

U.S. Department of Labor

Office of Administrative Law Judges
Washington, DC



In the Matter of

FEB 27 1990

ELMER VAN ORSDALE, ET AL.
Complainants

vs.

Case No. 87- JSA-3

MARYLAND DEPARTMENT OF
EMPLOYMENT AND TRAINING,
Respondent

DECISION AND ORDER

This is an appeal. under Section 658.424 of Title 20, Code of Federal Regulations, by Elmer Van Orsdale and other migrant or seasonal farm workers (hereinafter “Van Orsdale” or “MSFW”), from a decision of the Regional Administrator, Employment and Training Administration. United States Department of Labor (hereinafter respectively “RA”, “ETA”, and “DOL”), with respect to the application of Sections 653.113 and 658.401 of that Title. Because the question at issue is a narrow one, involving a question of law only with no dispute regarding the facts, the parties have requested that it be decided as submitted on the record without a hearing. That request has been granted. We do, however. have the benefit of helpful briefs submitted by counsel on both sides.

Background

Among the purposes of the Immigration and Nationality Act, 8. U.S.C. § 1101 *et seq.*, is one to prevent immigrant foreign labor from adversely affecting the job opportunities of United States workers. That concern, as applied to agricultural workers, is more specifically considered in the Wagner-Peyser Act of 1933, as amended, 29 U. S. C. 49 *et seq.* As is customary. specific provisions to carry out the purposes of these and related statutes have been promulgated as regulations within the Code of Federal Regulations.

In the application of the two Acts and other related statutory enactments, there is an interplay between the Job Services agencies established by the several States and the Department of Labor’s Employment and Training Administration. In Maryland. that Service is under the Department of Employment and Training (hereinafter “MDET”), Respondent in this case. With respect to seasonal migrant farm labor, which is our concern here, farm employers who wish to hire such workers may either hire them from among those referred at the request of such an employer by the State Job Service. or hire from among those who apply directly to the employer.

As is the case generally with respect to immigrant labor under our statutes, certain statutory and regulatory provisions apply to the hiring of foreign labor, with the design of preventing employers from hiring such foreign labor if United States citizen workers are available to do the job. Naturally, there are provisions for receiving reports of such situations, investigating them, determining whether or not such reports are factually correct, and taking preventive or curative action.

In the present case, Van Orsdale and others are United States citizens who sought and found work picking peaches for certain farm operators in the State of Maryland. They had not been referred through the State's Job Service, but had applied and been hired directly. They claim that they were fired from that work, while foreign workers were retained, in violation of law. They reported the relevant allegations of fact to the State Job Service. seeking investigation by it and punitive or curative action. That Service declined to act on their complaint, on the basis that the applicable regulations authorize such action by them only with respect to workers hired through Job Service referral, and that for these Complainants all that the Service could do was to refer the matter to the Department of Labor for investigation. The record indeed includes a written statement by an official of the Job Service that they were going to do so, but the Department of Labor states that no such referral was ever received.

Complainants were not satisfied with that response in any event, and appealed to the Department's Regional Administrator, pursuant to the regulations, to hold that the Job Service was wrong in its view of its authority and its duty, and to hold further that the Service did have the right and the obligation to take the action 2.requested by them. The RA concluded that Complainants were partly correct in their contentions, in that the Job Service did have the affirmative duty to investigate the complaint (and if it appeared valid to attempt to resolve it), but he went on to state that if the agency could not resolve it the agency's next step should not have been to proceed with disciplinary action (as Complainants here desire), but rather to refer the matter to the ETA for action. The regulations provide also for appeal from the RA's decisions in these matters, to this Office, and Complainants have brought the matter to us for decision.

The Provisions Involved

Two provisions of the regulations in Title 20, C.F.R., Sections 653.113 and 653.401(a)(1), appear largely to govern the resolution of the question presented here.

Section 653.113 reads in pertinent part as follows:

653.113 Processing apparent violations.

(a) If a State agency employee observes, has reason to believe, or is in receipt of information regarding a suspected violation of employment related laws or JS regulations by an employer, except as provided at Sec.653.503 (field checks) or Sec. 658.400 of this chapter (complaints), the employee shall document the suspected violation and refer this information to the local office manager.

