



## WORKFORCE DEVELOPMENT COUNCIL

317 W. Main Street  
Boise, ID 83735-0790

### TRANSMITTAL #1

### MEMORANDUM

November 22, 2005

**TO:** Workforce Development Council  
**FROM:** Karen A. McGee, Chair  
**SUBJECT:** Appeal of Workforce Area Designation

**ACTION REQUESTED:** Accept, Reject or Modify the Recommended Decision of the Workforce Development Council's Hearing Officer

### BACKGROUND:

On May 31, 2005, Governor Kempthorne announced his decision to approve the current WIA State Plan and to create two workforce areas, the former Region VI and the Balance of State comprising all other areas in the state. Consequently, former Regions I, II, III, IV and V were notified that their local area designations were not being continued under the Governor's new plan. These five former areas appealed the Governor's decision alleging a statutory entitlement to mandatory designation under WIA.

An administrative hearing was held on September 28, 2005. Evidence was presented and legal arguments were made to Duff McKee, the Workforce Development Council's hearing officer. After considering all the evidence, the Council's hearing officer made the following recommendations:

I recommend that the Workforce Development Council conclude that none of the regions who have petitioned for review meet the qualifying criterion for designation as a local workforce investment area under Section 116(a)(2) of the WIA act. I recommend that the Council conclude that the temporary designation of Section 116(a)(3) of the WIA act is no longer available to any of the entities in Idaho. I make no recommendation to the Council on any action to be taken or not taken under Section 116(a)(4) of the act. Under the act, such is exclusively a matter of executive prerogative of the Governor, acting with the advice of the Council, and is not subject to examination on appellate review.

The Council must decide to accept, reject or modify the hearing officer's decision. The Council must make its decision based only upon the record that was before the hearing officer. The Council may not receive or consider any evidence not presented to the hearing officer. The only issue before the Council is whether any of the appellants satisfied the statutory qualifications for mandatory designation under WIA.

**ACCESS TO RECORD:**

A complete copy of the "Hearing Officer's Findings of Fact, Conclusions of Law and Recommendations for Final Order" is attached to this memorandum. A copy of the entire record is available for your review at:

[http://cl.idaho.gov/Portal/ICL/alias\\_wia/tabID\\_5568/DesktopDefault.aspx](http://cl.idaho.gov/Portal/ICL/alias_wia/tabID_5568/DesktopDefault.aspx)

by selecting the November 22 meeting date. You may also access the record from the Department's homepage by selecting WIA, State Council, Meeting Dates, 2005 and then the November 22 meeting date.

**ACTION:**

The Council must accept, reject or modify the hearing officer's recommendation. Because this is simply a review based on specific statutory requirements, Council members should be prepared to cite the law and/or regulations should they wish to alter the hearing officer's recommendation.

Council staff will reduce the Council's decision to writing and deliver the Council's decision to the Governor and the appellants.

Contact:        Primary        Alice Taylor    (208) 332-3570, ext. 3313

Attachment

IDAHO STATE DEPARTMENT OF COMMERCE AND LABOR  
WORKFORCE DEVELOPMENT COUNCIL

In the matter of the appeals of:

PANHANDLE AREA COUNCIL,  
CLEARWATER ECONOMIC  
DEVELOPMENT ASSOCIATION, SAGE  
COMMUNITY RESOURCES, REGION IV  
DEVELOPMENT ASSOCIATION and  
SOUTHEAST IDAHO COUNCIL OF  
GOVERNMENTS

Appellants

HEARING OFFICER'S FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND  
RECOMMENDATIONS FOR FINAL  
ORDER

A hearing was held pursuant to notice on Wednesday, September 28, 2005, in conference facilities at the Idaho Department of Commerce and Labor, Boise, Idaho. The following parties were present: Craig G. Bledsoe, deputy attorney general, for the Idaho Department of Commerce and Labor; Starr Kelso, attorney at law, for Regions I, III, IV and V; and Wanda Keefer, Executive Director of Clearwater Economic Development Association, for Region II. Hearing officer Duff McKee conducted the hearing. Alice Taylor, administrative assistant from the Department of Commerce and Labor monitored the conference as clerk.

