

U.S. Department of Labor

Office of Administrative Law Judges
Washington, DC



In the Matter of :

DAVID E. MAC ARTHUR
Complainant

v.

Case No. 82-TAE-1

REAL BEAUCHESNE
Respondent

Robert N. Moore, Esq.
For the Complainant

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

Before: ROY P. SMITH
Administrative Law Judge

DECISION AND ORDER

Preliminary Statement

This proceeding arises under the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 et seq. (hereinafter referred to as the "Act"), and the regulations issued pursuant thereto governing the Employment Service system. 20 C.F.R. Part 658. Regulation section numbers mentioned in this Decision and Order refer to sections of Title 20. This case arises from a determination by the Regional Administrator, U.S. Department of Labor, Employment and Training Administration, Region I, that the respondent terminated the complainant in violation of Employment Service regulations.

In response to an Order to Show Cause issued on February 10, 1982, the parties have agreed to submit the case for decision on the written evidence and legal arguments. Both the complainant and the respondent have filed briefs in this matter.

Issues

1. Whether the Regional Administrator had jurisdiction to render his decision dated December 17, 1981. If so, what is the proper standard of review of that determination.

2. Whether the respondent, Real Beaulac, terminated the complainant, David MacArthur, in violation of the Job Service and other applicable regulations. Whether the Regional Administrator imposed sanctions that were proper and within his regulatory authority. If so, whether the Regional Administrator properly calculated the monetary amount of restriction.

Findings of Fact and Conclusions of Law

Prior to the 1980-81 cutting season, the respondent applied for temporary labor certification of certain Canadian woods workers to assist in his logging operation. As part of the certification process dictated by Section 655.201(c), the Job Service required the respondent to recruit U.S. workers through the Employment Service intrastate and interstate clearance system. The respondent consequently submitted a Clearance Order, Rural Manpower Job Offer, for 21 individuals to the local office of the Maine Job Service at Skowhegan, Maine. The Job Service then requested the respondent to attend a pooled job interview in Skowhegan at some time during June 1980. At that pooled job interview, the respondent met with and hired the complainant and Eddie Mitchell, both of whom had been referred there by the Job Service.

The complainant and Mr. Mitchell worked as a two-person crew for the respondent from June 17, 1980, until October 6, 1980. During this time, the complainant and Mr. Mitchell provided their own chain saws, and the respondent furnished a skidder machine. The two men alternated duties between chopping and operating the skidder until September 1980, at which time the respondent requested that only Mr. Mitchell operate the skidder.¹ The complainant and Mr. Mitchell complied with this request.

On the morning of October 6, 1980, Mr. Mitchell sustained a work-related injury to his vertebrae. The complainant transported Mr. Mitchell to receive medical attention, and then returned to the work site in late afternoon to advise the respondent that Mr. Mitchell would not immediately be returning to work. Upon receiving this information, the respondent gave the complainant the choice of either finding a new partner to operate the skidder or obtaining work elsewhere. The respondent did not assign the complainant to work as a chopper with any of the other crews he had working for him at that time.

¹ The respondent made this request, because he felt the complainant was too hard on the machine. During their employment up to that time, the complainant and Mr. Mitchell had experienced three breakdowns on two different machines, with all three breakdowns occurring at times when the complainant was in control of the skidder.

The complainant secured employment the next day, October 7, 1980, with Corriveau Logging, Inc., and actually began working there on October 8, 1980. The complainant worked for Corriveau until November 5, 1980, at which time he sustained a job-related injury. As a result of this injury, the complainant was unable to work for Corriveau in any capacity during the remainder of the cutting season.

On December 3, 1980, the complainant filed a complaint, in which he alleged that the respondent had fired him in violation of Section 655.104(b)(1), with the Maine Job Service. The local Job Service office conducted an investigation of the complaint, and the Monitor Advocate, in a decision dated December 29, 1980, found no violations of the regulations. The complainant disagreed with this determination and filed an appeal on January 15, 1981. On June 29, 1981, the complainant amended his complaint to allege that the respondent violated Sections 655.203(c) and 655.202(b)(6)(i) of the regulations. Pursuant to complainant's request for a hearing, a State Hearing Official from the Maine Department of Labor, Bureau of Employment Security conducted a hearing on August 11, 1981, on the issues stated in the amended complaint. In a decision rendered on August 28, 1981, the State Hearing Officer affirmed the decision of the Monitor Advocate.

On September 2, 1981, the complainant appealed the State Hearing Officer's decision to the Regional Administrator, U.S. Department of Labor, Employment and Training Administration. The Regional Administrator issued a Notice of Determination on December 17, 1981, and directed the Maine Job Service to initiate proceedings to discontinue services to the respondent, and ordered the respondent to pay \$4,462.24 to the complainant as the value of the employment which the respondent should have offered to him. The Regional Administrator further warned that any additional violations of the terms of the respondent's 1980- 1981 temporary labor certification would result in a denial of eligibility to apply for temporary labor certification in the coming year. In a letter dated January 11, 1982, the respondent requested a hearing before an administrative law judge of the Department of Labor.