(b) If the employer has filed a job order with the JS office within the past 12 months [as was the situation in the present case], the local office shall attempt informal resolution. If the employer does not remedy the suspected violation within 5 working days, procedures at Part 658, Subpart F of this chapter [looking to discontinuance of service to the employer by the Job Service System] shall be initiated and, if a violation of an employment related law is involved, the violation shall be referred to the appropriate enforcement agency in writing.

* * *"

Section 658.401 reads in pertinent part as follows:

“658.401 Types of complaints handled by the JS [Job Service] complaint system.

(a)(i) The types of complaints (JS related complaints) which shall be handled to resolution by the JS complaint system are as follows: (i) Complaints against an employer about the specific job to which the applicant was referred by the JS involving violations of the terms and conditions of the job order or employment-related law (employer-related complaint) and (ii) complaints about Job Service actions or omissions under JS regulations (agency-related complaints).

* * * "

D i s c u s s i o n

This appeal has been taken from the decision of the Department of Labor’s Regional Administrator. In fact he and the Complainants do not differ in their conclusions by a great deal, but both of them do differ significantly from the views expressed by the State Job Service Director and counsel for the Employer involved. For that reason, it appears that it would be helpful to understand the parties’ respective positions in some detail.

Complainants acknowledge that, because they had not been referred by the Job Service, they were not eligible to avail themselves of the Job Service employment-related complaint system provided for in Section 658.401(a)(1)(i). All parties involved agree. Complainants do contend -- and the Regional Administrator agrees, although the State agency and the Employer do not -- that the Maryland agency should have determined whether or not there was in fact an apparent violation of the applicable regulations. Complainants contend further, however, that, in view of the fact that the Job 4.Service was in receipt of information (i.e., Complainants’ complaint) regarding a suspected violation, it was required under the provisions of Section 653.113 to “document)I that suspected violation and after accomplishment of such documentation to proceed with efforts at’ informal resolution and if necessary with further measures of enforcement as set out in that Section. What they seek here is a ruling that the RA erred in not including such a holding in his decision. The Regional Administrator is in agreement

with Complainants, to the point that the State Job Service should have treated Complainants' complaint as constituting "reason to believe" or "information" of a suspected violation under Section 653.113, and that they accordingly should have proceeded to "document" that violation -- i.e., to investigate and determine whether or not the alleged violation had in fact occurred, and then if it had to proceed with efforts at informal resolution as prescribed in that Section. However, the Regional Administrator goes on to say that, if the State agency was unable to resolve the case, then it should have notified the Department of Labor, "as the appropriate enforcement agency," of the matter. Since it appeared that no such action had been taken, the RA concluded that the State agency was itself in violation of Job Service regulations and stated that he would issue a Notice of Initial Findings of Non-Compliance to it (20 C.F.R. 658.702(e) provides for such action).

The State agency and the Employer have a different view. They take the position that, viewed in perspective with the whole plan of regulation of alien agricultural workers, Section 653.113 should be viewed as a procedure by which the State agency is able to resolve informally matters coming to its attention that are susceptible of being resolved within a few days. and that those provisions were not designed to provide a vehicle for direct-hire employees to have the same rights of appeal as citizens hired by way of State agency referral, so that consequently Complainants here have no standing to seek action under that Section.

This view was rejected by the Regional Administrator, and neither the State nor the Employer have appealed from his decision . What is before us is the question whether or not the RA erred in not providing in his decision a requirement that the State agency carry out in a case like this one the full armament provided in Section 653.113(b), including proceedings looking toward discontinuance of service to the Employer.

The crux of that portion of the decision below which is objected to by the appellants here reads in full as follows;

"The Employer, Fairview Orchards Associates filed a job order within the past 12 months. The MDET should have decided if there was an apparent violation. If there appeared to be, the MDET should have attempted to resolve the case. If it could not do so, it should have notified the Employment and Training Administration (ETA) as the appropriate enforcement agency (in writing) of the matter. No such action appears to have been taken. In failing to carry out this action, the State agency did not fulfill its responsibility under 20 CFR 653.113."

Decision

The principal purpose emphasized by the regulations that are at issue here is the same as the relevant purpose of the Immigration and Nationality Act: to make certain that the use of alien workers does not adversely affect the interests of United States citizen workers. *See, e.g.,* 20 C.F.R. 655.0. It is to this end that regulations have been promulgated under Part 653 of Title 20, dealing with Services for Migrant and Seasonal Farmworkers, for the Labor Certification Process for the Temporary Employment of Aliens in the United States under Part 655, and with respect to Administrative Provisions Governing the Job Service System, under Part 658.

