U.S. Department of Labor Office of Administrative Law Judges
Washington, DC

In the Matter of

U. S. DEPARTMENT OF LABOR
JESSE THOMAS JACKSON
Complainants

DATE: APR 29 1986
CASE No. 86-JSA-1

v.

GARDENHOUR ORCHARDS, INC.
Respondent

Keith G. Talbot, Esquire
For the Complainant Jesse T. Jackson

S. Steven Karalekas, Esquire
For the Respondent

Before:ERIC FEIRTAG
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Wagner-Peyser Act of 1933, 29 U.C. §49 et seq., and the regulations governing the Job Service System found at 20 C.F.R. Part 6. This decision is rendered on the Administrative File and the written arguments of the parties as determined in accordance with 20 C.F.R. §658.424(b).[1]

[1] In accordance with my Order dated December 5, 1985, the Complainant submitted a brief on February 3, 1986. The Respondent thereafter submitted a brief on February 5, 1986, to which the Complainant filed objections on February 10, 1986. On February 7, 1986, the Respondent filed a Supplemental Brief to which the Complainant objected on February 18, 1986 in a Motion to Strike. The Complainant's Motion is hereby denied, with the exception that the untimely submitted evidence marked as Exhibit E and attached to the Respondent's Supplemental Brief will not be considered.

FINDINGS OF FACI' AND CONCLUSIONS OF LAW

As the result of a job service referral, Complainant Jackson applied for fruit harvesting employment with the Respondent on September 29, 1983, pursuant to the Respondent's agricultural clearance order. The Respondent informed the Complainant that neither a job nor housing were available for him at that time. In fact, the Respondent's housing was being reserved for temporary foreign workers who were en route to its premises and who arrived on September 29, 1983. When the Complainant applied for work and was refused it by the Respondent, 50 percent of the work contract under which the foreign workers were employed had not elapsed.

On October 24, 1983, the Complainant filed a Job Service Complaint with the Maryland Employment Security Administration, alleging violations of 20 C.F.R. §655.203(e), relating to the requirements for the hiring of U.S. workers, and 20 C.F.R. §655.202(b)(l), relating to the requirements for provision of housing to job applicants. The Hagerstown Employment Service Office found, on October 31, 1983, that the Respondent had violated 20 C.F.R. §655.203(e). The Director, Maryland Department of Employment and Training, subsequently found the Respondent to be in violation of 20 C.F.R. §§655.203(c),(d), and (e). The Director's decision was affirmed by the State Special Examiner and the Regional Administrator.

This is an appeal from the August 12, 1985 decision of the Regional Administrator (RA) that Maryland Employment Service System services to the Respondent be discontinued pursuant to 20 C.F.R. §658.501. The RA found that the Respondent had violated the assurances contained in its application for temporary foreign labor certification as set forth in 20 C.F.R. §§655.203(c),(d), and (e), by failing to hire the Complainant at a time when it was employing and housing temporary foreign workers and 50 percent of the contract period under which the foreign workers were employed had not expired. The RA further found that the Respondent had violated §658.501(a)(6) by refusing to accept qualified workers referred through the clearance system.

DISCUSSION

The Respondent contends that although the Complainant was not hired at the time he applied for work, he would have been offered employment later that same day, but he could not be located. In essence, rather than terminate a foreign worker in order to hire the Complainant at the time he applied, the Respondent chose to wait until several workers quit before attempting to offer employment to the Complainant.

The regulations require that while the 50 percent rule set forth in 20 C.F.R. §655.203(e) is in effect, employers must hire qualified U.S. workers who apply, despite any preference for foreign labor. During this period, qualified U.S. workers who apply for jobs in which foreign workers are employed must be given preference over the foreign workers. See Virginia Agricultural Growers Ass'n v. U.S. Department of Labor, 756 F.2d 1025, 1029-1030 (4th Cir. 1985). The Respondent's argument that DOL regulations do not require immediate termination of foreign workers so as to effect immediate employment of qualified U.S. workers is therefore, incorrect, as it effectively denies to U.S. workers the preference to which they are entitled under

the regulations. In the present case, the Complainant, a qualified U.S. worker, should have been hired immediately upon application had he been granted the preference required & the regulations. Consequently, I must affirm the RA's finding that the Respondent violated the assurances contained in its application for temporary labor certification as set forth in 20 C.F.R. §§655.203 (c),(d), and (e). In addition, I find that the Respondent has violated §658.501 (a)(3) by failing to fully comply with the assurances made in its job order.

The RA's finding that the Respondent violated 20 C.F.R. §658.501(a)(6) by refusing to accept qualified workers referred through the clearance system must, likewise, be affirmed. The Complainant was a qualified worker referred through the clearance system and the Respondent did not accept him for employment when he applied for work. As noted by the RA, it is immaterial whether the Respondent later would have made work available to the Complainant. The crucial fact is that when the Complainant was interviewed by the Respondent, he was denied employment. Offering the Complainant a possibility of future employment in response to his application for work was a clearly insufficient substitute for hiring the Complainant at that time.

Accordingly, the RA's decision that Job Service services to the Respondent be discontinued pursuant to 20 C.F.R. §658.501 is hereby affirmed.

ORDER

The State of Maryland shall terminate all Job Service services to Gardenhour Orchards, Inc. in accordance with 20 C.F.R. §658.502(a)(3) and 20 C.F.R. §658.502 (a)(6) until reinstatement of services is deemed appropriate pursuant to 20 C.F.R. §658.504.

ERIC FEIRTAG
Administrative Law Judge