Jurisdiction and Standard of Review

The Regional Administrator had jurisdiction to render his decision of December 17, 1981, because the Job Service regulations are applicable to the complaint in question, and the complainant has undertaken the correct procedures in a timely fashion at every level of the adjudication at both the state and federal levels.

Section 658.401 of the Job Service regulations provides, in pertinent part:

The types of complaints (JS related complaints) which shall be handled to resolution by the JS Complaint System are as follows: (1) 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 complaints)....

The complaint filed by Mr. MacArthur on December 3, 1980, meets all of the above criteria for consideration under the Job Service Complaint System. The Maine Job Service referred the complainant, by means of the pooled job interview, to the respondent for employment pursuant to the terms and conditions of the Clearance Order. As a consequence of this referral, the respondent interviewed and hired the complainant for his logging operation. When the respondent dismissed the complainant on October 6, 1980, the complainant filed a grievance alleging that the respondent had terminated him in violation of the Job Service regulations. Under these circumstances, the Job Service regulations are applicable to the present matter, and the complaint is properly within the Job Service Complaint System.

The Regional Administrator also had jurisdiction of the complaint, because the complaint complied with all procedural directives specified in the Job Service regulations. See 20 C.F.R. §658.400 et seq. The complainant filed his complaint in a timely manner and then correctly appealed each adverse decision through all applicable levels of local and state adjudication. After the complainant completed his recourse at the state level without satisfactory resolution of his complaint, he appealed the decision of the State Hearing Officer to the Regional Administrator in accordance with 20 C.F.R. §658.418(c). The complaint, therefore, was properly before the Regional Administrator, and the Regional Administrator had jurisdiction to render a decision on the matter.

Neither the statute nor the regulations articulate, in any precise fashion, the standard of review to be applied by the administrative law judge in conducting proceedings pursuant to Section 658.424. The complainant argues that the administrative law judge is to merely conduct a review of the evidentiary proceedings at the lower levels, and the respondent claims that the administrative law judge is to undertake a de novo determination.

While not amounting to a specific declaration of the standard of review, Sections 658.424 and 658.425 suggest that the administrative law judge's determination is to be de novo. Basically, subsections (b) and (g) of Section 658.424 refer to the introduction of new evidence at the ALJ level, regardless of whether the judge schedules a hearing or makes a determination on the record; and subsection (b) of Section 658.425 directs the ALJ to consider the entire record, including evidence presented at the hearing, in formulating his determination. Any review by the administrative law judge, in order to be compatible with these provisions, must consider the new evidence submitted to this Office after the determination by the Regional Administrator. A de novo review, therefore, is the only type of review which allow-for consideration of new evidence and is consistent with the regulatory scheme.²

² Of course, the administrative law judge will afford due deference to any credibility and demeanor determinations of the State Hearing Officer who had the opportunity to observe the witnesses when the testimony was taken.

Termination in Violation of Regulations

A focal issue in this matter concerns whether the respondent terminated the complainant in violation of the regulations. The complainant alleges that respondent terminated him in violation of 20 C.F.R. §655.202(b)(6)(i) and 5655.203(c). The respondent, on the other hand, maintains that he never terminated the complainant. The outcome of this question depends on the interpretation given to the events surrounding the parties' actions on October 6, 1980. According to the testimony of the complainant at the state hearing, the complainant returned to camp in the late afternoon of October 6, 1980, to update the respondent on Mr. Mitchell's injury and to inquire about his own future employment status. The complainant stated that the respondent told him he still could not operate the skidder, and that he should find work elsewhere. The complainant said that he interpreted this comment to mean that he should seek employment with a different employer. On the other hand, the respondent testified that he informed the complainant that he still could not operate the skidder, but that the complainant could continue to work if the complainant found someone else to run the machine. The respondent further told the complainant that if he could not find anyone else to drive the skidder, there was nothing else for him to do at the work site.

These circumstances indicate that the respondent terminated the complainant after Mr. Mitchell became unavailable due to a job-related injury. Although the respondent may not have, in so many words, directly terminated the complainant, the respondent, by his words and actions on October 6, 1980, placed an undue burden upon the complainant and essentially, if not in fact, terminated his employment.

In his brief, the respondent argues that he offered several choices to the complainant with respect to his continued employment. Based upon the respondent's testimony, the respondent actually presented the complainant with only two alternatives: 1. the complainant could continue to work, but only if he found another individual to operate the skidder; or 2. the complainant could seek work elsewhere.

In the context of the complainant's employment as an individual employee, the respondent's first alternative is no alternative at all, because it places an undue and unacceptable burden upon the complainant.³ As an individual employee, the complainant should not have to assume any responsibility at all for the hiring of a co-worker. This alternative essentially

³ According to the terms of the Clearance Order, the respondent originally hired the complainant and Mr. Mitchell as individual employees. Even though the complainant and Mr. Mitchell expected to, and actually did, work together on the same crew, they were hired as individual employees.

The respondent's payroll record further confirms the complainant's status as an individual employee by showing that the respondent compensated the complainant based upon the number of hours that he, alone, worked.

represents an abrogation by the respondent of the traditional duties and responsibilities of an employer.

