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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Rosita George, Plaintiff, vs. Office of Navajo and Hopi Indian Relocation, an Administrative Agency of the United States, Defendant.	No. CV-3:17-CV-08200-dlr **MEMORANDUM IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff pursuant to Fed. R. Civ. P. 56, reply's to Defendant's Response to Plaintiff's Motion for Summary Judgment and Responds to Defendant's Cross Motion for Summary Judgment.

I. The Independent Hearing Officer's Decision Was Arbitrary and Capricious

Under the arbitrary and capricious standard, this Court must consider whether the Independent Hearing Officer (IHO) decision was premised on the pertinent legal factors

and whether there has been a clear error of judgment. *Environmental Defense Ctr., Inc. v EPA*, 344 F.3d 832, 858 nt. 36 (9th Cir. 2003). The Agency should be overturned if it "entirely failed to consider an important aspect of the problem." *US Inc. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983). A court should overturn a decision as arbitrary and capricious when the agency "failed to articulate a rational connection between the facts found and the conclusions made". *California Energy Comm'n v. Dep't of Energy,* 585 F. 3d 1143, 1150 (9th Cir. 2009). This Court must find an "articulated rational connection" between the case facts and the agency decision. *Ocean Advocates v. U.S. Army Corp of Engineers,* 402 F.3d 846, 860 (D. Ariz, 2004)

A. <u>Rosita George was Self-Sufficient Head-of -Household by July 7, 1986</u>

The ONHIR's regulation states that an applicant who has never been married must be the head of household at the time of relocation or by July 7, 1986. 25 CFR § 700.147 (a) and 700.69 (c). The applicant must prove that he/she "actually maintained and supported him/herself" 25 CFR § 700.69 (b). The present Head of Household regulations were put in effect on May 29, 1984 and soon after that the Susan Crystal Memorandum was made ONHIR policy. (Exhibit A to the motion for Summary Judgment herein after "the Crystal Memorandum"). In that Memorandum Ms. Crystal sets forth the ONHIR policy that has been followed since 1984. (see 1989 Manual Exhibit "B") Paragraph 3 of Ms. Crystal's memorandum states:

> Individuals who can produce wage statements, W-2 forms, or tax returns showing a consistent level of income in excess of the general assistance level would be considered self-supporting.

Thus, the inquiry by the IHO should have been whether Ms. George on July 7, 1987, was self-supporting. Instead the sole analysis was whether she met the $1,300 presumption of self-support through paper documentation. The $1,3000 per year of income creates a presumption of self-support but it is not the only method to prove self-support. The regulation at issue states head of household is proven by showing the applicant actually maintained and supported herself. **25 CFR § 700.69 (b).**

Ms. George, on July 7, 1986, was living in an apartment in Flagstaff with a roommate. **(CAR 000163; CAR000130)**. She was working for Coconino County earning $268.00 by-weekly. **(CAR 000030).** General assistance income level is $50.00 by-weekly. She was helping support her mother and was not supported by her mother. **(CAR 000108).**

When ONHIR denied Ms. George's application it misstated its own regulatory criteria. ONHIR in its denial letter stated that Ms. George must show "earnings over $1,300 in 1985 or prior year or earnings of the [sic] $1,3000 from January 1, 1986 through July 7, 1986." **(CAR 000037)** However, it was Ms. George's burden to prove she was self-supporting and if she proved she earned $1,3000 per annum she would be considered presumptively self-supporting. (**See: ONHIR Response at 11** "ONHIR's binding regulations or policies do not identify a specific dollar amount an applicant must have earned to qualify as "self-supporting") Ms. George did prove she was self-supporting on July 7, 1986, because she was not supported by her family and she had "income in excess of the general assistance level". **Paragraph 3 of Ms. Crystal's Memorandum cited above.**

ONHIR cites to *Benally v. Office of Navajo Hopi Relocation,* No. 13-cv-8096-PCT-PGR, 2014 U.S. Dist LEXIS 16319 for support that Ms. George did not actually support herself. However, a reading of Benally demonstrates the applicant was 18 years old, still in high school and "his basic needs for food and shelter were met by the school and dormitory and by his parents". The Benally case is not comparable to Ms. George who was sixteen days away from turning 21 years old, was a high school graduate and she lived in an apartment with a roommate. Her income on July 7, 1986 was proven through check stubs and social Security earning statements. **[CAR 000035; 000028-30].** In fact, ONHIR agency policy treats applicants under 21 years, who are still in high school different than adult applicants like Ms. George. [*See Crystal Memorandum*)]

The IHO in deciding this matter accepted ONHIR eligibility Counsel's theory that Ms. George must prove her eligibility through verified wage document proving $1,300 in income by July 7, 1986. ONHIR characterizes Ms. George's position as "Novel" that if General Assistance yearly income is required, she should not have to prove that amount in the first 187 days of the year when all other applicants prove the income on a 365 day period. This is not "novel" it is rational. Ms. George proved at hearing that as of July 7, 1986, she was living independently and earning a County salary of over five times the General Assistance income amount. This is not novel, it is meeting her burden which was ignored by IHO.

