Date: **December 1, 1997**

Case No.: **96-JSA-4**

In the Matter of:

VICTOR POLEWSKY,
Complainant

v.

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

BEFORE: John M. Vittone
Chief Administrative Law Judge

DECISION AND ORDER REMANDING CASE

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, on the basis of a job related service complaint filed by Victor Polewsky ("Complainant") in April of 1982 against Electrical Unlimited and its owner, Dominic Couture)"employer"), with the State of Vermont.

Procedural History

Complainant filed a complaint on April 8, 1982, alleging that employer used false working conditions in order to secure employees. Specifically, the complaint was based on the allegations that the job order was inaccurate and that Complainant was improperly terminated from his position with employer.

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. Mr. Copeland concluded that the employer had not violated the regulations. The Complainant appealed that determination and requested a hearing. Over his objections, a telephonic hearing was held, and on June 26, 1992, the State determined that the employer had not violated the terms and conditions of the job offer. Rather, the State hearing officer concluded that Complainant was terminated because he did not follow the employer's instructions.

The Complainant appealed this determination to the Regional Administrator of the Employment and Training Administration, U.S. Department of Labor ("RA"). In a decision issued on November 25, 1992, the RA affirmed the state hearing officer's decision that the complaint was without merit.

The Complainant appealed this adverse decision to this Office. On September 19, 1994, I issued my decision finding that the State had improperly held a telephonic hearing, over the objection of Complainant, and thus its decision could not stand. Specifically, I ordered:

> 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.*** (Emphasis added.)

The State subsequently held a new hearing and, based at least partially on the record of the prior telephonic hearing, found on August 17, 1995, that (1) no violation of Job Service regulations had occurred, and (2) the matter was moot since the employer was no longer in business in the state. Complainant again timely appealed the State's decision to the RA. After review of the matter, the RA found that the State's proceeding had not been conducted in accordance with my original Remand Order dated September 19, 1994, and thus Ordered that the case be Remanded to the State of Vermont for proceedings consistent with my ruling.

The State again appealed the decision of the Regional Administrator to this Office. In accordance with such appeal, this matter comes before me for the second time.

Discussion

Mootness

On August 17, 1995, the State hearing officer (Appeals Referee) found that Mr. Polewsky's complaint was meritless and moot. As noted, the decision was appealed to the Regional Administrator, and is now before this Office.

On October 31, 1996, the State of Vermont, acting in its capacity as Respondent, filed with this Office a Motion to dismiss this matter as moot. The State argues that the employer is no longer in business and that no action can be taken against it. The Regional Administrator, however, maintains that a review of the facts demonstrates that such assertions are insufficient to warrant dismissal of this matter. For instance, the Supreme Court in *Defunis v. Odegaard*, 415 U.S.. 312 (1974), noted that:

> "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 494 U.S. 244, 246 (1971). The inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964);

> *see also Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969); *Sibron v. New York*, 392 U.S. 40, 50 n.8 (1968).

Defunis, 415 U.S. at 316. *See also Florida Wildlife Federation v. Goldschmidt*, 611 F.2d 547 (5th Cir. 1980).

The State argues that this matter is moot because the employer involved in the instant case is no longer in business, and thus no remedial action can be taken against him. Specifically, the State contends that:

> [n]o matter what decision might ultimately be reached on the merits after whatever additional proceedings might be ordered, no action could be taken against the employer since it no longer exists.

(*See* Affidavit of Thomas W. Douse, at 2).

A case is “moot” when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. In other words, an action may be considered moot when it no longer presents a justiciable controversy because the issues involved have become, essentially, dead. Further, the issue must not be one that has a potential to recur or likely to be raised again between the parties.

Under 20 C.F.R. § 658.501(a), the State may discontinue Job Service (“JS”) services to an employer who has violated the JS regulation after an appropriate finding is made that a violation has occurred. That employer will then be unable to utilize the job service until the deficiencies found are corrected. Under the regulations, the employer must cure the deficiency prior to reentry into the system. 20 C.F.R. § 658.504(a)(2). The Regional Administrator contends that action against a misbehaving employer, even one not currently utilizing the JS system, protects the integrity of the JS system, and keeps an employer from later reentering the system and escaping the imposition of a sanction for its earlier violation of the regulations.

