun's supervisor, Earl Bordeaux, Jr., gained unauthorized access to information about Mr. Bettelyoun's HIV-positive diagnosis and disseminated that information to other tribal officials and employees for the purpose of discriminating against Mr. Bettelyoun. Notice at 6; HHS PF No. 31, 35, 36. I conclude that HHS has not proved these allegations by a preponderance of the evidence.

---

<sup>31</sup> The Eighth Circuit noted:

In this context, it is significant that the section 504 plaintiff must show that handicap was the sole reason for the decision, while the Title VII plaintiff need only show that a protected classification was a factor influencing the decision.

755 F.2d 117 n.5. Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

I note by way of background that Mr. Bettelyoun is an enrolled member of the Rosebud Sioux Tribe, an Indian Tribe of approximately 20,000 members located in Rosebud, South Dakota. Tr. 38, 1102. In the summer of 1988, the Tribe employed 600 people in various departments headed by 57 directors. Tr. 1102. One such department, the Resource Development Office (RDO), operated as the planning arm of the Tribe by soliciting grants and developing new programs for the Tribe. Tr. 191, 981 - 82. The Bureau of Indian Affairs of the U.S. Department of Interior financed all operations of the RDO, including the salaries for its four-person staff. Tribe Ex. 1; Tr. 191 - 92.<sup>32</sup>

In early June 1988, Mr. Bettelyoun was hired to work in the newly-created position of Senior Planner/Assistant Director for the RDO on the recommendation of Earl Bordeaux, Jr., its Director. Tribe RRA No. 30; Tribe Ex. 5; Tr. 43. Mr. Bettelyoun was 37 years old at that time and a college graduate. See, e.g., HHS Ex. 4. There is no dispute that, immediately prior to beginning work for the RDO on June 6, 1988, Mr. Bettelyoun had been hospitalized for nearly two weeks due to severe medical problems. From approximately May 15, 1988 until June 4, 1988, he had been experiencing acute symptoms, such as "raging fevers," difficulties with standing or walking, weight loss of 20 pounds or more, and loss of his ability to taste. Tr. 59 - 60. He was admitted through the emergency room of the IHS Hospital on May 27, 1988, and he remained hospitalized there until the afternoon of June 5, 1988. Tr. 60 - 62; Tr. 312 - 13. During that period, he received a test for HIV, called HTLV-III. Tr. 61.

As already discussed, HHS contended that, despite the contrary inferences arising from his extended hospital stay for very acute symptoms, Mr. Bettelyoun's health did not interfere with his ability to perform his new job the day following his discharge from the hospital. Some of Mr. Bettelyoun's own testimony was equivocal on this issue. He claimed he "could function" and "guessed" he

---

<sup>32</sup> The Tribe raised as an affirmative defense before hearing that, given the focus of HHS's allegations, the RDO (and not the Tribe) is a proper party to this action. Answer at 2. In response, HHS has acknowledged that the authority to terminate HHS funds is "limited to the particular program or activity within which noncompliance has been found." Department's Pre-Hearing Brief in Opposition to Respondent's Affirmative Defenses at 21. However, HHS's Notice did not specifically limit its allegations of discrimination to the RDO's director and employees. Notice at 6. I denied the Tribe's prehearing motion to dismiss the action against the Tribe because the status and role of the RDO turned on disputed facts.

was well enough to work upon his discharge from the hospital on the afternoon of June 5, 1988, even though some people had thought him deathly ill during the preceding days. Tr. 62, 193. He said he had lost weight, but he contended that how he looked "should not have been part of [his] daily work experience" because his being diagnosed as HIV positive had not affected his ability to work. Tr. 356. Such testimony by Mr. Bettelyoun is consistent with my earlier finding that HHS has failed to prove by a preponderance of the evidence that he was a qualified handicapped employee.

There is no allegation by HHS that any act of discrimination took place from June 6, 1988, Mr. Bettelyoun's first day on the RDO job, until some time after June 14, 1988. Mr. Bettelyoun testified that, on June 14, 1988, he was informed by Dr. Jereb of the IHS Hospital that he had tested positive for HIV and may have two months, six months, a year or two years to live -- "it depends." Tr. 72, 74.

Mr. Bettelyoun testified to having felt depressed and extremely pressured by the news of his infection and the possibility that he might live for only two months to two years. Tr. 73 - 74, 322. He acknowledged having considered many weighty questions concerning what he should do with his remaining time in life. Tr. 74 - 76.

Mr. Bettelyoun claimed that, even though others later told him he appeared "in trauma" (Tr. 73), he did not take time off from work after receiving the news of his infection and prognosis. Tr. 72 - 73. However, Ms. Whipple, then Director of the Tribe's CHR Department, testified to having given him time off because he appeared so visibly shaken after he returned from the hospital and shared the news of his diagnosis with her. Tr. 411 - 12. (She said he had been assigned to work for her department part time before he received the test results. Tr. 411.<sup>33</sup>) I find her testimony more credible because it is more consistent with Mr. Bettelyoun's description of his mental state and Dr. Jereb's prognosis of his much shortened life expectancy, and because she has no incentive to give false testimony.

Mr. Bettelyoun traced the origins of the Tribe's alleged discrimination against him to Mr. Bordeaux's discovery and announcements concerning his HIV infection. I was

---

<sup>33</sup> Mr. Bettelyoun's testimony is consistent also with Ms. Whipple's account that he performed work for her while he was still assigned to RDO. When he explained his subsequent formal transfer to CHR, he said: "I was issued a memo saying that I was moved from Resource Development Office to the CHR office since I was writing proposals for them." Tr. 259 (emphasis added).

not persuaded that the Tribe engaged in unlawful discrimination against him or that Mr. Bordeaux obtained information concerning his health without his consent, as alleged.

Mr. Bettelyoun testified that he never told Mr. Bordeaux that he is infected with the HIV virus, and he never confirmed or denied this diagnosis to Mr. Bordeaux. Tr. 76. HHS noted also that Mr. Bordeaux "did not have a release from William Bettelyoun which permitted him access to information about his medical condition." HHS PF No. 31.

Mr. Bordeaux does not claim that Mr. Bettelyoun ever told him he was HIV-positive. According to Mr. Bordeaux, what Mr. Bettelyoun said was that he was in the middle of a three-stage terminal illness and that Mr. Bordeaux could talk to the doctors about his terminal illness. Tr. 996.

I find Mr. Bordeaux's testimony concerning the conversation credible because it is supported by other evidence of record. Mr. Bordeaux provided details of how and where the discussion with Mr. Bettelyoun took place. Moreover, Mr. Bettelyoun admitted that he had willingly discussed his health with Mr. Bordeaux a few days earlier. On June 6 or 7, 1988, Mr. Bettelyoun told Mr. Bordeaux that doctors had ruled out certain diagnoses but were still considering Rocky Mountain Spotted Fever, which could recur. Tr. 76 - 77. In addition, Dr. Jereb noted in the medical charts Mr. Bettelyoun's desire to be open about his HIV diagnosis. Tr. 335. By contrast, I find Mr. Bettelyoun's testimony overly technical and therefore of questionable sincerity.<sup>34</sup>

Mr. Bordeaux claimed to have gone to see the doctors at the IHS hospital because he was concerned about the possible impact of Mr. Bettelyoun's unspecified terminal illness on Mr. Bettelyoun's ability to perform his job. Tr. 999, 1000. According to Mr. Bordeaux, the job Mr. Bettelyoun was hired to perform was not a physical one, but it entailed considerable mental stress and required that deadlines for submitting grant proposals be met. Tr. 1000; Tribe Ex. 2. After two trips to the IHS hospital in Rosebud, Mr. Bordeaux concluded from the information Dr. Wayne Foster and other hospital employees gave him that Mr. Bettelyoun had the HIV virus. Tr. 995, 997 - 1000.

---

<sup>34</sup> Moreover, as discussed in part II.B. of this decision, a United States district court dismissed criminal charges against Dr. Wayne Foster because the court believed, contrary to Mr. Bettelyoun's testimony, that Mr. Bettelyoun had given consent for release of his medical information. Tribe Ex. 29 at 7 - 8.

Mr. Bordeaux's explanation that he was concerned about Mr. Bettelyoun's ability to work is reasonable and is consistent with other evidence introduced by HHS. For example, as noted previously, Ms. Whipple testified she gave Mr. Bettelyoun time off from work because he looked so visibly shaken after returning from the hospital and he admitted that he felt very depressed and under a great deal of pressure. Mr. Bordeaux's explanations of his motives are consistent also with the job description of the Senior Planner/Assistant Director position held by Mr. Bettelyoun. See Tribe Ex. 2.