At this hearing, an opportunity was offered to all parties to present evidence and arguments to the hearing officer in support of the respective positions of the parties. Following the conclusion of the hearing officer advised all parties that he would hold the record open until Friday, September 30, for submission of additional written arguments. If written arguments were

submitted, the hearing officer would hold the record open until Monday, October 3, 2005, for submission of any reply or rebuttal.

All written arguments have been submitted and the record is now closed. The hearing officer has been fully and duly advised of the evidence and all arguments the parties wish to make. Therefore, the hearing officer now makes and enters the following findings of fact and conclusions of law, and the following recommendations for order.

### **Facts and Procedural History**

The salient facts of this case, insofar as are germane to the issues within reach of the hearing officer in these proceedings, are not in dispute. The petitioners in this matter are all regional associations of local governmental units within the state of Idaho that have been serving as “Local Workforce Investment Areas” (LWIAs) under the federal Workforce Investment Act (WIA) of 1998<sup>1</sup>. Generally, the Panhandle Area Council, or Region I, serves the northern counties around and above Coeur d’Alene, the Clearwater Economic Development Association, or Region II, serves the central panhandle counties centered on Lewiston, the Sage Community Resources, or Region III, serves the 10 southwestern counties surrounding Boise, the Region IV Development Association serves the south central counties around Twin Falls, and the Southeast Idaho Council of Governments, or Region V, serves the eastern central counties around Pocatello. All are non-profit corporations, the constituents of which are the governmental units – counties and municipalities – making up the respective service areas. All are or were organized to accomplish the administration and implementation of grant programs such as the federal WIA.

The WIA was enacted in 1998 as a federal job training program to replace other federal programs – notably, the federal Job Training Partnership Act. The act became effective in 2000. It is administered on the national level by the U.S. Department of Labor. The federal WIA called

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<sup>1</sup>112 Stat. 936, enacted as Pub. L. No. 105-220 August 7, 1998,

for implementation of the new federal act by the states through five year plans to be adopted in accordance with federal guidelines by the several states and approved by the Secretary or his delegate. The five year plan for Idaho was adopted and approved for Idaho in 2000, and implemented by then Governor Phil Batt. The five appellants were designated Governor Batt as LWIAs for their respective service areas, and each has served as an LWIA for the five year period from July 1, 2000 through June 30, 2005.

Wanda Keefer, executive director of Region II, reported with considerable pride that Idaho, largely through the efforts of the regional LWIAs, had built an impressive record of achievements in the area of workforce development during the five years that the first WIA plan was in operation in Idaho. There is no suggestion in any of the materials submitted, or in the testimony offered at hearing, that the LWIAs in place in Idaho did a superlative job during the five years of the initial WIA plan.

The federal participation however, changed. The law did not change, but the funding under the law did. Beginning in 2002, federal funds available for grants under state programs were reduced considerably – from \$15.2 million in 2002 to \$9.6 million in 2005, or a cut of over 37%.<sup>2</sup> A determination was made by the state executive branch – the Governor’s office and the Department of Commerce and Labor – to restructure the WIA plan for the next two year period.

According to the initial plan adopted and approved for Idaho, the federal act and the federal regulations developed by the U.S. Department of Commerce pertaining to the federal act, the initial state plan terminated or expired on June 30, 2005. A new, two-year state plan was to be prepared by each state and submitted for approval by federal authorities for the period commencing July 1, 2005. A new state plan for Idaho was developed and presented to the federal authorities for approval in the spring of 2005. The new plan was prepared by the staff of the

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<sup>2</sup> Hearing Exhibit 8 – Memorandum from Roger Madsen to Workforce Development Council, May 11, 2005

Idaho Department of Commerce and Labor and submitted over the governor's signature. It was approved by the federal authorities on June 29, 2005.<sup>3</sup>

The significant change in the plan, as is relevant to these proceedings, was the reorganization of the LWIAs into two units – one statewide unit and one unit comprised essentially of Region VI from the old plan, but with both units being administered through the state office of Commerce and Labor. The objective of the reorganization was to reduce or eliminate the \$1.3 million in administrative expenses required to staff and operate the LWIAs by consolidating all administration into the state office.

