U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
DIEUNAIS SEJOUR, ET AL.,[1] Complainants	:	CASE NO. 83-WPA-1
vs.		
TRI-COUNTY LABOR CAMP, INCORPORATED, and RUSSELL PITZER Respondents		

DECISION AND ORDER

Preliminary Statement

On June 18, 1985 the undersigned was assigned this case. The case was originally assigned to Administrative Law Judge Sidney Harris, who, pursuant to 20 C.F.R. 658.424(b), ruled that the case should be decided on the present record without further hearing. Based on the present record, the following facts appear undisputed:

1. On June 2, 1980 the respondents filed a clearance order with the West Virginia Department of Employer Security (WVDES) containing all assurances required by 20 C.F.R. 655.203 under which they obligated themselves to assist in the active recruitment of U.S. workers. In this connection, 29 C.F.R. 40.51(p) specifically provides that the respondents "shall refrain from recruiting, employing . . . an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment, and must evidence an affirmative showing of a bona fide inquiry of each prospective employee's status as a U.S. Citizen or as a person lawfully authorized to work in the United States. Such affirmative showing will be deemed to be met by written documentation that reliance in good faith was based on any of the following:

(1) _____
(2) _____
(3) INS Form I 94."

1/ The appeal only involves 5 of the original 13 complainants.

2. On August 23, 1980, 13 complainants, all citizens of Haiti, visited respondents' camp, seeking employment as apple pickers. Then visit was referred by WVDES and they were accompanied by Mr. William Hoskovec, a social worker employed by the Migrant and Seasonal Farm Workers' Association, and Attorney Garry Geffert, who was employed by the West Virginia Legal Service plan. Of the 13 complainants, only Mr. Dieunais' Sejour was interviewed by Mr. Pitzer. However since he did not possess the necessary documentation listed in 29 C.F.R. 40.51(p) he did not obtain employment from the respondents. Mr. Pitzer did not interview the other 12 complainants even though he was told each of them had INS-Form I-94. Because the 13 applicants did not obtain employment from respondents they each filed a Job Service Complaint with WVDES alleging they were denied employment by respondents even though they were U.S. qualified workers.

3. These complaints were investigated by Mr. Arthur Braun, the State Monitor Advocate at WVDES. On December 18, 1980 Mr. Braun rendered decisions adverse to each complainant. These decisions were then appealed by the complainants and consolidation for a hearing before Judge Garry Johnson, a West Virginia State Administrative Law Judge. On September 1, 1981, Judge Johnson conducted a preliminary hearing in which, inter alia he denied Respondents' motion for a bifurcated procedure whereby separate hearings on liability and damages would be conducted, ruling that he would hear all issues in one proceeding (T 23, September 1, 1981 transcript). On December 8, 1981 Judge Johnson conducted the hearing, during which all the parties were represented by counsel and had an opportunity to present evidence, examine and cross-examine witnesses under oath and submit briefs in support of their respective positions. At the hearing testimonies were given by Messrs. Gary Geffert, William Hoskovec, Russell Pitzer and Arthur Braun. But none of the complainants testified.

4. On March 25, 1982 Judge Johnson rendered a Decision containing Findings of Fact and Conclusions of Law. Under Conclusion of Law #6, he held, "the respondents did violate their assurance in that they failed to take bona fide actions demonstrating their good faith in fulfilling their obligation to assist the employment service in the active recruitment of U.S. workers". Under Conclusion of Law #7 he held, "the state hearing examiner does have the authority or jurisdiction to award restitution, but no damages were proved in this case because none of the complainants testified." In explaining this conclusion, Judge Johnson stated, ". . . in this case, none of the complainants testified and there is no foundation upon which an award of restitution can be made. There was no evidence presented concerning injuries to the specific complainants and whether any of them obtained work after this incident. In light of the inadequacy of facts on which to determine an award, no restitution is awarded."

5. On April 20, 1982 the complainants appealed Judge Johnson's decision for not awarding damages to the Regional Administrator (RA); on April 23, 1982 respondents also appealed Judge Johnson's decision holding that respondents violated their assurances under 20 C.F.R. 655.203(b). In the meantime complainants also requested Judge Johnson to reconsider his decision for not awarding damages or, in the alternative, to schedule a hearing to determine damages. However, Judge Johnson denied the request on May 12, 1982.