Other evidence submitted by HHS, such as the guidelines issued by the U.S. Office of Personnel Management (OPM), support the legitimacy of Mr. Bordeaux's stated purpose for seeking information concerning Mr. Bettelyoun's health. The guidelines issued by OPM in late March of 1988 dealt with the federal employer's right to evaluate an HIV-infected employee's ability to work safely and reliably when there is a cause for concern. HHS Ex. 21g. The OPM document explained the circumstances under which a federal employee has a responsibility to produce medical documentation regarding the extent to which his HIV infection is affecting his availability for duty or job performance, as well as the federal employer's need to address the concerns of fellow employees who are fearful of working with an HIV-infected worker. Id. These federal bulletins note that accurate and timely information will allow the agency to consider alternatives to keeping the employee in his or her position if there are serious questions about safe or reliable work performance, and that medical information will help determine also whether the HIV-infected employee's medical condition is sufficiently limiting to entitle the employee to be considered for reasonable accommodation under the Rehabilitation Act. Id.

As a whole, the record fails also to adequately support HHS' theory that Mr. Bordeaux had an unlawful purpose in telling others of Mr. Bettelyoun's medical condition. One witness, for example, who was a member of the Tribal Council during the summer of 1988, testified to having heard of Mr. Bettelyoun's HIV infection from Mr. Bordeaux. Tr. 778, 828. Such testimony is consistent with Mr. Bordeaux's explanation that he talked to the people he considered his superiors in order to find out if the Tribe had any personnel policies and procedures for dealing with AIDS. Tr. 1006.

Also, there is inadequate evidence to support the proposition that Mr. Bordeaux, other managers employed by the Tribe, or tribal leaders were responsible for disseminating the news of Mr. Bettelyoun's medical condition. The evidence indicates that everyone, without regard for their employment relationship to Mr. Bettelyoun, was disseminating the news in and out of the



workplace. In addition to hearing the rumors that may have already resulted from Mr. Bettelyoun's long hospital stay or his physical appearance during June of 1988, many people learned about Mr. Bettelyoun's test results from IHS employees or other sources. For example, Arvella Haukaas, secretary for the RDO, testified that she learned from a male nurse of the IHS Hospital that Mr. Bettelyoun "had AIDS" and that there was common knowledge concerning Mr. Bettelyoun's condition based on information given by another hospital nurse and the inferences people drew from the hospital room in which Mr. Bettelyoun had stayed. Tr. 708 - 09, 746, 763 - 64, 767. A friend of Mr. Bettelyoun's heard that Mr. Bettelyoun's aunt had given the news of his HIV test results to quite a few people in Rapid City. Tr. 879. Dr. Jereb noted that the laboratory technician at the IHS Hospital read Mr. Bettelyoun's test results before sending them to Dr. Jereb, and she became upset by the news and told it to Dr. Jereb in the hallway of the hospital, where others could have overheard her. HHS Ex. 23 at 19. Thereafter, an IHS Hospital ward nurse, who was also a friend of Mr. Bettelyoun's, asked Dr. Jereb on the street for his advice on whether she should obtain a blood test after she, too, heard the news. Id. at 30.

In addition, Dr. Jereb recorded in Mr. Bettelyoun's chart:

Patient stated that he did not want his diagnosis hidden, that he was going to tell other people.

Tr. 335 - 36. Dr. Jereb was certain that Mr. Bettelyoun made such a statement. HHS Ex. 23 at 15. The information recorded by Dr. Jereb suggests that Mr. Bettelyoun himself may have voluntarily discussed his HIV infection with others. This inference is supported by the testimony of Ms. Whipple, who stated that Mr. Bettelyoun had told her of his HIV test results during mid-June 1988, upon returning from the hospital. Tr. 411 - 14, 458, 467, 470.

In order to prove that Mr. Bordeaux was discriminating against Mr. Bettelyoun, HHS introduced much hearsay evidence on what others were purportedly saying about Mr. Bettelyoun and Mr. Bordeaux. Even though Mr. Bettelyoun never heard Mr. Bordeaux talk to anyone about his medical condition, Mr. Bettelyoun claims to have heard from many people that Mr. Bordeaux was giving the news to others. Tr. 79 - 83, 230. Also, HHS introduced evidence to show, for example, that other employees heard Mr. Bettelyoun's brother say that Mr. Bordeaux had threatened to bodily remove Mr. Bettelyoun from the reservation. Tr. 743 - 44. Another witness said she was asked by a janitor in the hallway whether she had heard that Mr. Bordeaux was harassing Mr. Bettelyoun. Tr. 547. I did not find such

second or third-hand information persuasive. On the record as a whole, I was not persuaded that Mr. Bordeaux inappropriately obtained or disseminated information regarding Mr. Bettelyoun's HIV infection.

B. HHS has not proved that Mr. Bettelyoun was subjected to disparate treatment solely because his HIV infection became known.

In contending that Mr. Bettelyoun was later subjected to adverse treatment by the Tribe due solely to his HIV infection, HHS compares Mr. Bettelyoun's experiences during the initial eight calendar days of his employment to the experiences he described for the remaining two months and 12 days of his employment after he and others learned of his HIV test results. According to HHS, during the eight calendar days between June 6, 1988 until June 14, 1988 (when Mr. Bettelyoun received news of his HIV test results), Mr. Bettelyoun encountered no difficulty in performing his job or in interacting with tribal officials and employees, who treated him no differently than other tribal staff members. HHS PF No. 20.

Mr. Bettelyoun testified that, when he reported for work on June 6, 1988, he was welcomed, given orientation, and was treated cordially by everyone he met. Tr. 67 - 70, 174 - 75. During orientation, Mr. Bettelyoun and another newly hired planner for RDO, Mike LaPointe, received information about the locations of bathrooms, the timing of coffee breaks, and the procedures for collecting their paychecks. Tr. 175.

I find that Mr. Bettelyoun's experiences during the first eight calendar days of his employment do not provide a reasonable basis for Mr. Bettelyoun to form expectations concerning how he should be treated by others or how he should perform his work thereafter. During the first several days, he was undergoing orientation and being welcomed into a newly created position. Also, because the position assumed by Mr. Bettelyoun was a newly-created one, Mr. Bettelyoun performed his work without a job description during those initial days; he relied on general instructions given to him by Mr. Bordeaux. Tr. 183, 765. A few weeks later, he was reassigned from the RDO to the CHR office. Tr. 106, 410 - 13, 455. Given these factors, I was not persuaded that Mr. Bettelyoun was reasonable in his opinion that other employees interacted with him differently after the initial eight days solely because of his HIV infection.

In further support of its theory that the Tribe had caused or condoned the disparate treatment of Mr. Bettelyoun at the work place due to his HIV infection, HHS introduced testimony from the RDO's secretary that she sprayed disinfectant on her word processor,

telephone, and desk after Mr. Bettelyoun had used them. Tr. 705. Also, HHS introduced testimony from the cleaning lady that, while she was in the midst of doing something else one day, Mr. Bordeaux told her to "scrub" the RDO's rest room for men, while giving her no similar instruction concerning the rest room used by women. Tr. 518; see also HHS PF No. 59. However, other evidence introduced by HHS shows that these events do not constitute unlawful acts per se.<sup>35</sup> There is also inadequate proof from HHS that these acts were approved, authorized, or directed by the Tribe.

Mr. Bettelyoun was asked if, for the period from mid-June to August 25, 1988, he had perceived any disparities in the manner Mr. Bordeaux and his co-workers treated him (Mr. Bettelyoun) as opposed to Mr. LaPointe, the other planner who was hired by RDO on the same day as Mr. Bettelyoun. Tr. 394. Aside from the other planner's access to a typewriter, the only thing Mr. Bettelyoun noted was the other planner's having been allowed by Mr. Bordeaux to "go and receive per diem and travel expenses and go attend a tourism seminar conference" that had nothing to do with a planner's work assignment. Tr.

---

<sup>35</sup> For example, HHS introduced a publication from its Centers for Disease Control. HHS Ex. 12. The HHS publication defined "other workers" as "persons in settings, such as offices, schools, factories, and construction sites, where there is no known risk of AIDS virus transmission." Id. at 1. Under the heading of "Other workers sharing the same work environment," the Centers for Disease Control gave the following advice:

Equipment contaminated with blood or other body fluids of any worker, regardless of HTLV-III/LAV infection status, should be cleaned with soap and water or a detergent. A disinfectant solution or a fresh solution of sodium hypochlorite (household bleach ...) should be used to wipe the area after cleaning.

Id. at 2. The publication does not define "other body fluids."

Moreover, there is no evidence that more than one female employee (Ms. Hawkass) worked in RDO at the same time that three male employees (Mr. Bordeaux, Mr. Bettelyoun, and Mr. LaPointe) worked in that department. Tr. 1005. As already noted above, Mr. Bettelyoun and Mr. LaPointe assumed newly-created positions in the department on the same day. Therefore, it is possible that after the size of the RDO department was so expanded, the rest room used by the department's male employees became dirtier than the one used by the female RDO employee.