As a consequence of this restructuring of the LWIAs under the new state plan, each of the five regions identified above – being all but Region VI – were advised by letter dated June 9, 2005, that they would no longer be designated as LWIAs under the new Workforce Investment Act plan beginning July 1, 2005. Each of the regions received an identical letter from Roger Madsen, Director of the Department of Commerce and Labor, acting as Governor Kempthorne's designee. In this letter, Director Madsen advised the regions that their current designation as a local workforce investment area under the current WIA plan was to expire on June 30, 2005. The letter further advised that the regions did not meet the statutory criteria for mandatory designation as LWIAs under the new plan, and that any request for discretionary designation was being denied. It explained that the region could appeal the decision if it felt that it did meet the statutory criteria.

The five regions submitted letters to the Chair of the Workforce Development Council stating their desire to appeal the decision of the governor.

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<sup>3</sup> Hearing Exhibit B – Letter from U.S. Department of Labor, Employment and Training Administration, Washington D.C. to Governor Dirk Kempthorne, re: Idaho's Strategic Plan for Title I of the Workforce Investment Act and the Wagner-Peyser Act, dated June 29, 2005.

## Jurisdiction of Hearing Officer

act<sup>4</sup>: The statutory basis for these proceedings is set forth in Section 116(a)(5) of the federal

(5) Appeals.--A unit of general local government (including a combination of such units) or grant recipient that requests but is not granted designation of an area as a local area under paragraph (2) or (3) may submit an appeal to the State board under an appeal process established in the State plan. If the appeal does not result in such a designation, the Secretary, after receiving a request for review from the unit or grant recipient and on determining that the unit or grant recipient was not accorded procedural rights under the appeal process established in the State plan or that the area meets the requirements of paragraph (2) or (3), as appropriate, may require that the area be designated as a local area under such paragraph.

In Idaho, the Workforce Investment Council has been designated as the "state board" under the WIA act. The powers of the Council, as relevant here, are found in Section 111 of the federal act:

(a) In General.--The Governor of a State shall establish a State workforce investment board to assist in the development of the State plan described in section 112 and to carry out the other functions described in subsection (d).

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(d) Functions.--The State Board shall assist the Governor in--

- (1) development of the State plan;
- (2) development and continuous improvement of a statewide system of activities that are funded under this subtitle or carried out through a one-stop delivery system described in section 134(c) that receives funds under this subtitle (referred to in this title as a "statewide workforce investment system"), including--
  - (A) development of linkages in order to assure coordination and non-duplication among the programs and activities described in section 121(b); and
  - (B) review of local plans;
- (3) commenting at least once annually on the measures taken pursuant to section 113(b)(14) of the Carl D. Perkins Vocational and Applied Technology Education Act (20 U.S.C 2323(b)(14));
- (4) designation of local areas as required in section 116;
- (5) development of allocation formulas for the distribution of

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<sup>4</sup> All references to the federal act mean The Workforce Investment Act Of 1998, Public Law 105-220, enacted by the 105th Congress on Aug. 7, 1998, and found at 112 Stat. 936.

funds for adult employment and training activities and youth activities to local areas as permitted under sections 128(b)(3)(B) and 133(b)(3)(B);

(6) development and continuous improvement of comprehensive State performance measures, including State adjusted levels of performance, to assess the effectiveness of the workforce investment activities in the State as required under section 136(b);

(7) preparation of the annual report to the Secretary described in section 136(d);

(8) development of the statewide employment statistics system described in section 15(e) of the Wagner-Peyser Act; and

(9) development of an application for an incentive grant under section 503.