B. ONHIR Argument that Ms. George Waived her Presentation of Evidence is Incorrect

ONHIR in its endless quest to limit the Court's whole review of the record raises a waiver and exhaustion argument regarding the only issue before the IHO; whether Ms. George met the Head-of -household earning standard. It is not surprising that ONHIR does not want the Court to take a searching look at the irrational findings of its IHO. However, Ms. George did not raise any new issues in this appeal. The only issue throughout her application process was whether she attained a self-supporting status pursuant to the Settlement Act and its regulations. The entire hearing transcript is devoted to this issue and the agency's denial is based on Ms. George not attaining $1,300 in earned income by July 7, 1986. **(CAR 000037)** This is significantly different then the plaintiff in the Zara case which is relied upon by ONHIR. *Zara v. Ashcroft,* 383 F.3d 927 (9th Cir.2004). In Zara the Plaintiff made general challenges to the Hearing Officer's (IJ) decision. *See Karapetyan v. Holder*, 337 Fed Appx 714, 716 (9th Circ. 2009). Here the Plaintiff has made specific challenges arising out of the record on appeal.

The exhaustion doctrine should not be implemented in a formalistic manner by the Courts as ONHIR advocates. *Figueroa v. Mukasey*, 543 F.3d 487 (9th Cir. 2008) In *Klamath-Siskiyou Wildlands Center v. Graham*, 899 F. Supp. 2d 948, 963 (E.D. Calif. 2012) the Court discussed this issue and held:

> However, the Ninth Circuit interprets the exhaustion requirement broadly. *See, e.g., Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.,* 606 F.3d 1058, 1065 (9th Cir.2010). During administrative proceedings, a party "need not raise an issue using precise legal formulations, as long as enough clarity is provided that the decision maker understands the issue raised." *Lands Council v. McNair,* 629 F.3d 1070, 1076 (9th Cir.2010). "The plaintiffs have exhausted their administrative appeals if the appeal, taken as a whole, provided sufficient notice to the Forest Service to afford it an opportunity to rectify the violations that the plaintiffs alleged." *Native Ecosystems Council,* 304 F.3d at 899.

> An argument is not preserved, however, if the connection between the concerns expressed during administrative proceedings and the issues raised in court is "too attenuated." *Great Basin Mine Watch,* 456 F.3d at 967. Ultimately, "there is no bright-line standard as to when this requirement has been met[,] and [the court] must consider exhaustion arguments on a case-by-case basis." *Idaho Sporting Cong.,* 305 F.3d at 965.

Ms. George has made specific challenges to the reasoning applied by the IHO in his decision that she had not proven herself to be self-sufficient by July 7, 1986. ONHIR not only had notice of the issue; it based its entire denial around the issue it now claims was not raised. Here, the Court must make a searching review of the record to determine "a rational connection between the facts found and the conclusions made". *California Energy Comm'n, Id. at 1150.* In the instant case, the IHO focused solely on traditional income and ignored the facts that proved Ms. George was self-sufficient pursuant to the Settlement Act and the regulations promulgated thereunder.

C. The IHO Failure to Consider Traditional Income was Arbitrary and Capricious

In 1985, Ms. George moved to Flagstaff and supported herself through selling arts and crafts for her brothers-in-law's business. She testified at length regarding the business and how she sold kachina dolls and lamps with her Aunt Cecelia Sands (misnomer in the record "Simms") Ms. Sands also testified at length as to the sale of Kachinas and lamps door to door and to shops in the area.