394 - 98. Mr. Bettelyoun asserted that, if the other planner was allowed to take non-job related overnight trips and receive per diem and travel expenses for them, then Mr. Bettelyoun felt he should have been allowed to do so as well. Tr. 396. Mr. Bettelyoun attributed the difference to his HIV infection. Tr. 397. However, Mr. Bordeaux testified that Mr. LaPointe's travels were related to his work on USDA projects. Tr. 1036.

In a technical sense, the alleged failure to allow Mr. Bettelyoun to take as many non-job related trips and to incur as much non-job related travel expenses as Mr. LaPointe may exemplify a form of proscribed employment discrimination. If Mr. Bettelyoun were a qualified handicapped person, the regulation would prohibit his employer from "[a]fford[ing] a qualified handicapped person an opportunity to ... benefit from the ... benefit ... that is not equal to that afforded others." 45 C.F.R. § 84.4(b)(iii). I do not find the regulation applicable, given HHS' failure to show that Mr. Bettelyoun is a qualified handicapped employee and given the conflict in the evidence concerning the purposes of Mr. LaPointe's trips. However, Mr. Bettelyoun's desire to take non-job related trips and receive reimbursement for non-job related expenses is relevant to my assessment of his credibility.

In response to Mr. Bettelyoun's situation, Mr. Lunderman held a meeting with the RDO staff in late June 1988. At the meeting, he told them that rumors must stop, that they needed to work together, and they needed to behave professionally. Tr. 101. Mr. Bettelyoun alleged that others' discriminatory treatment of him changed and became more indirect after Mr. Lunderman's speech to the RDO staff. Tr. 102. He said people turned and walked away from him, told him they were busy, failed to give him messages from his family, and moved his desk in the RDO office. Tr. 102.

The testimony concerning the alleged movement of Mr. Bettelyoun's desk is conflicting as to whether it was moved (e.g., Tr. at 446, 712), for what reason it might have been moved (e.g., Tr. at 508, 513 - 19, 712), and the maximum extent of possible movement (e.g., Tr. 1022 - 26). Apparently to prove that Mr. Bordeaux caused the desk to be moved, HHS called one of the cleaning people, Marie Two Charger, to testify. Marie Two Charger and her husband were the people who usually cleaned the RDO office, but there were others as well. Tr. 713. Ms. Two-Charger testified that she was never able to move Mr. Bettelyoun's desk by herself, and when she needed to sweep under it, she required the help of two other people to move it. Tr. 508. She was aware that one day in mid-July 1988, Mr. Bettelyoun's desk had been pushed back against the wall. Tr. 509. She did not know who had moved the desk. Tr. 513, 517. After being questioned

repeatedly by HHS' counsel on whether she ever had a conversation with Mr. Bordeaux concerning the movement of the desk or whether she ever received instructions from Mr. Bordeaux concerning how she should explain the movement of the desk, Ms. Two Charger's testimony was steadfastly that she has never spoken to Mr. Bordeaux concerning the movement of that desk. Tr. 514, 515 - 18.

After representing that she was not trying to impeach Ms. Two Charger's credibility, counsel for HHS then proceeded to elicit totally different testimony from Ms. Two Charger concerning a conversation she allegedly had with Mr. Bordeaux. Counsel for HHS showed Ms. Two Charger the contents of a recent statement signed by her at the request of HHS' counsel in preparation for HHS' litigation. Tr. 523. That document, which HHS failed to provide to the Tribe prior to the hearing in violation of my Prehearing Order (Tr. 533), sets forth Ms. Two Charger's recollection that in August of 1992, she was asked by Mr. Bordeaux to sign a document claiming responsibility for having moved the desk.<sup>36</sup> Tr. 523 - 26. (This statement was apparently intended to support HHS' contention that Mr. Bordeaux had moved Mr. Bettelyoun's desk for a discriminatory purpose.) Having exhibited no failure of memory or understanding in testifying repeatedly that she had never held any conversation whatsoever with Mr. Bordeaux concerning the desk, Ms. Two Charger then ratified the accuracy of the information contained in HHS' proposed exhibit 38 in response to a series of leading questions from HHS counsel on direct examination of her own witness. Tr. at 527 - 29. This witness claimed no medical condition that would account for her abrupt changes in testimony; she gave no credible explanation for her turn-about in testimony; and she showed no confusion or difficulty with understanding questions, contrary to HHS' assertion. See Tr. 515. For these reasons, I give no weight to the modified testimony provided by Ms. Two Charger or to the contents of HHS Ex. 38.

Moreover, Mr. Bordeaux testified that neither Mr. Bettelyoun nor anyone else had told him that the desk was moved, and Mr. Bettelyoun testified also that he did not speak to Mr. Bordeaux about the desk. Tr. 97 - 99; 1047. Mr. Bettelyoun's failure to question Mr. Bordeaux about the movement of the desk convinces me that the event did not trouble Mr. Bettelyoun at the time. Mr. Bettelyoun's failure to question Mr. Bordeaux about the desk also is more consistent with the Tribe's contention that, if the desk was moved at all, it was probably done in the course of cleaning the office, and the desk could not have been

---

<sup>36</sup> Ms. Two Charger's statement was marked as HHS Ex. 38 and admitted into evidence. Tr. 531 - 32.

moved very far, given the size of the office and the other furniture it contained.

According to HHS, the Tribe subjected Mr. Bettelyoun to harassment and disparate treatment by reassigning him to CHR. See HHS PF No. 66, 67. The evidence introduced by HHS in support of this contention is conflicting and unpersuasive.

HHS introduced Mr. Bettelyoun's testimony that, as a consequence of the reassignment on or about July 19, 1988, he was required to work in a storage room in Ms. Whipple's department until a few days before he submitted his resignation. Tr. 106, 108. He said he was required to use a typewriter stand in her office as his "desk" after he moved out of the storage room. Tr. 111. He said he had no typewriter<sup>37</sup> or telephone to use and felt that he was treated adversely by the Tribe in these and other ways until he resigned involuntarily. Tr. 107 - 11, 143 - 45.

HHS also introduced evidence that disputes Mr. Bettelyoun's perceptions of discrimination while under Ms. Whipple's supervision. Ms. Whipple, also called to testify by HHS, recounted her good intentions in seeking Mr. Bettelyoun's reassignment, the unavailability of any private office in her department and the CHR building, his having borrowed her typewriter to use in the storage room, and another planner's having used the storage room when he needed quiet to think. Tr. 431, 433, 434, 450, 455 - 56. Ms. Whipple explained that when he was first assigned to her department, Mr. Bettelyoun shared her office (then the only office not shared with another worker), and he used a "student desk" of 3.5 feet by 2 feet from which she had removed her typewriter. Tr. 433, 447, 448. Mr. Bettelyoun complained that he was kept from doing his work in her office because she needed privacy to do her counseling work from time to time. Tr. 434. Therefore, she gave him the only other available space in the building, the storage room, along with her typewriter to use. Tr. 449, 455.

Mr. Bettelyoun acknowledged that no one actually sabotaged his work or made it impossible for him to accomplish his work tasks. Tr. 274. But he testified that, because of the "AIDS hysteria," people took a longer time than before to give him the materials he needed and, therefore, they made it more difficult for him to complete his work. E.g., Tr. 277. However, neither he nor any other witness provided the necessary details to support his perceptions of undue or purposeful

---

<sup>37</sup> Later during the hearing, he testified to having had access to a typewriter in a meeting room, which he took "upstairs" to use. Tr. 264.

delays. He did not disclose the period of time people took to give him his needed materials before his test results became known, as compared to the period thereafter. Mr. Schmidt, the Vice-Chairman of the Tribe, indicated that there were problems at times when Mr. Bettelyoun asked for records from his office staff; but the problems were not due to Mr. Bettelyoun's HIV infection, but because his aunt, Doreen Gardner, who managed the Tribe's Spotted Tail Crisis Center, tried at times to have him do work for her without routing the matter through official channels. Tr. 925. Mr. Schmidt felt people were more frustrated with Mr. Bettelyoun's aunt than with Mr. Bettelyoun. Id.

Mr. Bettelyoun also gave Ms. Whipple other reasons for his failure to complete his work projects for CHR, one of which involved a training center for AIDS. Tr. 435 - 37. In addition to stating that he was having difficulty obtaining the necessary statistics, he also told her that he could not meet the project deadlines because he was worried about his family's safety, he did not know how he felt about himself, and the subject matter of AIDS for one of the projects was too close to him. Tr. 437. At least two of the reasons he gave for being unable to complete his work on time had nothing to do with whether others were cooperating with him or providing him with the materials he needed.