The RA, in his Prehearing Brief, indicates that a case is not moot where the employer has acted voluntarily to withdraw from use of the activity in question. Quoting the Supreme Court case of *United States v. W.T. Grant Co.*, the RA finds that:

> voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (footnotes and citations omitted).

While I agree that, in general, a case is moot "if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,"[1] I am compelled, at this point, to refrain from making such a meritorious determination. I am remanding this case to the State agency pursuant to RA's determination that the State proceedings were conducted in violation of my original Remand Order.

Regional Administrator's Determination

The RA found that the proceedings conducted by the State were invalid and in violation of my September 19, 1994, Decision and Order in which I vacated and remanded the case to the state agency. Relying on the regulations which provide that a telephonic hearing is proper only when all parties consent, 20 C.F.R. § 658.417(m)(2), I found that the State hearing was invalid. Specifically, I concluded that:

> 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 official and the RA have clearly denied Mr. Polewsky his right to administrative due process.

(*Victor Polewsky v. Vermont Department of Employment and Training, et al.,* 94-JSA-6 (Sep 19, 1994).

Upon review of the second State proceeding, the RA found that the defects of the first proceedings were now an integral part of the conclusions reached in the second proceeding. I agree with the RA's determination.

On Remand, the Appeals Referee of the State of Vermont, Department of Employment and Training, violated my order when he allowed the introduction into the hearing record testimony obtained during the vacated telephone hearing. The regulations require that the Appeals Referee shall, among other things, "[a]ssure that all relevant issues are considered." *See* 20 C.F.R. § 658.417(d)(3). Further, the Appeals Referee "should apply, where reasonably necessary, rules and principles designed to assure that the most credible evidence is produced and that testimony is subjected to cross-examination." *Polewsky*, 94-JSA-6. Any testimony and/or documentation obtained in violation of the proceedings provided by the Job Service regulations is invalid and was not to be introduced into the new record.

I find that the RA was correct in his assertion. Specifically, the RA determined that:

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[1] *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

> the regulations requires the state hearing office to "issue subpoenas" if authorized to do so by State Law. Third party testimony without cross-examination is tantamount to hearsay evidence. The Appeal Referee has the State legal authority to issue subpoenas. As such, it was not at his discretion, but his **obligation** to subpoena the employer and any other relevant witness in order to insure a fair hearing and allow the introduction of the most credible evidence and cross-examination testimony.

[*See Regional Administration Determination,* Sept. 5, 1996 (footnote omitted) (bold added)].

It is worth reiterating that the state hearing officer is compelled to assure that all relevant issues are considered. 20 C.F.R. § 658.417(d)(3). Likewise, the officer need not conduct a hearing pursuant to the technical rules of evidence. *See* 20 C.F.R. § 658.417(I). However, the hearing officer may not accept as part of the record documentation which was originally produced in violation of the Code of Federal Regulations. The Appeals Referee erroneously considered the evidence produced in the prior telephonic conference, and incorrectly relied on it in reaching his decision, even over the objections of the Complainant. 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. . ." In other words, without such express consent, a telephonic hearing shall not be conducted. Accordingly, I agree with the RA's conclusion and REMAND this case to the state for further proceedings in compliance with the JS regulations. In making its determination, the state agency *shall not rely on records* from its earlier proceeding, which has since been vacated.

ORDER

In light of the foregoing, and in view of the current record, it is hereby **ORDERED** that the decision of the Regional Administrator is **AFFIRMED**, and this case is **REMANDED** to the state agency for proceedings ***consistent with both this decision and the prior remand order dated September 19, 1994.***

SO ORDERED.

JOHN M. VITTONE
Chief Administrative Law Judge

JMV/pmb