ONHIR has at least since 1984 recognized that applicants like Ms. George can prove earning that are cash based without paper documentation. The Crystal Memorandum

states that it is common for residents of the HPL, like Ms. George to support themselves through odd jobs. The Memorandum states "In some circumstances, individuals may be able to show they are self-supporting without the benefit of tax returns and wage statements because of the lifestyle on the HPL." ONHIR Management Manual follows suit and sets forth procedures to be followed by the agency in evaluating an application that "does not have proof of cash income**." Exhibit "B" to Plaintiff's Motion for Summary Judgment § 1100 page 18.**

In Ms. George's case, she was informed in writing that to satisfy ONHIR regarding her traditional income she must provide details regarding the business including how the kachina's were made and where they were sold. **[CAR 000037; 000042; 000045)** ONHIR does not inform Ms. George she must provide wage documentation or her application will be denied. Most probably because this would violate ONHIR policy. Ms. George attempted to comply and provided written statements from people who recalled her job from thirty-three years before. **[CAR 000047-49]**. At hearing she and her Aunt provided detailed and consistent testimony proving her employment and range of gross income.

ONHIR has a longstanding policy of accepting tradition earned income "without the benefit of tax returns and wage statements." *Crystal Memorandum.* However, the IHO has his own policy that is in apposite with ONHIR's policy. As stated in his Dean Begay decision on May 20, 2016 regarding undocumented wage testimony: "The undersigned has repeatedly stated that such testimony, given 30 years after the fact, and without documentation, is inherently unreliable and is not credible." **(Exhibit "C" to the motion**

for Summary Judgment; In the Matter of the Application of Dean Begay No. 4986). IHO's repeatedly announced his policy that he will not accept "undocumented" proof of income and anyone who testifies about it is not a credible witness. The IHO then sets aside any oral testimony as not credible and finds that the applicant has failed to meet her burden. The IHO's policy is not consistent with ONHIR's long standing policy. In furtherance of his own policy he has pre-determined that traditional income will not be recognized. He then sets aside all testimony regarding undocumented income and totally fails to discharge his duty to review the evidence and apply it to ONHIR policy. The application of a personal policy by the IHO in disregard of ONHIR's policy is arbitrary and capricious and should be set aside by this court. *5 U.S.C.A. § 706 (2) (D)* (hold unlawful agency action "without observance of procedure required by law")

II. Exhibits A, B and C are Properly Before the Court

The Court's review of ONHIR's agency action is through a whole record review. *5 U.S.C.A. § 706* ("the Court shall review the whole record.") The "whole record" is all of the documents directly or indirectly considered by the decision-makers of the agency including evidence contrary to the agency's position. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (quotation omitted); *see also Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (finding that the administrative record "includes everything that was before the agency pertaining to the merits of its decision"). An agency may not only present to the Court the documents it wants reviewed. *Universal Camera Corp v. NLRB*, 340 U.S. 474, 487-88. The whole

record review is expansive. *Arizona Rehabilitation Hosp., Inc v. Shalala*, 185 F.R.D. 263 (D. Arizona, 1998). The District Court may inquire outside the record when the agency has relied on documents not included in the record. *Animal Defense Counsel v. Hodel*, 840 F.2d 1432, 1436(9th Cir. 1988). Thus, ONHIR attempt to hide its own longstanding policy and limits the Court's access to policies in effect at the time of the application should be denied.

A. The Crystal Memorandum and The Management Manual

The Crystal Memorandum is relied upon by the agency and has been its policy for at least 34 years. It is cited in a number of cases regarding Navajo eligibility for relocation benefits. *O'Daniel v. Office of Navajo Hopi Indian Relocation,* 2008 WL 4277899; *Benally v. Office of Navajo and Hopi Relocation,* 2014 WL 523016.

In *Tsosie v. ONHIR*, Case 3:16-cv-08245-JWS 11/28/17 Judge Sedwick denied ONHIR's position that the Crystal Memorandum cannot be considered. The Court ruled as follows:

> The court's review of an agency decision must be based on the "whole record" before the agency at the time of decision. The whole record is not simply the record designated and submitted by the agency. Rather, it "consists of all documents and materials directly or *indirectly* considered by agency decision-makers …" The 1985 memorandum appears to be the document setting forth ONHIR's presumptive self-sufficiency income level of $1,300. That amount was based on the level of "general assistance available to single individuals on the Reservation" at that time. That amount is used and cited by ONHIR decisions, including Tsosie's initial denial letter. It has been cited in another court decision in this district involving ONHIR's denial of relocation benefits, and in that decision the court noted that ONHIR itself cited the memorandum. The court therefore concludes that the memorandum is a document

> indirectly considered in ONHIR decisions involving the issue of self-sufficiency. (Citations omitted)

The Tsosie Court relied on *Thompson,* Id. and *Portland Audubon,* Id. in support of its decision. The Crystal Memorandum is obviously a document relied upon by the parties and the IHO. The Management Manual also should be part of the record and it further demonstrates that the Crystal Memorandum was "codified" within the Agency and demonstrates the Agency's internal inconsistency in deciding the George appeal. The policy manual dictates how an applicant with no wage documentation is to be processed. Nowhere in ONHIR policy, the Crystal Memorandum or Ms. George's denial from the Agency does it state that an undocumented wage claim will not be recognized. ONHIR rush to limit this courts review of the whole record should not be allowed.