Section 651.10 contains definitions of some terms relevant to this case. The term “‘Complaint’ means a representation made or referred to a State or local JS office of a violation of the JS regulations and/or other federal, State or local employment related law.” “‘Complainant’ means the individual, employer, organization, association, or other entity filing a complaint.” There appears to be no doubt that Van Orsdale and the other complaining workers involved in this’ proceeding are “complainants” in the contemplation of these regulations, and that they did file a “complaint.”

We learn from Section 658.401 that there are two types of complaints handled by the Job Service complaint system. The first, “employer-related” complaints, are directed against actions of the employer. These complaints are concededly restricted to workers referred by the Service, and it is clear that the Complainants here are not eligible to file this sort of complaint. The second type, “agency related complaints”, are complaints about the actions or omissions of the Job Service itself. With respect to these, as the RA rightly observed in his decision, there is no restriction as to eligibility, nor is there any doubt that a complaint about an omission by the Job Service itself was exactly what the Complainants here were complaining about. Specifically they ‘were complaining, rightly or wrongly, that the Job Service had failed to discharge the duties imposed on it by Section 653.113.

If such a complaint “concerns violations of an employment-related law” (and this one surely does), then we are told by Section 658.416(b)(1) that the State agency shall refer it to “the appropriate enforcement agency.” That latter term is nowhere defined in the regulation, but the context makes it clear that in this instance it is the Department of Labor’s Employment and Training Administration. *See, e.g.,* Sections 658.401(c), .410(c)(2), .413(b), .415(e), .420-.424, and .702. Section 658.416(b)(2) explicitly requires that,

* * *

(b)(1) If the JS-related complaint concerns violations of an employment-related law, the [State agency] shall refer the complaint to the appropriate enforcement agency

(2) If the enforcement agency makes a final determination that the employer violated an employment related law, the State JS agency shall

initiate procedures for discontinuation of services immediately in accordance with Subpart F "

Such a determination by the enforcement agency is expressly made a basis -- and the only basis available even on Complainants' view of the facts in this case -- for the discontinuation of services under Section 685.501(a)(4). Moreover, Section 655.210(a) also provides that, if the RA, after granting a temporary labor certification to an employer, has probable cause to believe that the employer has not complied with the terms of that certification, he should investigate and in the event of an adverse conclusion should declare the employer ineligible for such a certification during the coming year. Presumably, these are the provisions that the RA had in mind in concluding that the State agency should have referred the matter to him for investigation and enforcement, and in this he seems clearly to have been correct. Moreover, it seems that the State agency itself does not disagree, nor do the Complainants.

Complainants do contend, however, that Section 653.113 seems to provide for another procedure. Clearly, the present complaint is a "JS-related complaint" of the second type provided for in Section 658.401 (a)(1) -- a complaint, not against the Employer for anything it has done, but against the State agency for not having reacted more strongly. That, indeed, is what the RA concludes. It is certainly true that, as described in subsection (a) of Section 653.113, State agency employees have had reason to believe, and have received information, regarding a suspected violation of employment-related laws or Job Service regulations by the Employers here. It appears also that this information was not acquired by either of the two excepted categories of items, field checks or "complaints", inasmuch as no field check was involved nor was any complaint about a specific job to which a complainant had been referred by the Job Service. Under these circumstances Section .113 seems to require, and the RA concurs, that the State agency employee was required to document the suspected violation and refer this information to his field office manager.

The verb "document" is not defined in Section 651.10, and it does not appear as a verb in *Black's Law Dictionary (Fifth ed.,)*, either. However, the *American Heritage Dictionary (1976)* defines it, in the sense applicable to the present usage, as meaning "to support (an accusation or claim, for example) with evidence or decisive information." Obviously, a necessary precondition for such support is an investigation that results in a determination that the violation alleged has in fact been committed. The State agency did not make such an investigation, as the RA points out, and I agree with him that it failed in its duty by virtue of that omission.