6. On July 28, 1982, the RA rendered a decision affirming Judge Johnson in all respects except the denial of employment for one complainant, Dieunais Sejour, who was found not entitled to employment because he did not possess the proof of citizenship/legal right to work in the U.S. according to the regulation at 20 C.F.R. 40.51(p). The RA found the remaining 12 complainants possessed acceptable proof of citizenship/right to work in the U.S. and therefore were qualified U.S. workers. Because of respondents' failure to interview any of the 12 complainants, or request to review their documents, the RA concluded that respondents breached their affirmative duty to actively recruit and provide employment to these workers. On the question of restitution to the Complainants, the RA's decision stated, "Federal Regulation at 20 C.F.R. 658.502 & 658.504 clearly provide for restitution to injured complainants and the conditioning of any future use of Employment Service System on the resolution of restitution to the injured complainants". However, the RA agreed with Judge Johnson that, in this case, "there is no foundation upon which an award of restitution can be made." After the RA's decision, the complainants and the respondents filed separate appeals to the Office of Administrative Law Judges.

Discussion and Conclusion

I have carefully considered the respective briefs submitted by the respondents, the complainants and the RA. I note two issues are presented for my resolution: First, whether the RA correctly decided that the respondents breached their affirmative duty to actively recruit and provide employment for the 12 complainants; second, whether the RA correctly decided that no restitution can be awarded to the complainants. On the first issue, I note, the respondents take the position that after Mr. Sejour's interview, Mr. Pitzer invited each of the other twelve to his office for interview, if they had the proper documentation to work as specified in 29 C.F.R. 4.51(P). The respondents apparently argued that since no one came forward for interview they did not breach their assurances.

In determining whether this argument has merit, I have carefully considered the testimonies of Messrs. Pitzer, Geffert, Hoskovec and Braun in the December 8, 1981 hearing. According to Mr. Geffert, after Mr. Sejour's interview he had a conversation with Mr. Pitzer in which he informed Mr. Pitzer the other twelve each had INS Form-94 and asked whether Mr. Pitzer wanted

to interview them. Mr. Pitzer's response, according to Mr. Geffert, was that these Haitians were aliens and his quota of aliens was filled and that he was only interested in interviewing and employing U.S. Citizens. (Transcript, p. 33-34). I note Mr. Geffert's testimony is colloborated by the testimonies of Mr. Hoskovec and Mr. Braun. According to Mr. Hoskovec, although he was not with Mr. Geffert and Mr. Pitzer, he overhead Mr. Pitzer saying he considered the Haitians aliens and he had his quota of aliens at that time. (Transcript p. 64). According to Mr. Braun, in connection with his investigation of the complaints he interviewed Mr. Pitzer, who stated, "I asked that group (the remaining twelve complainants), if there were any U.S. citizens here who wanted a job picking apples and no one came forward". (Transcript, p. 116). Based on these testimonies, the only conclusion I can draw is that Mr. Pitzer had decided not to hire the 12 complainants because they were not U.S. citizens and therefore the respondents breached their assurances by not actively recruiting and employing the 12 Haitians who had proper documentation to work in the United States.

On the second issue, I agree with the RA that 20 C.F.R. 658.502 and 658.504 clearly provide for restitution to injured complainants. However, before restitution can be awarded to a complainant, I believe, he must first show his monetany damage resulting from the respondents' breach of assurances. The monetary damage, of course, would be the difference between the wages he would have earned from respondents during the harvest period and the wages he actually earned during the same period. Under 20 C.F.R. 655.202 (b)(6)(i), I do not believe it would be difficult to determine a complainant's would-be wage from the respondents during the harvest period. However, since none of the complainants testified at Judge Johnson's hearing and none was subject to respondents' cross-examination, I do not believe there is any reliable information to determine each complainant's actual wage earned during the harvest period. I realize that this case involves appeal by only five of the original thirteen complainants and that each of the five submitted an affidavit regarding his actual wage earned during the harvest period. However, in view the fact that the parties were given an opportunity to present evidence on all issues (damage and liability) at the December 8, 1981 hearing and none of the complainants testified at that hearing, I must treat the five affidavits with suspect since they were not submitted at the hearing and not subject to respondents' cross-examination. Under the circumstance, I agree with the RA's decision in not awarding restitution.

ORDER

Respondents, Tri-County Labor Camp, Inc. and Russell Pitzer, are notified that all JS Services will be terminated in 20 working days unless adequate assurance is given that any

policies, procedures or conditions responsible for the violations have been corrected and same or similar violations are not likely to occur in the future.

Victor J. Chao

VICTOR J. CHAO
Administrative Law Judge

Dated: SEP 16 1985
Washington, D.C.
VJC:crg

SERVICE SHEET

Case Name: Dieunais Sejour

Case No.: 83-WPA-1

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