For these reasons, I do not find credible the allegation that Mr. Bettelyoun was not able to accomplish his work tasks as easily as before his HIV diagnosis solely because others were discriminating against him on account of his handicap.

C. Many allegedly discriminatory incidents relied on by HHS occurred outside the workplace setting.

I find that many events which HHS alleged to be discriminatory are irrelevant because they occurred, if at all, outside the employment setting. For example, during the period of his employment, Mr. Bettelyoun heard only one person say that he should be gotten rid of and shot: Doreen Gardner, his aunt. Tr. 231 - 32. Also, Mr. Bettelyoun named only one person who said within his hearing that she did not want to deal with him for fear of becoming contaminated: Doreen Gardner, his aunt. Tr. 232. He said he could not recall the names or full names of others who said they feared becoming contaminated. Id.

I find that, even if Mr. Bettelyoun's aunt had said such things about him, HHS has not proven that such statements constitute employment discrimination perpetrated or condoned by the Tribe as an employer. Mr. Bettelyoun did not allege, for example, that his aunt made such statements to him at the work place or in her capacity as

the director of the Tribe's Spotted Tail Crisis Center. Therefore, any such statements made by Ms. Gardner are not attributable to the Tribe.

Other proof submitted by HHS also extended well beyond the workplace setting. Mr. Bettelyoun said he heard from his brother that some tribal employees made disparaging comments in the fields and at a party in another town about Mr. Bettelyoun's condition. Tr. 126. He said he was troubled by his niece's being called the "AIDS girl" at the Head Start Program. Tr. 143. Also, Mr. Bettelyoun heard that the tribal Vice Chairman's live-in girlfriend, who was a friend of Mr. Bettelyoun's sister-in-law, was encouraging his sister-in-law to leave her home because of Mr. Bettelyoun. Tr. 275.

Also, HHS introduced testimony from a witness who heard Mr. Bordeaux's father, Earl Bordeaux, Sr., say during the Health Committee's report at a full Tribal Council meeting that a person with AIDS was working for the Tribe but he should not be doing so. Tr. 538.<sup>38</sup> The witness explained that others at the Council meeting told him he should not be making such remarks because he would get into trouble. Id. After that, everyone "stayed away" from that matter. Id.

I do not find material to the issue of employment discrimination HHS' evidence concerning the experiences of Mr. Bettelyoun's sister-in-law, the Vice-Chairman's live-in girlfriend, or Mr. Bettelyoun's niece at the Head Start Program. With respect to the comment allegedly made by Mr. Bordeaux, Sr., HHS apparently introduced this evidence to show that Mr. Bordeaux, Sr., as a Tribal Council member, was directing his son to give effect to his discriminatory animus. I find, however, that the father's opinion does not constitute proof that his son, as Mr. Bettelyoun's supervisor, was engaged in employment discrimination on his own or on behalf of the Tribe. If, as suggested by the above discussed equivocal testimony, Mr. Bordeaux, Sr., expressed the above-described opinion in his capacity as a Tribal Council Representative during a Tribal Council meeting, such an opinion is not actionable. Moreover, since there is no evidence that anyone at the Tribal Council meeting agreed with Mr.

---

<sup>38</sup> In an earlier statement given to OCR, this same witness said she overheard Mr. Bordeaux, Sr., make such remarks to another person (whose identity she could not recall) during a break in the Council meeting. HHS Ex. 25n.

According to this witness, who served on the Tribal Council for eight years, council members are legislators dealing with issues that affect the Indian people who live on reservations. Tr. 535.



Bordeaux, Sr.'s statement, the evidence of the statement fails to support HHS' theory that tribal officials were causing, engaging in, or condoning employment discrimination against Mr. Bettelyoun.

Nor did I find persuasive HHS' contention that Mr. Bettelyoun was subjected to unlawful discrimination because Tribal Council members publicly joked about Mr. Bettelyoun's HIV infection. See HHS PF No. 41. HHS offered testimony that a witness heard Alex Lunderman, the Tribal Chairman, laugh when he was told by others that Mr. Bordeaux was afraid to be in the same room with Mr. Bettelyoun (Tr. 481) and another witness heard Mr. Bordeaux laugh and utter "gay jokes" in a bar about Mr. Bettelyoun's test results (Tr. 806). Even assuming that Messrs. Lunderman and Bordeaux laughed in their capacity as Mr. Bettelyoun's employers while in a bar and elsewhere, HHS introduced the testimony also of Geraldine Arcoren, the Tribal Chairman's secretary, who explained that in their culture, laughter and joking are ways that tribal people cope with very sad, upsetting, or frightening matters. Tr. 486, 501 - 502. Ms. Arcoren's explanation persuades me that these men's laughter may not have been motivated by any discriminatory animus or intent to harass Mr. Bettelyoun.

D. Mr. Bettelyoun's perceptions of harassment were not always reasonable, and may have been the result of the mental stress associated with learning of his HIV diagnosis.

Even though HHS alleged that the Tribe discriminated against Mr. Bettelyoun solely because of his handicap, HHS introduced evidence that Mr. Bettelyoun's perceptions may have been caused by the mental stress associated with HIV. For example, HHS elicited Mr. Bettelyoun's testimony on direct examination that he became "emotionally fatigued" after June 14, 1988. Tr. 354. Mr. Bettelyoun explained that, in hindsight, he thought he and the people in his family, community, church, and workplace were all vacillating between the differing stages of the death and dying process: denial, anger, bargaining, grieving, and then acceptance. Tr. 354 - 55. He felt it was difficult and tiring for him to maintain social and work relationships with people who did not have the illness but were changing from the anger stage to the bargaining stage, and then reverted to the denial stage. Tr. 355. He felt he was inundated constantly with these changes in other people, and he could not figure out at which stage these people were. Id.

Mark Babitz, M.D., testified that, when people find out that they have the HIV virus, their reactions have ranged from mild concern to major depression and even suicide. Tr. 597. He testified that the emotional state of people with the HIV infection may affect how they perceive other

people's behavior Tr. 597 - 98; see also HHS Ex. 21c at 18. For example, the infected individuals may experience severe depression, which may in turn cause them to experience paranoid feelings or thoughts "on how they perceive things or about how their work is evaluated or about whether they are liked or not, or things like that." Tr. 597 - 98.

HHS relied on Mr. Bettelyoun's perceptions of harassment by those around him to show that the Tribe had engaged in or condoned unlawful discrimination against him solely on the basis of his handicap. Mr. Bettelyoun defined harassment as:

Anything other than professional courtesy. If you are at 8:00 to 5:00 jobs, you are there. Anything other than that are just conversation. [A]nd I still don't feel that talking about my diagnosis is anybody's business other than mine unless I offer it freely.

That's harassment to me. It's nobody's business. I am HIV positive, ... or I have Aids. That is not part of people's job description when they are working from 8:00 to 5:00.

Tr. 130 - 31. Mr. Bettelyoun's definition and perceptions of harassment are not objectively reasonable; nor were his perceptions of harassment consistent.

Concerning his perceptions of "harassment" after June 14, 1988, Mr. Bettelyoun testified that he found it objectionable that the Tribal Chairman as well as tribal members who were not his co-workers offered to pray for his cure, by "laying hands" on him in accordance with his people's traditional customs and beliefs. Tr. 115, 117, 1105. He found it objectionable that the Tribe's Social Services Committee members cried, appeared upset, and voiced their support for him after his medical condition became known. Tr. 113, 238 - 41.<sup>39</sup> He found it objectionable that the Tribal Chairman's secretary told him he looked ill, and he stopped talking with her. Tr. 117. He found it objectionable that the Vice Chairman's

---

<sup>39</sup> One of the Social Service Committee members testified that she worked on the Committee as part of her responsibilities while serving on the Tribal Council. Tr. 548 - 49. She and other members of the Committee offered the Committee's assistance to Mr. Bettelyoun because its members heard he was having problems and he had come into the office used by the Committee (they did not go to him). Tr. 546 - 47, 549 - 50. Mr. Bettelyoun never availed himself of the Committee's help. Tr. 550, 554.

secretary was standoffish to him at first; but when she became supportive of him, he found it objectionable because she may have been overly supportive when doing so was not in her job description. Tr. 118 - 19, 271.

Even though Mr. Bettelyoun said he found it objectionable for people to exhibit concerns for his health and to offer to help him (he said he reacted by keeping his head down when he walked and wearing sunglasses), he found it objectionable also that people walked away from him, no longer joked with him during coffee breaks, and failed to invite him to take breaks with them at a local mini-mart. Tr. 115, 122 - 124, 135; see also Tr. 761. He found it objectionable that people were urging him to stand up for his rights and wanted to discuss his plight with him. Tr. 120 - 21. He thought it was wrong of people to give him advice before he asked for it and during office hours. Tr. 273. He thought it also wrong and harassing that Tribal Council representatives offered their assistance to him before he sought them out. Tr. 239.

