

U.S. Department of Labor

Office of Administrative Law Judges
Washington, DC



In the Matter of

ROBERT WILLIAM ROCK,
Complainant

v.

Case No. 81-JS-1

OHIO BUREAU OF EMPLOYMENT
SERVICES,
Respondent

Robert William Rock
Pro se

Eugene P. Nevada, Esq.
For Ohio Bureau of Employment
Services

Bette J. Briggs, Esq.
For U.S. Department of Labor

Before: EVERETTE E. THOMAS
Associate Chief Administrative Law Judge

DECISION AND ORDER

This proceeding was initiated by the above-named Respondent who requested administrative-judicial review, pursuant to 20 C.F.R. §658.421(f) of a determination of a the Regional Administrator of the U.S. Department of Labor. Wagner-Peyser Act of 1933, 29 U.S.C. 549 et seq. and 20 C.F.R. §658 et seq.

Section 49 of the Wagner-Peyser Act (hereinafter referred to as the Act) authorizes the establishment of a federal employment service, and the designation of state employment services to function in conjunction with the United States Employment Service (USES). The basic objective of the Act is to establish an interstate recruiting system for the recruiting and transfer of labor. USES has the responsibility for insuring that State Employment Services conform with Federal statutes and regulations. In order to implement this objective, and in accordance with his rulemaking authority, 29 U.S.C. §49(K), the Secretary of Labor has issued regulations which establish the procedures for awarding, continuing and terminating of funds, and which institute

the guidelines
under which State employment offices are to function.¹

Statement of the Case

On August 1, 1980 the Complainant, Mr. Robert William Rock, filed a grievance against the Lancaster office of the Ohio Bureau of Employment Services. He made four complaints. First, the Complainant alleged that he was deprived of employment services in violation of section 504 of the Rehabilitation Act of 1973. Second, he argued that he was denied the opportunity to contest this denial of services. Third, the Complainant alleged that he was denied access to his employment service file. Fourth, the Complainant was falsely accused by State employers of violent, intimidating, and uncooperative behavior. (AF-10)

On August 8, 1980, officials of OBES and the Lancaster office met with the Complainant. Following the meeting, by letter of August 18, 1980, OBES confirmed that the Lancaster Office would resume placement services to assist Mr. Rock in finding suitable employment. The letter further stated that, in return for the resumption of services, Mr. Rock was not to "threaten, intimidate, or otherwise place [OBES] employees in fear of [his] actions." (AF-42) Complainant responded in writing to this letter on August 19, 1980. He objected to the inference that he had threatened or intimidated OBES employees and requested a hearing at the State level on all issues raised in his August 1, 1980 complaint. (AF-41)

Following a hearing on September 15, 1980, the State hearing official issued a decision on October 9, 1980, dismissing all charges. With respect to the issue of deprivation of services, the State hearing official found that in July 1980, Mr. Rock received, but chose not to return, a standard form from the Lancaster office. This forum inquired as to whether the Complainant was still actively seeking work. Thus, the Lancaster office was justified in not rendering services to Complainant. Mr. Rock's objection to "false accusations" in an interoffice memorandum (IOC) of August 30, 1979 was also dismissed. The hearing officer reasoned that although the memorandum contained unattributed information and conclusions, there was no evidence that the information in the IOC had been misused. (AF-9)

On October 31, 1980, Complainant appealed the State hearing officer's decision to the Regional Administrator of the U.S. Department of Labor (RA). (AF-6) Following a review of the record and a Federal investigation of the complaint, the RA issued a determination and found, inter alia, that the Complainant was in fact denied the referral services of the Lancaster Office from sometime in May 1980 until approximately August 15, 1980. Regarding the issue of false

¹NAACP, Western Region v. Brennan, 360 F. Supp. 1006 (D.C.1973). See Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973); Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969) Jenkins v. S & A Chaisan & Sons, Inc., 449 F.Supp. 216 (S.D.N.Y: 1978).

accusations, the RA found that the controversial July 23, 1979 interoffice memorandum² contained many false accusations regarding Complainant's mental and emotional stability, his marital relationship, his capacity for violence and his ability to get along with supervisors and fellow workers. All of these allegations were based upon unsubstantiated, secondhand information. Moreover, the RA found that the attitude of . the Lancaster office staff towards the Complainant would detrimentally affect his chances of being hired. Based on these findings, the RA ordered OBES: (1)(a) to acknowledge to the Complainant, in writing, that he was wrongfully deprived of referral services, and (b) to examine its policies regarding the withholding of services to applicants with the aim of preventing a recurrence of this situation; and (2)(a) to acknowledge to Mr. Rock in writing that false accusations were made against him, and (b) to instruct all local offices in general, and the Lancaster office in particular to adhere strictly to JS guidelines regarding the kind of applicant information to be recorded.³

Issues

1. Whether the Complainant was unreasonably denied employment services by the Lancaster office of the Ohio Bureau of Employment Services?
2. Whether the Complainant was denied an opportunity to challenge the withholding of employment services?
3. Whether the Complainant was denied access to his file in violation of the Freedom of Information Act, 5 U.S.C. §552 or the Ohio Privacy Act?
4. Whether the Interoffice Memorandum (IOC) of the Ohio Bureau of Employment Services contained unfounded accusations which would have detrimentally affected the Complainant's chances of being hired?