The criteria for selection of LWIAs is spelled out in Sections 116(a)(2) through (4) of the federal act. As is relevant to these proceedings, these sections of the federal act provide as follows:

(2) Automatic designation.--The Governor shall approve any request for designation as a local area--

(A) from any unit of general local government with a population of 500,000 or more;

(B) of the area served by a rural concentrated employment program grant recipient of demonstrated effectiveness that served as a service delivery area or substate area under the Job Training Partnership Act, if the grant recipient has submitted the request; and

(C) of an area that served as a service delivery area under section 101(a)(4)(A)(ii) of the Job Training Partnership Act (as in effect on the day before the date of enactment of this Act) in a State that has a population of not more than 1,100,000 and a population density greater than 900 persons per square mile.

(3) Temporary and subsequent designation.--

(A) Criteria.--Notwithstanding paragraph (2)(A), the Governor shall approve any request, made not later than the date of submission of the initial State plan under this subtitle, for temporary designation as a local area from any unit of general local government (including a combination of such units) with a population of 200,000 or more that was a service delivery area under the Job Training Partnership Act on the day before the date of enactment of this Act ....

(B) Duration and subsequent designation.--A temporary designation under this paragraph shall be for a period of not more than 2 years, after which the designation shall be extended until the end of the period covered by the State plan ....

(C) Technical assistance.--The Secretary shall provide the States with technical assistance in making the determinations required by this paragraph. The Secretary shall not issue regulations governing determinations to be made under this paragraph.

(4) Designation on recommendation of state board.--The Governor may approve a request from any unit of general local government (including a combination of such units) for designation (including temporary designation) as a local area if the State board determines, taking into account the factors described in clauses (i) through (v) of paragraph (1)(B), and recommends to the Governor, that such area should be so designated.

According to the authority granted to me as hearing officer and as contained in the letter of appointment issued to me by the chair of the Workforce Development Council, I have been appointed pursuant to the provisions of Section 116(a)(5) of the federal Workforce Investment Act and Section VIII (A)(3) of the current state plan. As such, I am a hearing officer for the Workforce Development Council under the specific quoted section of the federal act. I do not have plenary jurisdiction to hear any grievance that might be presented to me.

For reasons stated herein, this means that the only areas for review in these proceedings are the questions of whether the petitioning entities qualify for automatic designation as LWIAs under Sections 116(a)(2) and 116(a)(3) of the WIA act. There is no provision in the federal act or in the state plan for any administrative appeal from any decision of the Governor, or any recommendation by the Council, for what has been referred to as "optional" designations under Section 116(a)(4) of the federal act.

The scope of administrative appellate review is spelled out in Section 116(a)(5) of the act, which provides in essence that any candidate not granted designation as an LWIA under the

automatic designation criteria of Section 116(a)(2) or the “temporary and subsequent” designation criteria of Section 116(a)(3) may appeal. The issue for determination on appeal becomes whether or not the protesting entity is entitled to a designation as an LWIA as a matter of law.

It is significant to this determination that the hearing officer is an extension of the Workforce Development Council, which in turn is an *advisory* body to the Governor. In the letter of appointment from the chairperson of the council, I am instructed that I am to act as the *Council’s* hearing officer on the matters designated in Section 116(a)(5) of the WIA.

Petitioners argue that a hearing on all relevant issues should be conducted, including issues pertaining to whether the 2005 plan as announced by the Governor and approved by the U.S. Department of Labor is outside of the federal act as enacted in 1998, whether the Governor abused his discretion as granted to him by the federal act in recasting the investment area designations to exclude the five intrastate regions, whether the Workforce Development Council is qualified or eligible under the federal act to be a LWIA, and whether the U.S. Department of Labor correctly approved the 2005 WIA plan advanced by the Governor in violation of the rights of the five petitioning regions. All of these might be appropriate issues to bring before a federal administrative law judge in an administrative appeal to the Secretary of the U. S. Department of Labor under the federal act, but these issues are outside of the designation of issues cataloged in the provisions for appellate review by a state hearing officer under the state plan. I do not have jurisdiction to entertain any of them in a hearing before me, as an arm of the advisory council to the Governor.