Mr. Bettelyoun did not contend that he ever told the people who were "harassing" him with their offers of help or expressions of sympathy that he found their behavior improper, unwelcome, or objectionable. HHS introduced the testimony of some witnesses who believed that their attempts to help Mr. Bettelyoun were welcomed by him and had heard him say that he needed the hug or show of support. Tr. 456 - 57, 460 - 61, 487 - 88. Even the Vice Chairman of the Tribe said he had given what he considered a "friendly hug" to Mr. Bettelyoun on occasion after he learned of Mr. Bettelyoun's medical condition. Tr. 924. The Vice Chairman thought he was being supportive of Mr. Bettelyoun in showing that he was not afraid to express himself. Tr. 924 - 25. No one heard Mr. Bettelyoun say that he did not wish to be hugged or to receive encouragement. Tr. 460 - 61. Nor did Mr. Bettelyoun say that, when he wanted to socialize, he ever took the initiative of inviting his co-workers to join him for breaks or in activities.

Whether or not Mr. Bettelyoun may have found the above-described actions personally objectionable, his opinions and the nature of the actions he described do not constitute actionable employment discrimination. At bottom, what he found "harassing" consisted of people's efforts to socialize with him during work time, people's failure to seek him out when he was in the mood to socialize, and people's failure to leave him alone when he was not in the mood to socialize. His perceptions of harassment are consistent with the earlier described testimony he gave concerning the lack of synchronization between the varying mental stages of the death and dying process that he and others around him were experiencing due to his medical diagnosis. Mr. Bettelyoun's allegations of harassment also are consistent with Dr.

Babitz's opinion that someone who is HIV-positive may experience paranoia when they are severely depressed.

HHS introduced additional evidence showing that, in June of 1988, the IHS Hospital that was providing treatment to Mr. Bettelyoun did not have available brochures or instructional classes on living with the HIV infection. Tr. 151 - 2, 324, 335. This line of evidence, including Mr. Bettelyoun's descriptions of his fluctuating moods, indicates that some of Mr. Bettelyoun's perceptions of discrimination were not caused by objectively hostile or unreasonable actions taken by other people. Instead, he and others who cared about him were undergoing a natural psychological course which even the area IHS hospital did not explain to them at the time.

E. HHS failed to prove that any disparate treatment that may have occurred was due solely to Mr. Bettelyoun's HIV infection because the evidence suggests that Mr. Bettelyoun's mental state, "Indian Politics," homophobia, and professional jealousy may have all played a role.

From the evidence offered by HHS I cannot conclude that Mr. Bettelyoun was subjected to disparate treatment solely on the basis of handicap. This is in part because HHS' evidence includes many possible reasons for Mr. Bettelyoun's experiences. For example, in the previous section, I discussed the role Mr. Bettelyoun's mental state played.

Mr. Bettelyoun testified also that he believed he was a victim of "Indian Politics," in which people took a negative and tried to get evil or political gain from it. Tr. 143. He further explained that the cultural values of his people emphasize the negative, and rumors or "word of mouth" are used to accentuate the negative in tribal politics and in tribal employment situations, which pits family against family. Tr. 363 - 64. He acknowledged that Indian Politics existed long before he became infected with HIV. Tr. 269. He felt that there exists no distinction between the tribal community and the tribal government; in his culture, work and home are one and the same. Tr. 366. I find, however, that section 504 of the Rehabilitation Act is limited to redressing discrimination that occurs in programs or activities that receive federal funds.

Also, the testimony of Ms. Whipple contradicts HHS' contention that the Tribe discriminated against Mr. Bettelyoun solely due to his HIV infection. According to Ms. Whipple, tribal employees reacted negatively to homosexuality, which they inferred from Mr. Bettelyoun's HIV status. Tr. 422 - 423, 425. Ms. Whipple believed that the general cultural attitude on the reservation was that "gay" people should be beaten and removed from the premises. Tr. 423. According to Ms. Whipple, even those

who had been told that AIDS cannot be transmitted through casual contact were stand-offish, due to their suspicions of Mr. Bettelyoun's homosexuality. Tr. 420 - 21, 461.

Dr. Babitz, an employee of HHS whose responsibilities include helping the agency to administer HIV early intervention programs, was also of the opinion that homophobia is a major factor that causes people to fear HIV and AIDS. Tr. 584. Dr. Babitz explained that people tend to be afraid of those who might be different, and in the case of HIV or AIDS, different because of their sexual orientation. Id.

There is also evidence of record that suggests that whatever animosity may have existed between Mr. Bettelyoun and Mr. Bordeaux resulted from professional jealousy. Mr. Schmidt, the Tribe's Vice Chairman, testified that there had been noticeable friction between Mr. Bordeaux and Mr. Bettelyoun since the outset of Mr. Bettelyoun's employment. Tr. 940. Mr. Schmidt believed that the friction was caused by Mr. Bettelyoun's being a more capable writer than Mr. Bordeaux. Id. In Mr. Schmidt's opinion, Mr. Bettelyoun could have made Mr. Bordeaux look bad, and Mr. Bettelyoun should have been Mr. Bordeaux's boss. Tr. 941. Mr. Schmidt did not hear Mr. Bettelyoun complain of the treatment he received from Mr. Bordeaux due to his medical condition; but Mr. Bettelyoun did complain to Mr. Schmidt that his work capabilities surpassed Mr. Bordeaux's. Tr. 922 - 23. Mr. Schmidt acknowledged the possibility that, as a result of the pre-existing friction between the two men, Mr. Bordeaux might have seized upon Mr. Bettelyoun's HIV infection as a pretext "to maybe squeeze him out." Tr. 941.

F. The Tribe responded reasonably to the problems of which it was aware.

The record as a whole establishes that Mr. Lunderman, on behalf of the Tribe, addressed Mr. Bettelyoun's complaints in a reasonable and lawful manner.

In response to Mr. Bettelyoun's situation, Mr. Lunderman first held a meeting in late June 1988 with the RDO staff. He told them that rumors must stop, that they needed to work together, and they needed to behave professionally. Tr. 101. Those present did not hear Mr. Lunderman refer to Mr. Bettelyoun's HIV infection. Tr. 733 - 34, 511 - 12. Nor was it Mr. Bettelyoun's desire that Mr. Lunderman tell others at this meeting that he was infected with the virus.

After a second meeting initiated by Mr. Bettelyoun on July 13 or 14, 1988 (Tr. 102), Mr. Lunderman issued directives on July 19, 1988 for all tribal employees to attend at least one of three designated training sessions

on AIDS. Tribe Ex. 14, 15; Tr. 715 - 17. I find that Mr. Lunderman's directives were reasonably calculated to remedy the problems experienced by Mr. Bettelyoun. Some people reported hearing Mr. Bordeaux and others say that they feared AIDS, were concerned for the health of their families, or did not wish to work with Mr. Bettelyoun. E.g., HHS Ex. 25(b), (e), (f), (o). (However, not everyone behaved with fear or hostility towards Mr. Bettelyoun. E.g., Tr. 933.) The federal publications submitted by HHS recommend the use of education (such as news bulletins, question and answer sessions, films, and video tapes) to address the concerns of those who work with HIV-infected individuals. E.g., HHS Ex. 21c at 18, 21g. Even though there is no medical basis for an employee to refuse to work with an HIV- infected individual, the U.S. Office of Personnel Management, for example, instructed managers to take the concerns of such employees seriously and to address them with appropriate information and counselling. HHS Ex. 21g.

Also, Dr. Babitz's testimony helped establish the reasonableness of Mr. Lunderman's directive on the training sessions. Dr. Babitz is employed by HHS to provide oversight and consultation in the administration of HHS grants, and he gives educational programs also on behalf of HHS to persons who work in HHS-funded grant programs. Tr. 565. When asked by HHS whether there are any established methods for alleviating or for dealing with co-workers' fear of HIV or AIDS, Dr. Babitz answered that it was basically through education; that is, answering questions, giving people assurances, distributing published information, and like efforts. Tr. 585.

In addition to directing the employees' attendance at training sessions, Mr. Lunderman authorized Mr. Bettelyoun's reassignment to the CHR department headed by Ms. Whipple, who had been requesting Mr. Bettelyoun's assistance in drafting grants for her department. Tr. 106, 411 - 13, 455. According to Ms. Whipple, she had discussed the reassignment with Mr. Bettelyoun and he had agreed to it. Tr. 413, 455. Mr. Bordeaux said he was on a business trip at the time and did not request Mr. Bettelyoun's reassignment. Tr. 1007 - 08.<sup>40</sup>

---

<sup>40</sup> In Ms. Whipple's opinion, Mr. Bordeaux was confused about Mr. Bettelyoun's status during the period he worked for her. Tr. 454 - 55. The personnel office may not have made the formal changes, but she considered him an employee of her department. Tr. 454. Mr. Bordeaux, on the other hand, considered himself Mr. Bettelyoun's supervisor at the same time and made several calls a day to Ms. Whipple to check on Mr. Bettelyoun's whereabouts. Tr. 455, 1013. The foregoing evidence  
(continued...)