However, to accompany the Complainants to immediate decertification proceedings under Part F of Section 658 requires a leap of faith that we cannot make because the gap in logic is too wide. Even the most lawbreaking employer could not be required to remedy a "suspected violation" until after it had been "documented" and unless it appeared that he had actually committed it. The State agency could hardly be expected to take any action, formal or informal, tending toward the sanction of decertification, unless and until it had first satisfied itself that there at least was something akin to probable cause that a violation had in fact been committed. The agency should be faulted for failing to do its duty under Section 653.113, but it could not reasonably have proceeded to take remedial action before the allegation of violation had been

looked into. What it failed to do was to look into it.

The RA agrees that the State agency should have proceeded with investigation and documentation, and that it should have gone further and attempted to accomplish informal resolution of the violation it suspected. But he does not carry his reasoning to what might appear to be its necessary logical conclusion, that, failing accomplishment of a remedy within five days, the procedures appearing at Subpart F of Part 658 should have been initiated. The reason why this step is a significant one, as Complainants by their counsel note in their brief furnished us in support of this appeal, is that when such a proceeding (for discontinuation of services to the accused employer) is initiated, that triggers an appeal procedure which has substantive procedural safeguards for both sides of the employment dispute. The brief points out that, once services to an employer have been discontinued, in order to gain reinstatement of services that employer must pay restitution to the workers who were subjected to the violation, and that this is the ultimate remedy sought by the Complainants here.

But this leaves the Complainants still with two problems.

The first is that action looking toward termination has to have some basis beyond the agency's suspicion that a violation has been committed. The bases for discontinuation of services are listed at the beginning of Subpart F itself, in Section 658.501(a). I find only one basis there listed that could possibly be applicable in this case:

“(4) [employers who] Are found by a final determination by an appropriate enforcement agency to have violated any employment-related laws and notification of this final determination has been provided to the JS by that enforcement agency.”

And this requirement is consistent with the second problem.

That is the instruction to the State agency, in Section 653.113(b) itself, that it initiate action under Subpart F “and, if a violation of an employment related law is involved, the violation shall be referred to the appropriate enforcement agency in writing.” This meshes, obviously, with the first requirement.

Moreover, Section 658.502(a), within Subpart F, requires the State agency to “notify the employer in writing that it intends to discontinue the provision of JS services pursuant to 20 CFR Part 653 and the reason therefore.” Furthermore, under paragraph (a)(4) of that Section -- the only provision that seems to be possibly applicable in the present situation --

“Where the decision is based on a final determination by an enforcement agency that the employer-related laws [the words ‘have been violated,’ which are clearly necessary from the context, have evidently been unintentionally omitted] the State agency shall specify the determination. The employer shall be notified that all JS services will be terminated in 20 working days unless the employer within that time”

proves either that the enforcement agency has reversed its ruling or that the requisite fines and restitution have been paid, and provides assurances that the violation will not be repeated.

One can only conclude from these considerations that, while the Regional Administrator may not have explained his position in as thorough a detail as he might have, his decision is essentially the only one that the regulations support. Complainants do have standing, to bring this complaint against the State agency, under Section 658.401. The State agency did have the duty to take cognizance of that complaint, and to investigate it and reach a preliminary decision with respect to its probable validity, and if it appeared that the complaint was valid to document it and refer the matter to the ETA. But the final determination of violation, of this employment-related law, with reference to United States citizen workers who had been hired directly and not through State agency referral, was for the enforcement agency, the Department of Labor, to make. And only after . it had made such a determination would there be any basis for beginning discontinuation-of-services proceedings under Subpart F of Part 658.

I see no alternative to affirmation of the decision here appealed from.

Clerical Error

We accept as uncontradicted Complainants' contention that the RA's decision does contain a clerical error, in attributing the alleged violation in the case of Complainant Ora Franklin to Fairview Orchards and not to Hepburn Orchards, Inc. The error should of course be formally corrected.

ORDER

For the reasons set forth above, it is ORDERED, That:

1. The clerical error appearing in the first paragraph of the Regional Administrator's decision here appealed from, in that Complainant Ora Franklin is included among those who had applied for employment during the 1983 and 1984 harvesting seasons to Fairview Orchards Associates, be, and it hereby is, changed to state that Ora Franklin had applied for such employment during that time to Hepburn Orchards, Inc.; and
2. That, as so corrected, the decision of the Regional Administrator be, and it hereby is, affirmed.

Samuel B. Groner
Administrative Law Judge