U.S. Department of Labor

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

In the Matter of

LEIGHTON KELLY AND NILES KELLY,
Complainants

v.

MAIBEC LOGGING, INC.
Respondent

Case No. 83-WPA-4

Robert N. Moore, Esquire
For the Complainants

Charles S. Einsiedler, Jr., Esquire
For the Respondent

Before: CHARLES P. RIPPEY
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Wagner-Peyser Act of 1933, 29 U.S.C. §49 et seq., and the regulations governing the Job Service system at 20 C.F.R. Part 658, as well as the temporary alien labor certification procedures provided for by the Immigration and Nationality Act, 8 U.S.C. §1101 et seq., and the regulations promulgated thereunder at 20 C.F.R. Part 655.

The parties have agreed to submit the case for a decision on the basis of the written record which consists of the administrative file (hereinafter referred to as AF with the state level hearing transcript designated as T) and the written arguments of the parties.

The preliminary matter, whether the appeal in this case was filed in a timely manner, needs to be addressed before discussion of the merits of this case. Complainants allege that their appeal of the Monitor Advocate's decision was filed within 20 working days as required by the regulations. 20 C.F.R. §658.416(d)(5). In support of this allegation, Complainants have submitted affidavits stating that they received the decision of the Monitor Advocate on November 13, 1981. Complainants have also filed a copy of a page from the 1985 Maine Government Directory

which lists the day following Thanksgiving as a holiday for the Maine Job Service office which they allege accounts for the one day delay in filing an appeal of the Monitor Advocate's decision. Respondent submitted a copy of 4 M.R.S.A. §1051 in response to Complainants' allegation which does not list the day following Thanksgiving as a legal holiday. 4 M.R.S.A. §1051 governs holidays for the State of Maine Judiciary which unless proven otherwise does not control operations of the State of Maine executive branch of which the Job Service Office is a part of. There is no question in my mind that the Executive branch has the authority to establish a holiday schedule, a schedule which designates the day following Thanksgiving as a holiday. Thus, there being no evidence to the contrary, I find that the day following Thanksgiving was a holiday for the State of Maine Government Offices and that the appeal of the Monitor Advocate's decision was filed in a timely manner.

Complainants seek reversal of the Regional Administrator's determination finding that the Respondent had not violated the Act in refusing to re-employ the Complainants on or about September 22, 1981. Respondent, Maibec Logging, Inc., is a logging company operating in remote sections of Northern and Western Maine. Since the population of available U.S. workers is sparse in the areas of Respondent's operations Respondent was granted temporary labor certifiction enabling him to employ Canadian workers for the 1981 harvest season from May 26, 1981 through February 28, 1982. Complainants, two U.S. workers were hired by the Respondent on May 26, 1981 and worked continuously up to July 15, 1981 when Respondent shut-down operations for a two-week vacation period. Complainants allege that they were not given prior notification of the two-week shut down and that they could not financially afford to be out of work for two weeks. (AF-tab G, pps. 12, 17) Allegedly, Complainants informed their supervisor, who had difficulty communicating in English, that they were looking for work elsewhere and would not be returning to work for the Respondent following the two-week shut down. (AF-tab G, pps. 12, 15, 18, 19, 25) Their supervisor testified at the state hearing that Complainants did not inform him that they would not be returning to work and as a result held the job open for Complainants for eight days following the end of the vacation period. (AF-tab G, pps. 25-26) When Complainants failed to return to work, Respondent filled their positions. (AF-tab G, p. 26)

The Complainants found employment with another logging company in July 1981 and worked for that company until September 16, 1981 when the operation closed down. (AF-tab G, pg. 12) Complainants contacted the Maine Job Service Office for information as to available logging employment and arrangements were made for a job interview with Respondent on September 22, 1981 (AF-tab A) The Respondent did not hire the Complainants on September 22, 1981 and as a result Complainants filed the instant action.