²Although the date of this memorandum was miscited both by the RA and the State hearing officer, it is clear from their further descriptions of the communication that they are referring to the August 30, 1979 memorandum set forth at AF-23. This OIC was written in response to the Complainant's July 23, 1979 grievance.

³Complainant's charge that he was denied services in violation of Section 504 of the Vocational Rehabilitation Act of 1973 was referred to the civil rights unit of the Department of Labor Regional Office for investigation and is, therefore, not addressed in the RA's determination. With respect to the allegation that Complainant was wrongfully denied access to his file, the RA found that he was provided an opportunity at the time of the State level hearing to copy any documents from his file. The RA advised, however, that OBES should review its policy on disclosure to assure that it is in compliance with applicable State law.

Discussion

I.

The purpose of the Wagner-Peyser Act of 1933 is to establish an interstate no-fee labor exchange to facilitate the placement of men, women and youth in suitable jobs. 29 U.S.C. §49b. The Job Service regulations (JS) establish the policies of the United States Employment Service (USES). Pursuant to 20 C.F.R. §604.1 (1980), a Job Service application must be accepted from any person who is legally qualified to work and the applicant must be referred to employers on the basis of information related solely to the applicant's employment qualifications. Moreover, the JS regulations require that a concentrated effort be made to reach out to and to aid individuals who are chronically unemployed. 20 C.F.R. §604.21 (1980)

Standard of Review

In order to decide whether the Complainant was wrongfully denied employment services, a standard of review must be adopted for the provision of these services by the states. The Department of Labor urges that there is no provision in the Act or in the JS regulations which authorizes the denial of services to any eligible individual. On the other hand, the Respondent, OBES, argues that the state's provision of employment services must only be reasonable. Support for OBES's argument can be found in the Act at 29 U.S.C. §49g. This section of the Act requires that state plans (which must be submitted to obtain federal funds) only be "reasonably" calculated to effectuate the purposes of the Act.

While there is not any specific JS regulation which authorizes the denial of employment services, the Act does give each state control over the day-to-day operation of the employment service with the proviso that the offices be operated within the guidelines established by the Secretary of Labor. However, some flexibility must be permitted if the employment services are to be rendered on a realistic basis. Therefore, I find that a state employment service must render services which are reasonable in light of the above-stated purpose of the Act.

History of Complainant's Contact with OBES

The facts surrounding the Complainant's use and, subsequent, denial of employment services must be examined in order to determine whether the denial of services by the Lancaster office of OBES was unreasonable. The Complainant has a long history of attempts to find employment through the Lancaster office. The record shows that the Complainant first contacted the Lancaster office in September 1972. From 1972 until July 1979, the Complainant sought assistance from the Lancaster office. As the Regional Administrator noted in his determination, "an uneasy relationship existed between [the Complainant] and the Lancaster local office" (AF-8) The Complainant filed grievances against OBES on February 3, 1975, July 23, 1979, and August 1, 1980. He also claims that he filed another complaint in July 1979; there is no record of this grievance. The gist of these complaints is that the Complainant felt that the Lancaster office failed to render adequate service and that they discriminated against him. On the other hand, the Lancaster office personnel accuse the Complainant of being insulting and violent (AF-8; AF-20).

As a result of this tension between Complainant and the Lancaster office personnel, the Complainant was informed in July 1979 that the Lancaster office was discontinuing services.

The Complainant filed the July 23, 1979 grievance in response to this discontinuance of services. In an attempt to informally resolve this grievance, the Lancaster office referred the Complainant to the Bureau of Vocational Rehabilitation (BVR). With the assistance of BVR, the Complainant attended Ohio University in Lancaster for the next seven months. Upon completion of the spring quarter, the Complainant was informed that his application for work-study funds would be denied due to funding limitations. They also advised him that he was responsible to find employment to cover his expenses for the next academic year. The Complainant then contacted the Lancaster office of OBES, but they refused to resume placement services.