Mr. Bettelyoun does not claim to have sought another meeting with Mr. Lunderman to discuss any problems with discrimination he may have experienced or suspected after his reassignment to CHR. His silence is consistent with the Tribe's contention that the Tribe did not cause or condone any employment discrimination against him. His silence also is consistent with Ms. Whipple's testimony that she did not treat him adversely but was attempting to help him. Her ability to help him was limited on at least one occasion by his own failure to cooperate. He would not identify to Ms. Whipple the person on her staff who was allegedly treating him poorly. Tr. at 435. At other times, she was told by Mr. Bettelyoun that people did not want to work with him, that people did not give him information immediately after promising to do so, and that people were preventing him from meeting deadlines in his work. Tr. 435, 437, 453 - 54, 465 - 66. However, there also is no evidence that he ever asked Ms. Whipple to intervene or alleviate these alleged problems. As discussed further below, Mr. Bettelyoun was already considering legal action against the Tribe, which could have provided Mr. Bettelyoun with a potential motive for announcing an exaggerated version of his experiences to others so that they may later recall them, while he sought no solution for these alleged problems from his supervisor, Ms. Whipple, or Mr. Lunderman.

Mr. Lunderman did not take further action because Mr. Bettelyoun did not continue to report problems to him after mid-July 1988 and Mr. Bettelyoun resigned from his job on August 25, 1988. Moreover, I do not fault Mr. Lunderman for his failure to bring about immediate changes fully satisfactory to Mr. Bettelyoun. Mr. Bettelyoun's problems were caused in part by his own mental state, deficiencies in the Tribal people's knowledge about the HIV virus, traditional cultural attitudes towards his suspected homosexuality, and the absence of instructional materials on coping with the social effects of HIV and AIDS during the Summer of 1988.

---

<sup>40</sup>(...continued)

persuades me that Mr. Bordeaux's attempts to keep track of Mr. Bettelyoun's movements were due to confusion about Mr. Bettelyoun's status, not due to Mr. Bordeaux's intent to treat Mr. Bettelyoun differently because of his HIV infection, as alleged by HHS. See HHS PF No. 52.

VI. If I had the authority to decide the merits of the discrimination alleged by HHS, I would find that HHS failed to prove by a preponderance of the evidence that the Tribe forced Mr. Bettelyoun to resign in violation of section 504 of the Rehabilitation Act.

A. HHS failed to prove that Mr. Bettelyoun resigned because Mr. Bordeaux repeatedly asked him to do so or that, if Mr. Bordeaux asked for Mr. Bettelyoun's resignation, he was acting for the Tribe.

To support HHS' allegation that Mr. Bettelyoun was forced by the Tribe to resign from his job, HHS elicited Mr. Bettelyoun's testimony that Mr. Bordeaux had asked for his resignation approximately eight times during private encounters between June 20 until July 15, 1988 (more than one month before Mr. Bettelyoun gave his resignation). Tr. 90. Mr. Bordeaux denied ever having asked Mr. Bettelyoun to resign. Tr. 1004. He said he was surprised by the resignation and had never been told by Mr. Bettelyoun that he objected to the way he was being treated. Tr. 1003 - 04. Mr. Bordeaux was told by Mr. Bettelyoun only that he was having some personal problems. Tr. 1003.

According to Mr. Bettelyoun, he was sufficiently troubled by his situation that, by June 28, 1988, he had retained an attorney. Tr. 82 - 84. He said he informed Mr. Bordeaux of his attorney and told Mr. Bordeaux he was going to remember all that was said for a possible legal action. Id. Mr. Bettelyoun said his attorney's advice was to let happen what happens, to stay on the job, and to get in touch again after three months. Tr. 139, 245. Such advice by his attorney helps to explain why Mr. Bettelyoun did not tell people that their offers of advice and prayers, for example, were not welcomed by him and should cease. Such legal advice and the option of a lawsuit provided Mr. Bettelyoun with incentives also to emphasize in his own mind (or at least to remember) only the adverse impact of his experiences from June 14 to August 25, 1988.

I do not find persuasive HHS' efforts to construe Mr. Bordeaux's alleged requests for a resignation as official acts on the Tribe's behalf. Mr. Bettelyoun testified that he never heard Alex Lunderman, then the Tribal Chairman, say that Mr. Bettelyoun should be fired or should resign. Tr. 227 - 28, 231. He thought Mr. Lunderman wanted him to resign because others told him so and because Mr. Lunderman did not write a memo instructing Mr. Bordeaux to stop asking for a resignation. Tr. 227 - 28. Another witness testified that she heard Mr. Lunderman utter words to the effect of "We're going to have to do something about it," and she interpreted Mr. Lunderman's meaning to be that he wanted to terminate Mr. Bettelyoun's employment. Tr. at 802,



813.<sup>41</sup> However, the Vice Chairman of the Tribe, Vernon Schmidt, testified to a meeting in which Mr. Schmidt and Mr. Lunderman instructed Mr. Bordeaux to handle the situation with Mr. Bettelyoun properly to protect the Tribe and the rights of Mr. Bettelyoun. Tr. 920 - 21, 939; HHS Ex. 25b. The tribal Chairman and Vice Chairman were in the chain of command over Mr. Bordeaux. E.g., Tr. 939.

HHS did not introduce any evidence showing that anyone other than Mr. Bettelyoun had heard Mr. Bordeaux or any other employee, official, or agent of the Tribe seek a resignation from Mr. Bettelyoun. One of HHS' witnesses, a Tribal Council member during 1988, testified that she never heard any tribal official speak negatively of Mr. Bettelyoun. Tr. at 807 - 09.

For these reasons, I am not persuaded that Mr. Bordeaux did ask Mr. Bettelyoun for his resignation. However, I conclude that, even if Mr. Bordeaux did ask Mr. Bettelyoun for his resignation, it was not done as an act of the Tribe.

B. The evidence suggesting that Mr. Bettelyoun resigned voluntarily is stronger than that suggesting that the Tribe forced him to resign.

In early June 1988, when Mr. Bettelyoun was hired to work in the newly created position of Senior Planner/Assistant Director for the RDO, he was 37 years old and a college graduate. See, e.g., HHS Ex. 4. Even though he had the paper credentials for the Senior Planner/Assistant Director position, he had also a history of changing jobs after short intervals due to disagreements with his supervisors or his desire to earn more money and work fewer hours.

Mr. Bettelyoun's departures from other jobs have had nothing to do with his HIV infection. From 1973 to 1981,

---

<sup>41</sup> This witness, Rose Cordier, on direct examination by HHS, first testified to having heard no tribal official make any negative statement concerning Mr. Bettelyoun. Tr. 807 - 08. She testified also that Mr. Lunderman did not say he wanted to fire Mr. Bettelyoun. Tr. 802. Having obtained these unequivocal answers under oath from Ms. Cordier without any indication that her memory had failed, HHS then had Ms. Cordier read an earlier statement of hers that was summarized by an OCR employee during the investigation of Mr. Bettelyoun's complaint (see HHS Ex. 25h) and change her testimony at hearing to indicate that she believed Mr. Lunderman was indicating with words such as "we're going to have to do something about it" as meaning that Mr. Lunderman wanted Mr. Bettelyoun fired. Tr. 810 - 14.

he had held a number of jobs with other employers for periods ranging from a few months to less than one year; he left at least three of those jobs due to disagreements with his bosses, and he left other jobs due to his dissatisfaction with the hours of work or the amount of his pay. Tr. 39 - 43; 387 - 392; HHS Ex. 4. After 1981 and until June of 1988, he took some classes and claimed no employment, other than volunteer work. Tr. 42, 172, 392; Tribe Ex. 4. For the period from May of 1987 until May of 1988, Mr. Bettelyoun described himself as a "volunteer" at the Spotted Tail Crisis Center, a tribal facility managed by Mr. Bettelyoun's aunt, Doreen Gardner, where he wrote grant proposals for the Center on a contingency-fee basis. Tr. 42 - 43. That is, he factored his compensation into the grant proposals he drafted so that he would receive a percentage of the grant money if the proposals received funding. Tr. 162, 179 - 82, 190, 392, 989. The timing of his resignation from his Senior Planner/Assistant Director job with the Tribe, together with his opportunities to earn money by the other means discussed herein, are consistent with his overall work history.