Therefore, I conclude that the appellate hearing in this case is limited to consideration of issues presented pertaining to the eligibility or qualification of the petitioning entities for designation as workplace investment areas under Sections 116(a)(2) and 116(a)(3) of the act.

### **Conclusions of Law**

No area of Idaho, and particularly none of the five regions constituting the petitioners in this case, meet the requirements of Section 116(a)(2) of the federal act. The Assistant Deputy Director of the Idaho Department of Commerce and Labor testified to this issue, and presented demographic exhibits that were not refuted. There is no area of local government within the state with a population greater than 500,000, the state does not have a population less than 1.1 million, and none of the special circumstances enumerated in this section of the federal act apply to Idaho, and more particularly, to any of the regions petitioning for consideration in this case.

Region II, Sage Community Resources, served as a LWIA under the initial five year plan under Section 116(a)(3) of the federal act, being the provision for “temporary and subsequent” qualification. The petitioners argue that this classification should continue, and entitle Region II (and any of the others that might qualify) to designation under this section. I am not persuaded.

Under the federal guidelines issued by the U.S. Department of Labor, controlling the state’s implementation of the act, it is clear that the “temporary and subsequent” designation was only available for the initial five year plan under the act. Specifically, the U. S. Department of Labor advised the Idaho Department of Commerce and Labor that “The law contains no provision mandating temporary and subsequent designation following the expiration of the prior plan.”<sup>5</sup> This is consistent with the wording of Subsection 116(a)(3)(B) of the act, pertaining to duration of the “temporary and subsequent” designation: “A temporary designation under this

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<sup>5</sup> Exhibit F – Letter from Christine D Kulick, Federal Coordinator for Plan Review and Approval, U.S. Department of Labor to John A. McAllister, Deputy Director, Idaho Department of Commerce and Labor, July 14, 2005.

paragraph shall be for a period of not more than 2 years, after which the designation shall be extended until the end of the period covered by the State plan....” Here, the designation was granted initially and thereafter extended until the end of the five year period covered by the initial five year plan. According to U.S. Department of Labor interpretation, as contained in its advice to Idaho, this designation is no longer available under the new plan that came into effect on July 1, 2005.

The only available avenue for the petitioning entities to receive a designation as a LWIA under the new plan placed into effect of July 1, 2005, would be for the Governor to designate such entity as an LWIA under the provisions of Section 116(a)(4) of the WIA. However, it is clear that the designation under this provision of the act is a matter of executive prerogative, to be exercised by the governor upon recommendation of the board. The specific statutory provision is as follows:

Section 116(a)(4) Designation on recommendation of state board.--The Governor may approve a request from any unit of general local government (including a combination of such units) for designation (including temporary designation) as a local area if the State board determines, taking into account the factors described in clauses (i) through (v) of paragraph (1)(B), and recommends to the Governor, that such area should be so designated.

Designation under this section is clearly an executive decision of the Governor, acting with the advice of the Council. I make no finding or nor any recommendation to the council as to whether it should or should not make such recommendation to the Governor on account of any of the applicants in this case. There is no provision in the act or in the plan for any administrative appeal from such decision of either the Council or the Governor under this section of the act.

Accordingly, I conclude that there is no legal basis for a mandatory designation of any of the appellants as LWIAs under the new WIA plan effective July 1, 2005. I leave to the

discretion of the Council the determination of whether any action is to be taken under Section 116(a)(4) of the act.