On August 1, 1980, the Complainant filed the grievance against OBES which is the basis of this case. In an attempt to resolve the August 1, 1980 grievance the Lancaster office told the Complainant that "the Lancaster local office would resume providing placement services to Mr. Rock" provided that "[the Complainant] would not threaten, intimidate, or otherwise place IOBES] employees in fear of [his] actions." (AF-41) The refusal to resume services, in conjunction with the Lancaster office's letter of August 8, 1980, prompted the Complainant to request a hearing to review the refusal to provide job referral services.

The evidence in the record indicates that from September 1972 through July 1979, the Lancaster office provided the Complainant with some job referrals. (AF-31 & 17) In the instant case, the Complainant does not challenge the sufficiency of the Lancaster office's services during this period. The crucial time period is from July 1979 through August 1, 1980. The Complainant alleges that during this period he was unreasonably denied placement services. During this time period, however, the Complainant was not actively seeking services for nine months while he attended Ohio University or while he worked for BVR. Furthermore, from July 1979 through July 1980 the Complainant's placement file shows at least ten local office visits, five counseling sessions, two job referrals and one job placement. (AF-17). Thus, I find that the record demonstrates that the Complainant had availed himself of the employment services of the Lancaster office during this time period.

However, on or about August 1, 1980 the Lancaster office refused to provide any further employment services to the Complainant. This decision was based upon the Lancaster office staff's perception that the Complainant was violent and threatening. An interoffice memorandum (ICC) dated July 23, 1980 to Mr. Charles Thompson, Director, from Mr. Lowery, summarizes the Lancaster office staff's attitude toward the Complainant.

This young man has been in our office on numerous occasions and has been referred to job openings, none of which he keeps for any length of time. Now when he comes into the office he has the girls frightened and they will not have him at their desk for interviews. He is very hostile. If he comes in the office I will tell him we cannot service him, calm him down as much as possible and, if necessary, get a restraining order through the prosecutor's office. To validate the

above statement I have had the girls who do the interviewing and have had occasion to witness by contact with this young man, his hostility and threats.

(AF-20).

Refusal of Services and the JS Regulations

The Lancaster office's refusal to provide the Complainant with placement services after July 1980 must have been reasonable in relation to the Job Service Regulations.⁴ Standards for the evaluation of Job Service applicants are set forth in the Job Service Regulations. 20 C.F.R. Part 604 (1980) These standards are applicable to the states pursuant to 20 C.F.R. §603.4 and to each state through the state agency's budget plans. The Employment Security Manual sets forth the following guidelines relevant to the evaluation of personal characteristics in the placement process:

Evaluation of personal Characteristics: The interviewer is limited making an objective evaluation of many aspects of the applicant's personal characteristics because the interview itself is not an effective method of measuring this class of evidence. . . .

Although fully aware of the foregoing limitations to an evaluation of personal characteristics, the interviewer studies and attempts to determine the significance of the following facts:

* * *

c. Personal Traits

The personal traits which an applicant manifests during the course of an interview are limited chiefly to appearance, attitude, and manner. The interviewer can only evaluate his own impression of these characteristics. This is influenced materially by the extent of which he understands the reason for the applicant's appearance, attitude, and manner at the time of the interview. The persistence of these traits may be noted in subsequent reinterviews.

Appearance and manner are of little or no significance in the performance of many jobs. The interviewer consciously attempts to prevent his impression of these traits from inadvertently influencing his evaluation of other aspects of the applicant's qualifications.

⁴It is beyond the jurisdiction of an administrative law judge to consider the constitutionality of the regulations themselves. 20 C.F.R. §658.425(a)(4). For a discussion of the regulations promulgated by the Secretary, see NAACP, Western Region, supra n.1, at 1011-17.

Employment Security Manual, Part II, Vol. 1, Section 1198. (Emphasis added).

The above guidelines indicate that personal traits should carry very little weight in the evaluation of an applicant. The evidence indicates, however, the Complainant's perceived personal characteristics were given great weight by the staff at the Lancaster office. Even though the state hearing officer dismissed the grievance, he found that the Lancaster office personnel's fear of Complainant was based upon half-truths and was unfounded. The Department of Labor also concluded that the Complainant was improperly denied Job placement services. (Regional Administrator's Determination, AF-8)

I find that the state employment office should have given very little weight to a Job Service applicant's personal characteristics in evaluating him for placement services. The Lancaster office gave the Complainant's personal characteristics and undue amount of weight. Therefore, under these guidelines the Lancaster office acted unreasonably when it denied further use of placement services to Complainant. The state employment office cannot guarantee a Job Service applicant a job, but neither can the state office refuse to provide services to a person whom the office personnel dislikes.