On September 22, 1981, Complainants filed their original complaint against the Respondent with the Maine Job Service alleging that Respondent did not hire them because "we did not return to work for him after the vacation period in July." (AF-tab A) They asserted that they felt that they should be able to replace the bonded Canadian workers. (AF-tab A) The local Job Service Office conducted an investigation of the complaint, and the Monitor Advocate, in a decision dated October 26, 1981 informed Complainants that their complaint had been resolved since they were hired by Respondent on October 19, 1981. (AF-tabs C and E) The Complainants appealed this decision and requested a hearing. (AF-tab F) A State Hearing Official from the Maine Department of Labor, Bureau of Employment Security, conducted a hearing on August 27, 1982 and rendered a decision on September 18, 1982 reversing the Monitor Advocate's decision and finding that there was no evidence of a lawful job-related reason justifying Respondent's failure to rehire Complainants in violation of 20 C.F.R. §655.203(c). (AF-tabs G and I) Respondent was ordered to pay restitution in the amount of $1,849.60 to complainant Leighton Kelly and $2,448.00 to complainant Niles Kelly.

On October 8, 1982, the Respondent appealed the State Hearing Officer's decision to the Regional Administrator, U.S. Department of Labor, Employment and Training Administration. (AF-tab J) The Regional Administrator found that lawful job-related reasons existed for Respondents refusal to rehire Complainants since they had failed to return to work and notify Respondent that they would not be returning to work following the July shutdown thus finding that the Respondent had not violated 20 C.F.R. §655.203(c). (AF-tab L) Complainants filed a timely appeal with this office requesting reinstatement of the State Hearing Officer's decision.

The issue presented for review is whether Complainants were rejected from employment in September 1981 for other than a lawful job related reason within the meaning of 20 C.F.R. §655.203(c). It is my opinion that an employees decision to voluntarily quit without notice to an employer serves as a lawful job related reason for an employer to reject a workers subsequent request to be rehired. Complainants do not challenge such a finding but allege that the evidence is conflicting as to whether Complainants informed their supervisor of their decision to terminate their employment. Though the testimony of the parties conflicts, Respondent's action in holding Complainants' job position open for eight days following the vacation period adds credance to their testimony and persuades me that Complainants never informed Respondent of their decision to quit. Complainants' allegation that if a misunderstanding occurred it resulted from their supervisors lack of fluency in English does not dissuade me from my decision. The supervisors lack of fluency in English put Complainants on notice that they must be careful to ensure that their decision to quit was properly understood. Thus, I find that the Respondent rejected the Complainants from employment in September 1981 for lawful job related reasons.

Complainants have put forth a series of arguments which are superfluous to the case at hand but for sake of completeness I will address them. First Complainants' argument that deference be given to the State Hearing Officer's decision is rejected. A de novo review is clearly contemplated by the regulations. Further, the Hearing Officer's decision was not supported by the substantial evidence of record. The Hearing Officer concluded that there was no testimony indicating that Complainants were not considered for rehire because of any problems during their previous period of employment. However, this finding evolved after an erroneous finding that Respondent rejected Complainants from employment because there was no available work. The Hearing Officer came to this conclusion after crediting Complainants' testimony at the hearing over Respondents conflicting testimony and ignoring the Complainants' complaint which listed as the reason that they were not rehired was their previous voluntary quit without notice to Respondent. The Hearing Officer also ignored the logical conclusion that Respondent would not bother to hold employment interviews when he had no need for additional employees. These factors were not given the consideration they warranted by the Hearing Officer and lead me to conclude that his decision was erroneous and unsupported by the substantial evidence of record.

Lastly, Complainants' allegation that 20 C.F.R. §655.203(e) placed a burden on Respondent to hire all qualified U.S. workers prior to the expiration of fifty percent of the work contract even if there existed lawful job-related reasons for not hiring certain U.S. workers is rejected. To give proper meaning to the regulations they must be read as a whole. It would impose an undue burden on an employer to require them to hire qualified U.S. workers during the first half of a contract despite the existence of a lawful job related reason for rejections of U.S. workers. The Act is premised on assuring that U.S. workers are employed prior to employment of alien workers but the Act cannot be read to impose an undue burden on employers by mandating that they hire U.S. workers for which there is a legitimate reason to reject. The Complainants may be qualified loggers however, they have proven themselves to be unreliable employees which is a legitimate reason to reject them for employment.

Based on the foregoing Findings of Fact and Conclusions of Law I find that the Regional Administrator's decision that there was no violation of the Act is correct.

Pursuant to 20 C.F.R. §658.425(c) this Decision and Order constitutes the final decision of the Secretary of Labor.

Charles P. Rippey

CHARLES P. RIPPEY
Administrative Law Judge

Dated: 29 APR 1985
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Leighton Kelly and Niles Kelly v. Maibec Logging, Inc.

Case Nos.: 83-WPA-4

Title of Document: Decision and Order

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