As for the issue of what or who caused Mr. Bettelyoun to resign from his job as Senior Planner/Assistant Director with the Tribe, I begin by noting that the evidence is conflicting as to the location(s) where Mr. Bettelyoun worked from mid-July (when Mr. Lunderman reassigned him to work for Ms. Whipple) until August 25, 1988 (the day Mr. Bettelyoun gave his resignation to Mr. Bordeaux). According to Ms. Whipple, Mr. Bettelyoun shared her office for approximately seven to ten days at the beginning of his reassignment (not the two days at the end as he had alleged), and he stayed in the storage room for another ten days thereafter.<sup>42</sup> Tr. 448 - 49. After Mr. Bettelyoun had been with the CHR department for approximately two weeks, he told Ms. Whipple he wanted to return to the RDO office to work. Tr. 436 - 37.<sup>43</sup> He said he could not complete the assigned projects for her. Id. Ms. Whipple did not know where he went thereafter, but she assumed that he returned to work in the RDO office. Tr. 448.

---

<sup>42</sup> Due to a head injury, Ms. Whipple was not always able to recall the dates of events. Tr. 407 - 08. There was no testimony indicating that her recollection of events or time spans was impaired. Nor did HHS, who called her to testify, so allege.

<sup>43</sup> The inferences from Ms. Whipple's testimony conflict with Mr. Bettelyoun's allegations that the conditions in RDO were very difficult for him to tolerate.

Mr. Bordeaux did not recall having seen Mr. Bettelyoun in the RDO office again. Tr. 1009. Mr. Bordeaux thought Mr. Bettelyoun sometimes travelled out of town on business for RDO. Tr. 1015.

Mr. Bettelyoun testified that he was sharing Ms. Whipple's office until a couple of days before he resigned, but that he had also received her permission to work 50 percent of his time at home, 25 percent of his time in the field, and 25 percent of his time at the CHR office. Tr. 108, 141.

Ms. Haukaas, the secretary of RDO, stated her impressions that Mr. Bettelyoun was gone from the office "a lot" to make presentations for IHS, that he was unable to meet deadlines for submitting grant proposals for the office as a result,<sup>44</sup> and that he had told her a week or longer before August 25, 1988 that he had given his oral resignation and would be doing consulting work for IHS. Tr. 721, 724 - 26. Also, as noted earlier, while Mr. Bettelyoun was employed full time by the Tribe, he held a part time job in another town at a video store managed by his brother.

There is no dispute that, while he was still employed by the Tribe, Mr. Bettelyoun took time away from his job in order to make speeches for IHS regarding his experience with the HIV infection. Tr. 152 - 53, 661, 721. When IHS hospital doctors diagnosed Mr. Bettelyoun as HIV-positive in June of 1988, the IHS hospital had pamphlets concerning the risks of transmitting the HIV virus, but it did not provide information on living or coping with the medical condition. Tr. 151. In July of 1988, a female friend of Mr. Bettelyoun's who also was infected with HIV and is a Native American, Mary Janis, approached him about making presentations of their experiences for IHS, which had set aside money for the project and asked for her assistance. Tr. 149, 862 - 64, 867 - 68. Thereafter, Mr. Bettelyoun performed such work for IHS while employed by the Tribe. Tr. 152 - 54, 661, 752. Ms. Janis testified that Mr. Bettelyoun later requested retroactive payments of \$250 per session from IHS for the

---

<sup>44</sup> Mr. Bettelyoun claimed that, during his employment with the Tribe from June 6 until August 25, 1988, he worked on four grant proposals, two of which sought funding for AIDS education. Tr. 184 - 85. Mr. Bordeaux testified that Mr. Bettelyoun only wrote two proposals during the employment period at issue; he had drafted the other two (which included mentions of AIDS education) at an earlier time, while he was with the Spotted Tail Crisis Center. Tr. 993. The two grant proposals Mr. Bettelyoun prepared while employed in his RDO position did not receive approval for funding. Tr. 994.

speeches he made during July and August of 1988. Tr. 880 - 81, 883. HHS was unable to locate through IHS the canceled checks and like documents that would verify the actual payments made by IHS to Mr. Bettelyoun. Tr. 1138 - 39.

Neither IHS nor Mr. Bettelyoun had asked Mr. Bettelyoun's supervisor for permission to make these presentations for IHS while Mr. Bettelyoun was being paid by the Tribe to do its work. Tr. 662, 891 - 92, 1016 - 17. However, Mr. Lunderman testified that Ms. Whipple asked if Mr. Bettelyoun could make a presentation, and Mr. Lunderman gave his consent. Tr. 1108. Mr. Lunderman did not state whether the permission he gave was for Mr. Bettelyoun to do a presentation for IHS.

Mr. Bettelyoun testified that he submitted his resignation on August 25, 1988 because he learned that Mr. Bordeaux had challenged his brother, Alvin Bettelyoun, to a fight at a restaurant during off-work hours and that Mr. Bettelyoun's niece was being called the "AIDS" girl at her Head Start Program. Tr. 142 - 44. Mr. Bettelyoun said he was bothered by what he considered "Indian politics" and felt that Mr. Bordeaux's attempt to fight Mr. Bettelyoun's brother was the proverbial straw that broke the camel's back. Tr. 143 - 45. Mr. Bettelyoun said he was already greatly troubled by his not having been given a typewriter or a business phone to use for his work, his need to drive 45 minutes from his home to the Tribal building, and his not getting any directions from Mr. Bordeaux on his work assignments. Id.

I did not find the reasons cited by Mr. Bettelyoun persuasive that his resignation was involuntary or that the described actions constituted a violation of section 504 of the Rehabilitation Act.

First, on the issue of Mr. Bordeaux's supervision over Mr. Bettelyoun's work (which allegedly contributed to Mr. Bettelyoun's involuntary resignation), Mr. Bettelyoun testified also that, even when he was assigned to work in the RDO office, he did not see Mr. Bordeaux for days at a time because Mr. Bordeaux had a drinking problem that caused him to be gone from the office for lengthy periods of time. Mr. Bettelyoun said Mr. Bordeaux's drinking just exacerbated the problems of Mr. Bettelyoun's being HIV positive. Tr. 196.

Mr. Bordeaux testified that, at the outset of Mr. Bettelyoun's employment, he gave Mr. Bettelyoun the freedom to pursue any grant or economic development project he wanted. Tr. 992. Mr. Bordeaux said he knew Mr. Bettelyoun was an experienced and well-qualified grants writer. Tr. 989 - 90. Moreover, Mr. Bettelyoun was the Senior Planner, to whom Mr. LaPointe of RDO

reported. Tr. 1009 - 10. According to Mr. Bordeaux, there were times when he was out of the office and Mr. Bettelyoun was left in charge to take care of office business. Tr. 1010. Thus, it is reasonable to conclude that Mr. Bordeaux did not supervise Mr. Bettelyoun closely because Mr. Bordeaux did not believe Mr. Bettelyoun required close supervision, rather than because of his HIV status.

I note also that, even according to Mr. Bettelyoun, Mr. Bordeaux had not asked for a resignation since July 15th -- approximately 40 days before he gave his resignation. Tr. 90. During the intervening 40 days, Mr. Bettelyoun was reassigned to work for Ms. Whipple, who did not ever ask for his resignation or indicate that she wanted him to stop working. The alleged lack of proper supervision from Mr. Bordeaux should not have contributed to Mr. Bettelyoun's resignation, since he was not supposed to have been supervised by Mr. Bordeaux after July 15, 1988. On the contrary, the fact that Mr. Bordeaux was no longer supervising Mr. Bettelyoun lends credence to Mr. Bordeaux's testimony that Mr. Bettelyoun resigned for personal reasons, as opposed to having been forced to do so by his employer. Moreover, in this context, Mr. Bettelyoun's criticisms of Mr. Bordeaux appeared gratuitous, but were consistent with Vice Chairman Schmidt's observation that there existed personal friction between the two men, due to Mr. Bettelyoun's superior capabilities.

As for the absence of a typewriter, I have earlier noted that Mr. Bettelyoun did borrow a typewriter to use and, therefore, his relating his resignation to his not having been provided with a typewriter was hypertechnical and unpersuasive. Even though there is no evidence that the Tribe installed a telephone for him after his transfer to CHR, HHS has not shown that the omission was due to anything other than oversight. Mr. Bettelyoun did not claim to have asked Ms. Whipple or Mr. Lunderman for a telephone. Nor did he claim to have asked the Tribe to reimburse him for the business-related calls he may have had to make from home or elsewhere. As in other matters, Mr. Bettelyoun's credibility is undercut by his prolonged silence on matters he later claimed were very troubling to him.