Because I have decided that the withholding of placement services was unreasonable, the Lancaster office must remedy the situation by resuming placement services to Complainant.

II.

The second issue is whether the Complainant was denied an opportunity to challenge the withholding of employment services. The evidence in the record indicates that the Complainant was well-aware of the grievance procedures at the Lancaster office. The Complainant filed grievances with the employment office on three separate occasions, February 3, 1975, July 23, 1979 and August 1, 1980. However, Complainant alleged that he filed a complaint in July 1979. The employment service has no record that this complaint was ever filed.

Both the state hearing officer and the Regional office of the Department of Labor found that the allegation that the Complainant was denied an opportunity to contest the denial of services was not supported by the evidence. They found that the Complainant was well-aware of the complaint procedures at the Lancaster office. (AF-8 & 9) The Complainant has not presented any other evidence to contradict these findings. Therefore, I also find that this complaint is unfounded and is hereby dismissed.

III.

The third issue in this case is whether the Complainant was denied access to his placement file in violation of the Freedom of Information Act, 5 U.S.C. §552 or in violation of the Ohio Privacy Act?

The Regional Administrator found that although the Ohio Bureau of Employment Services is funded by the Department of Labor, it is not subject to the provisions of the Freedom

of Information Act. He also noted that the state agency would be subject to state law provisions regarding access to personnel files. Nevertheless, the Regional Administrator correctly noted that he had no jurisdiction to enforce state laws. Similarly, this tribunal is not empowered to enforce an individual state's Privacy Act.

This tribunal does not have jurisdiction to render any determination based upon the applicability of the Freedom of Information Act or the Ohio Privacy Act to the alleged refusal of the Lancaster office to provide the Complainant access to his employment file. Accordingly, this allegation is dismissed.

IV.

The fourth, and final, issue presented in this case is whether the Interoffice Memorandum (IOC) between Mr. Lowery, Ms. Wilson and Mr. Avendano contained unfounded accusations which detrimentally affected the Complainant's chances of being hired. The state hearing office found that the IOC contained confidential information which had "no bearing on the applicant's qualifications for the job or his ability to meet any legitimate employer specifications." (AF-9) However, the hearing officer found that this information was not disclosed to potential employers and was not part of Complainant's employment file. Therefore, the IOC did not play any part in the decision to deny services to the Complainant and did not affect Complainant's chances of being hired. In essence, the information was not misused.

The Regional Administrator reversed the state hearing officer's finding and held that false accusations were made against the Complainant and that the general attitude toward the Complainant in the Lancaster office would have been detrimental to his chances of being hired. (AF-8)

The discussion in Part I, supra, outlines the overall negative relationship between the Complainant and the Lancaster Office of OBES. It is not necessary to repeat these events. However, it does bear repeating that the Regional Administrator -- with a minimal amount of investigation -- disproved many of these accusations. (AF-8) Second, it must be noted that an interviewer's appraisal of personal characteristics and attitudes should be restricted and should not be crucial in rendering employment services to qualified applicants. See discussion Part I, supra. Third, the state hearing officer found the information contained in the IOC had no bearing on the applicant's qualifications for employment. Finally, the Regional Administrator stated that there IS not a documented instance of physical violence by the Complainant and no formal charges were brought against him.

I conclude that the information in the IOC contained unsubstantiated allegations against the Complainant. The Job Service Guidelines attempt to severely limit an interviewer's personal evaluation of the applicant, because personal characteristics have little bearing on an applicant's job qualifications. Therefore, the existence of this memorandum would have an adverse effect on the Complainant's chances of being referred to jobs, even if the information was not disclosed to potential employers. The OBES must acknowledge to the Complainant in writing that unfounded

accusations were made and must instruct all employment offices to adhere strictly to Job Service guidelines regarding the evaluation and recording of applicant information.

ORDER

It is hereby ORDERED:

1. The OBES acknowledge to the Complainant in writing that he was unreasonably denied employment services. The Complainant should be allowed to resume the use of these placement services.
2. Complainant's allegation that he was denied an opportunity to challenge the withholding of employment services or the Ohio Privacy Act is DISMISSED.
3. Complainant's allegation that he was denied access to his file in violation of the Freedom of Information Act is DISMISSED.
4. The OBES acknowledge to the Complainant in writing that unsubstantiated allegations were made against him in the IOC.
5. The OBES should examine its policies concerning applicant information and its formal and/or informal policies regarding the withholding of services in order to prevent the recurrence of a similar situation in the future.

EVERETTE E. THOMAS
Associate Chief Judge

Dated: 24 FEB 1982
Washington, D.C.
EET/yw