DATE: SEP 19 1994

CASE NO. : 94-JSA-6

IN THE MATTER OF:

VICTOR POLEWSKY,
Complainant,

v .

VERMONT DEPARTMENT OF EMPLOYMENT AND TRAINING, ET AL.,
Respondents.

Appearances:

Victor Polewsky, Pro Se

Dominic Couture, Pro Se

David Copeland, Vermont Department of Employment and Training

Yvonne K. Sening, United States Department of Labor

BEFORE: John M. Vittone
Deputy Chief Judge

DECISION AND ORDER

This matter arises under the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. § 49 et seq., and the Department of Labor regulations issued at 20 C.F.R. Part 658.

Procedural History

Complainant, Victor Polewsky, filed a complaint against Electrical Unlimited on April 8, 1992. The Complaint alleges that Electrical Unlimited and its owner Dominic Couture used false working conditions in order to secure employees. Simply stated, the complaint alleges that Electrical Unlimited violated the terms of the job order. On May 13, 1992, David Copeland, Assistant Director of Employment and Training for the Vermont Department of Employment and Training (Department), issued the Department's determination and concluded that Electrical Unlimited did not use false working conditions or violate any regulations or employment laws.

On May 19, 1992, Mr. Polewsky appealed the Department's Determination. In his appeal, Mr. Polewsky requested that the state hearing officer subpoena Dominic Couture and Wayne Dunlop of the Vermont Department of Labor and Industry. Mr. Polewsky maintains that Wayne Dunlop should testify as to the proper actions for an electrician to take when confronted with a code violation.

A state hearing was conducted on June 15, 1992, by telephone. Mr. Polewsky had objected to having the hearing over the telephone by letter dated May 27, 1992. At the hearing Dominic Couture testified. Wayne Dunlop did not testify. The state hearing officer issued a decision on June 26, 1992, and held that Electrical Unlimited did not violate the terms and conditions of the job order. The state hearing officer concluded that Mr. Polewsky was terminated because he did not follow the employer's instructions.

Mr. Polewsky appealed the state hearing officer's decision to the Regional Administrator of the Employment and Training Administration, US. Department of Labor (RA). In a decision issued on November 25, 1992, the RA affirmed the state hearing officer's decision that the complaint is without merit.

Mr. Polewsky states that he appealed the RA's decision to this Office on December 9, 1992. Due to an apparent administrative error, this case was not docketed in this Office. However, Mr. Polewsky's appeal was accepted, and the case has been treated as if it was referred to this Office on June 14, 1994.

On June 24, 1994, I ordered the parties to submit any legal arguments and documentation and notified the parties that a decision would be made whether to schedule a hearing or make a decision based on the record. Mr. Polewsky filed a Petition for Hearings on July 8, 1994. On July 15, 1994, the United States Department of Labor, Office of the Solicitor (DOL), filed a letter representing the RA. DOL states that the RA's determination should be affirmed and indicates that it will present no further arguments in this matter. By letter dated July 20, 1994, the Department maintains that the RA's findings should be affirmed. On August 3, 1994, the undersigned re-docketed this appeal as case number 94-JSA-6.

Discussion

According to 20 C.F.R. § 658.424(b), the administrative law judge "shall decide whether to schedule a hearing, or make a determination on the record." Twenty C.F.R. § 658.417 sets forth the procedures and legal standards for hearings conducted by state hearing officers. The state hearing officer has the authority to reschedule a hearing, as appropriate (20 C.F.R. § 658.417(c)(2)) and shall, among other things, assure that all relevant issues are considered. 20 C.F.R. § 658.417(d)(3). Additionally, the state hearing officer need not conduct a hearing pursuant to the technical rules of evidence. See 20 C.F.R. § 658.417(i). However, the state hearing officer should apply, where reasonably necessary, rules and principles designed to assure that the most credible evidence available is produced and that testimony is subjected to cross-examination. Id. Furthermore, the state hearing officer may exclude immaterial, irrelevant or unduly repetitious evidence. Id.

According to 20 C.F.R. § 658.417(m)(2), the state hearing officer may, with the consent of parties, hold a hearing by telephone.[1] The record clearly demonstrates that Mr. Polewsky never gave his consent and, in fact, objected to having the hearing by telephone (Exhibit #8).[2] However, while both the state hearing officer and the RA were aware of this objection, neither official made any attempt to resolve this issue. Rather, the state hearing official went forward with the telephonic hearing and issued his determination. Then, on appeal, the RA specifically acknowledges Mr. Polewsky's objection and makes no attempt to resolve the issue.[3] The RA simply affirms the findings of the state hearing official with no discussion of the objections to the telephonic hearing.

The Job Service regulations are clear that the state hearing official shall conduct a hearing by telephone after obtaining the consent of the parties. 20 C.F.R. § 658.417(m)(2). By going forward with the telephonic hearing and issuing determinations based on the record developed at that hearing, the state hearing official and the RA have clearly denied Mr. Polewsky his right to administrative due process. As such, the undersigned has no choice but to vacate the RA's determination and remand this case to the state agency for proceedings consistent with applicable Job Service regulations.

ORDER

In light of the foregoing, it is hereby ORDERED that the decision of the RA is VACATED and this case is REMANDED to the state agency for proceedings consistent with this decision.

JOHN M. VITTONE
Chief Administrative Law Judge

JMV/dcm/eca

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[1] Twenty C.F.R. § 658.417(m)(2) states, in relevant part, that "the [s]tate hearing officer may conduct, with the consent of the parties, the hearing by a telephone conference call from a [s]tate agency. . . . " (Emphasis supplied.)

[2] Mr. Polewsky states, "[t]ake notice that objection is already made herewith, to the scheduling of this hearing to be by telephone, rather than in person. Such action is no doubt to deprive this appellant from the opportunity to adequately examine records, documentation, witnesses, as well as deny observation of witness demeanor. "

[3] In his determination, the RA states in his Findings of Fact that,"[b]y means of a letter dated May 27, 1992 the complainant, among other things, objected to a hearing by telephone. . . ."