In addition, I note that, at another juncture in the hearing, Mr. Bettelyoun's testimony was that he felt he could not continue to do his planning work from his home because the Tribe did not provide him with a business phone and a typewriter to use at his home. Tr. 144. I do not find an affirmative duty on the part of the Tribe to ascertain whether he had a typewriter or a telephone at his home. If Mr. Bettelyoun wished, he could have asked for reimbursement of business-related calls he made from home, and he could have asked to borrow a typewriter

from the office. Mr. Bettelyoun may not have asked about these two items for his home use because, as I have already noted, neither Mr. Bordeaux nor Ms. Whipple were clear on his whereabouts. There is inadequate evidentiary support for Mr. Bettelyoun's allegation that he received Ms. Whipple's authorization to work at home.

Mr. Bettelyoun's complaint about his 45 minute drive from home is also unpersuasive. The Tribe did not require or cause him to live 45 minutes away from his work site. Unless he increased the time he worked at home to 100 percent,<sup>45</sup> he would have the same distance to drive even if he did not have the HIV infection.

There is evidence of record to support the Tribe's contention that Mr. Bettelyoun resigned voluntarily.

According to Mr. Bettelyoun's account of his final exchange with Mr. Bordeaux, Mr. Bordeaux took the written resignation and told Mr. Bettelyoun, "[N]ow that you have given me what I want, I'll give you what you want. The doctor who released your medical information to us was Dr. Foster." Tr. 147. As already discussed in a preceding section, after obtaining Dr. Foster's name, resigning from his full-time job with the Tribe, and resigning from his part-time job with the video store managed by his brother, Mr. Bettelyoun then filed his lawsuit seeking damages resulting from IHS's alleged breach of his privacy rights. As also noted above, Mr. Bettelyoun received \$30,000 in settlement from the United States.

Also, Roger Follas of IHS testified that, shortly before Mr. Bettelyoun resigned from his job with the Tribe, Mr. Follas discussed with Mr. Bettelyoun the possibility of Mr. Bettelyoun's continuing to make speeches for IHS. Tr. 663. On August 26, 1988, the day after Mr. Bettelyoun resigned from his job with the Tribe, Mr. Follas executed a purchase order committing IHS to pay Mr. Bettelyoun for his services from August 31 to December 31, 1988. Tr. 665 - 66; Tribe Ex. 25.

Mr. Bettelyoun's testimony concerning the formation of his contract with IHS was equivocal, evasive, and not credible. He was asked if he has any conversations with Mr. Follas or Dr. Welte of IHS prior to August 26, 1988; Mr. Bettelyoun's answer was that he never attended any

---

<sup>45</sup> Mr. Bettelyoun testified that after his HIV infection became known, he worked at home 50 percent or more of his work day. Tr. 140 - 41. He claimed to have worked at the office approximately 75 percent of the time before his HIV infection became known. Tr. 70. HHS contends that this change was evidence of discrimination. HHS PF No. 68.

meetings with them where it was stated expressly that he would go to work for IHS. Tr. 296. He said he had no idea how or why IHS requisitioned his services on August 26, 1988. Tr. 286 - 97. Also, Mr. Bettelyoun refused to acknowledge that, by working for IHS, he expected to earn more than the \$7.75 per hour the Tribe paid him. Tr. 297 - 98. When asked about IHS's records showing that he was to be paid \$6500 over four months (from August 31, 1988 to December 31, 1988), Mr. Bettelyoun claimed, "That's not the way it turned out." Tr. 297. He claimed he was not paid \$6500 over a four month period, but he did not know the "exact figures" of how much he was paid by IHS for the four months. Tr. 298. He refused to concede even that \$6500 over a four-month period is greater than the amount he would have earned during the same period by working for the Tribe at \$7.75 an hour, eight hours each workday.<sup>46</sup> Tr. 297 - 98. Also, he also refused to concede that, in 1989, he earned considerably more money from his speechmaking activities around the country than if he had remained in his job with the Tribe. Tr. 298. Mr. Bettelyoun said he could not recall how much he earned in 1989. Tr. 299.

In fact, by September 13, 1988, 19 calendar days after resigning from the tribal job, Mr. Bettelyoun was claiming \$2281 from IHS for having completed 19 presentations. HHS Ex. 39 at 4. By September 20, 1988, IHS had obligated \$6500 from its AIDS Prevention Fund for payment to Mr. Bettelyoun. HHS Ex. 39 at 3. On November 15, 1988, Mr. Bettelyoun sought \$250 from IHS for each of his presentations in October, and he asked IHS to pay an additional \$3018.40 for the presentations he planned to make during the remaining contract period.<sup>47</sup> HHS Ex. 39 at 2. Despite his earlier denials and equivocations on this matter, he did receive a check from IHS for \$6500 in January 1989, for having made presentations for IHS during the preceding four months. Tr. 379.

While making presentations under contract with IHS during mid-September 1988, Mr. Bettelyoun and others formed a corporation also to provide education and support services for dealing with HIV and AIDS. HHS Ex. 37; Tr.

---

<sup>46</sup> Mr. Bettelyoun probably would have earned a gross income of approximately \$5425 during the same four-month period by working for the Tribe. ( $\$7.75 \times 40 \text{ hrs.} \times 17.5 \text{ weeks} = \$5425$ )

<sup>47</sup> According to a witness who worked with Mr. Bettelyoun in making these presentations, Mr. Bettelyoun sought retroactive payments of \$250 per session (plus per diem, travel, lodging and related expenses) because he thought the original contract price of \$100 (plus per diem, travel, lodging and related expenses) for each session was too low. Tr. 870 - 71.

358 - 59. Mr. Bettelyoun made presentations for the corporation during the period of his contract with IHS and thereafter as well. Tr. 358, 872, 874 - 75. At first, his speaking engagements for the corporation overlapped the same geographical area as that served by the local IHS office (i.e., the states of North Dakota, South Dakota, and Nebraska); later, he expanded his presentations for the corporation to several other states as well. Tr. 149, 301. The corporation's business manager negotiated varying prices for these engagements, and the Tribe was asked to pay \$500 per session for Mr. Bettelyoun's presentation in 1989. Tr. 300 - 01.

On the basis of the record as a whole, I find that HHS has not proven by a preponderance of the evidence that the Tribe caused Mr. Bettelyoun to resign involuntarily solely because of his HIV infection. As discussed above, there is evidence that Mr. Bettelyoun was not working hard or consistently for the Tribe from at least July until August 25, 1988 due to his other commitments and because he was distracted by the prognosis provided by Dr. Jereb. It is not unlikely that someone in Mr. Bettelyoun's position, who was told by his doctor that he might have only a couple months to a couple of years to live, would wish to have more leisure time or to earn more money than \$7.75 per hour for drafting grant proposals each day of the week. See Tribe Ex. 5.

I do not find credible Mr. Bettelyoun's testimony that he never considered leaving his job with the Tribe in order to maximize his use of the short time he thought he had remaining. Tr. 392 - 93. Nor do I find credible Mr. Bettelyoun's testimony that he never explored other job possibilities while employed by the Tribe. Tr. 398. Mr. Follas' testimony contradicted Mr. Bettelyoun's contention, as did Arvella Haukaas' testimony about Mr. Bettelyoun's earlier oral resignation. Also, it appears highly unlikely that Mr. Follas would have executed a purchase order for Mr. Bettelyoun's benefit on August 26, 1988, without having discussed the matter in some detail with Mr. Bettelyoun. The "justification memorandum" IHS prepared to support its contract with Mr. Bettelyoun was not submitted by HHS, because Mr. Bettelyoun did not authorize its release. Tr. 1137 - 38.

The financial records produced by IHS suggest a financial incentive for Mr. Bettelyoun to leave the Tribe's employ. In addition, Mr. Bettelyoun's formation of a private corporation for performing consulting work is consistent with his overall work history and his stated interest in maximizing his remaining time. Mr. Bettelyoun may have had more than one reason for resigning from his job with the Tribe. However, HHS has failed to prove by a preponderance of the evidence that the Tribe coerced his resignation in violation of section 504 of the Rehabilitation Act.



## CONCLUSION

For the reasons stated, I conclude that I lack subject matter jurisdiction over this action and that it must therefore be dismissed. In the alternative, if I had subject matter jurisdiction, I would conclude that HHS failed to prove by a preponderance of the evidence that: (1) Mr. Bettelyoun was a qualified handicapped person within the meaning of section 504 of the Rehabilitation Act, (2) the Tribe's alleged noncompliance with section 504 of the Rehabilitation Act could not be corrected by voluntary means, and (3) the Tribe discriminated against Mr. Bettelyoun solely on the basis of his handicap in violation of section 504 of the Rehabilitation Act.

/s/

---

Mimi Hwang Leahy  
Administrative Law Judge