B. The IHO's Prior Decision is Part of the Whole Record.

ONHIR request the Court not look at the Dean Begay decision because it was not made part of the record. The Tsosie decision also addresses this same claim by ONHIR and in ruling against the agency ruled as follows:

> The court disagrees with ONHIR's position that the hearing officer's prior decisions are extra-record evidence that cannot be considered on review or that the hearing officer's decisions can be inconsistent with one another without consequence. While an agency "cannot be expected, on pain of reversal, to anticipate and distinguish every marginally relevant case that a litigant might uncover in preparing a petition for review," it must nonetheless "deal consistently with the parties or person coming before them." It acts arbitrarily if it treats factually identical cases differently without providing a reasoned explanation. At page 10 (citations omitted) *Tsosie v. ONHIR*, Case 3:16-cv-08245-JWS 11/28/17

The Dean Begay case is cited to demonstrate inconsistency with ONHIR policy and to demonstrate that the IHO's arbitration policy in the Dean Begay matter was also interposed in Ms. Georges appeal resulting in an arbitrary and capricious decision.

The Court should further note that the day after ONHIR filed its Response brief in this matter it filed a Reply brief in the 9th Circuit stating the record should be supplemented with prior ONHIR IHO decisions. The motion states:

> The administrative record properly "includes everything that was before the agency pertaining to the merits of its decision." *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993); *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989). Thus, supplementation is appropriate to include documents that were considered, and in that sense were "relied on" by the agency, and not solely to include documents *cited* by the agency (as Ms. Charles suggests). *See Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). Rosita *Charles v. ONHIR*, Case: 17-17258, 11/14/2018, ID: 11087439, Dkt Entry: 56,

ONHIR is correct that prior decisions of the IHO are part of the record but not only when it suits ONHIR's purposes.

A. This Court Should Certify Plaintiff Eligible for Relocation Benefits as Has Been Done by the Court in Past Cases.

Defendant wrongfully requests the Court, if it finds for the Plaintiff, to remand the case for further proceedings and not certify the Plaintiff eligible for relocation benefits. The Court has certified other prevailing Plaintiffs under the Settlement Act. *See, e.g., Mike v. ONHIR,* 2008 WL 54920, at *11 (D. Ariz. 2008); *Elizabeth Begay v.*

ONHIR, CIV96-137-PCT-RGS at *9 (D. Ariz. 1997); *Daisy Martina v. ONHIR*, CIV95-0480-PCT-RGB at *9 (D. Ariz. 1996); *Laura Jensen v. ONHIR*, CIV95-0145-PCT-RCB at *10 (D. Ariz. 1996); *Noller Peter Herbert v. ONHIR*, CV06-03014-PCT-NVW at *14 (D. Ariz. 2008). ONHIR has the temerity to ask for further proceedings when Ms. George became eligible for relocation benefits in 1986. The ONHIR has one overriding duty which is to provide a generous and comprehensive relocation program. Instead, it has delayed the processing and hearing of her application for decades. Now, the ONHIR requests this court for a "simple remand" based on the citation of cases that are inapplicable to the case at hand. Response at 13; *But See: Varney v. Sec'y of Health and Human Services*, 859 F.2d 1396, 1401 (9th Cir. 1988) (further proceedings are unnecessary when no further record needs to be developed for a remand); *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012) ("where no useful purpose would be served by further administrative proceedings and the record has been thoroughly developed" there is no purpose for remand). ONHIR's request should be denied.

I. CONCLUSION

The forgoing arguments, and the arguments presented in Plaintiff's Motion for Summary Judgment, demonstrate that the ONHIR's decision to deny relocation assistance benefits to Rosita George was not based on substantial evidence, and was arbitrary, capricious, and contrary to law. The Court should therefore set aside the ONHIR's denial decision and grant Ms. George's Motion for Summary Judgment.

Respectfully submitted this 29th day of November, 2018.

HINKLE SHANOR LLP

By: *s/ S. Barry Paisner*
S. Barry Paisner
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CERTIFICATE OF SERVICE

I hereby certify that on 29th day of November 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and served a copy of the attached document through the CM/ECF System to all counsel of record.

s/ S. Barry Paisner
Attorney for Plaintiff