### **Other Arguments Raised**

The petitioners raised a number of other issues in the pre-hearing materials and in their arguments at hearing. The central theme of the other issues involves the sufficiency or legality of the new two year WIA plan that became effective on July 1, 2005. The petitioners argue that the Governor did not seek collaboration with all of the local government officials in designing the new two year plan and before deciding to eliminate the LWIAs, as is required by the federal act, and that the Governor has created a single-entity, state-wide LWIA under this plan, which is not permitted under the federal act. Petitioners argue that the 2005 plan as announced by the Governor and approved by the U.S. Department of Labor is outside of the federal act as enacted in 1998, that the Governor abused his discretion as granted to him by the federal act in recasting the investment area designations to exclude the five intrastate regions, and that the Workforce Development Council is not qualified or eligible under the federal act to be a LWIA. For these reasons, the petitioners argue that the U.S. Department of Labor should not have approved the 2005 WIA plan advanced by the Governor. Counsel for the Department of Commerce and Labor did not respond to these arguments, urging instead that all of these issues were outside of the jurisdiction of the hearing officer in the instant proceedings.

For the reasons set forth above, I agree with the interpretation advanced by the Department. My function as hearing officer for the Workforce Development Council under Section 116(a)(5) of the WIA is very limited. I am only examining the issue of whether the petitioning entities would qualify for mandatory designation as LWIAs under the provisions of either Section 116(a)(2) or 116(a)(3) of the federal act. None of the other arguments raised by

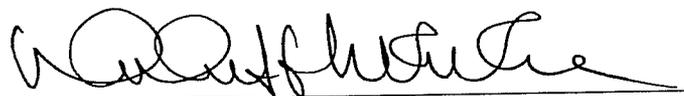
the petitioner go to this issue of qualification for mandatory designation; all of the arguments raised by the petitioners go to issues surrounding the sufficiency or legality of the Governor's actions in creating the new plan, and the sufficiency or legality of the U.S. Department of Labor in approving it.

These issues, if they are to be addressed at all, must be presented to the Secretary of the U.S. Department of Labor in a federal administrative proceeding or against the Governor and Idaho Department of Commerce and Labor in a judicial action in an appropriate court. I do not intend to comment that any such action might lie, or if so, where. I only comment that redress for the claims raised under these issues is not available in these proceedings under the limited jurisdiction granted to me under the state plan and the federal act.

### **Recommendations for Final Order**

Therefore, and for the reasons stated above, I recommend that the Workforce Development Council conclude that none of the regions who have petitioned for review meet the qualifying criterion for designation as a local workforce investment area under Section 116(a)(2) of the WIA act. I recommend that the Council conclude that the temporary designation of Section 116(a)(3) of the WIA act is no longer available to any of the entities in Idaho. I make no recommendation to the Council on any action to be taken or not taken under Section 116(a)(4) of the act. Under the act, such is exclusively a matter of executive prerogative of the Governor, acting with the advice of the Council, and is not subject to examination on appellate review.

Respectfully submitted this 10<sup>th</sup> day of October, 2005.



D. Duff McKee, Hearing Officer

Statement of available procedures

This is a recommended order of the hearing officer. It will not become final without action of the Workforce Development Council.

The Council shall place this recommended decision on the agenda for the next meeting of the Council for disposition. If no regular meeting is scheduled within forty-five (45) days of the date hereof, the Chair shall either call a special meeting of the Council, or shall appoint a special committee of the Council, for the purpose of considering this recommendation, all of which must be conducted within said forty-five (45) day period. The Council may accept, reject or modify the hearing officer's recommended decision.

In reviewing this decision, the Council may consider only the evidence presented at the hearing. The Council shall not receive or consider any evidence not presented to the hearing officer. The final decision of the Council shall be reduced to writing and delivered to the Governor and the appealing party.

If a timely appeal of the decision through the Workforce Investment Council does not result in the requested designation, the unit of general local government or grant recipient may further appeal the designation to the U.S. Secretary of Labor within thirty (30) days after receipt of the Council's written decision. The appeal to the Secretary must be consistent with the requirements of the Workforce Investment Act.

Dated this 10<sup>th</sup> day of October, 2005.



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D. Duff McKee, Hearing Officer