The respondent's second alternative, to find work elsewhere, is not any more acceptable than the first, primarily for the reason that it is tantamount to a dismissal of the complainant. These words are subject to only one interpretation, which is that the respondent is terminating the complainant and the complainant should seek new employment. The above-mentioned testimony of the complainant reinforces this interpretation. When the complainant returned to the work site on the afternoon of October 6, the respondent confronted him with two alternatives, one of which placed an unacceptable burden upon the complainant, and the other of which equated to dismissal of the complainant. Based upon this situation, I must conclude that the respondent terminated the complainant on October 6, 1980.

By terminating the complainant in this manner, the respondent violated the terms and conditions of the Clearance Order and employment-related law. Specifically, the respondent failed to comply with the terms of the three-fourths guarantee contained in the Clearance Order and set forth at 20 C.F.R. §655.202(b)(6)(i).⁴

Section 655.202(b)(6)(i), which is applicable to respondent by virtue of his application for temporary labor certification, states:

The employer guarantees to offer the [U.S.] worker employment for at least three-fourths of the workdays of the total period during which the work contract and all the extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the termination date specified in the work contract, or in its extensions if any.

According to the Regional Administrator's calculations, the complainant's work period, based on a starting date of June 17, 1980, and a contract expiration date of April 15, 1981, encompassed a total of 218 workdays.⁵ Under the provisions of the three-fourths guarantee, the respondent was required to offer the complainant employment for at least 163.5 days out of this work period. At the time of the complainant's termination on October 6, 1980, the respondent had only offered complainant employment for a total of 80 workdays. Since the three-fourths obligation had not been fulfilled, and the respondent essentially did not indicate any continued

⁴ The complainant also alleged a violation of 20 C.F.R. §655.203(c). That section primarily concerns itself with the initial availability of the job opportunity to U.S. workers, and not the continued employment of the U.S. worker once hired. Accordingly, I conclude that Section 655.203(c) is inapplicable to the present situation.

⁵ For the purposes of the three-fourths guarantee, a workday is any period consisting of eight hours of work time. 20 C.F.R. §655.202(b)(6)(i).

employment prospects within the remaining contract period, the respondent violated Section 655.202(b)(6)(i) of the regulations.⁶

Sanctions

In his determination of December 17, 1981, the Regional Administrator ordered the Maine Job Service to initiate proceedings to discontinue services to the respondent; advised the respondent that any additional violations would result in a denial of eligibility to apply for a temporary labor certification in the coming year; and ordered the respondent to pay the sum of \$4,462.24 to the complainant as back pay. The respondent maintains that these sanctions are not proper and are not within the regulatory authority of the Regional Administrator.

Although the Job Service regulations do not specifically enumerate remedial powers at the federal level, the Regional Administrator does possess broad authority to undertake any actions or impose any sanctions which are consistent with and effectuate the purposes of the Act and regulations.⁷ The authority of the Regional Administrator derives from Section 658.421, which governs initial review at the federal level by the Regional Administrator from determinations made on complaints at the state level. Under this section, the Regional Administrator reviews each file, makes certain determinations as to whether further investigation or other action is appropriate, and then proceeds to either affirm, reverse, or modify the decision of the State Hearing Official.

As this provision demonstrates, the Job Service regulations envision a system of administrative review in which the Regional Administrator evaluates a complaint and makes a determination concerning whether a violation of the Job Service regulations or Clearance Order occurred. An integral and vital component of any such complaint system, whether or not directly expressed, is the ability to provide redress for any actions which are adjudged to constitute a wrong under that system. The Regional Administrator, therefore, has the inherent power to order

⁶ Article XI of the applicable Woods Contract provides an exception to the three-fourths guarantee in those situations in which the employer terminates the worker for any of four reasons which amount to cause. Since the respondent in the case terminated the complainant solely for the reason that his crew mate no longer was able to work, this exception is not available to the respondent.

⁷ Contrary to the argument of the respondent, the remedial authority of the Regional Administrator is not limited by Section 655.210 to denying an employer's eligibility to apply for temporary labor certification in the coming year. The complaint in this matter originated under 20 C.F.R. Part 658, and Part 658 allows for the imposition of various substantive sanctions. Subsection (b) of Section 655.210 merely curtails the application of these other remedies in those situations in which the Regional Administrator chooses to deny temporary labor certification in the upcoming year.

any appropriate sanctions in order to serve the purposes of the Act and regulations.⁸

One of the traditional remedies for a wrongful termination is an award of back pay. The purpose of such an award is to restore the party to a position as near as possible to the position he would have been in had the wrongful termination not occurred. The exact amount of the back pay award depends upon the specific circumstances of each case and should take into consideration any subsequent wage or salary increases that would have occurred during the remainder of the contract period, as well as any subsequent wages received from other employment.

In this matter, the Regional Administrator assessed a back pay award of \$4,462.24 against the respondent for his wrongful termination of the complainant. Since there was no evidence of any subsequent earnings, the Regional Administrator had no basis for decreasing the amount of this award. During the proceedings before this Office, the respondent submitted the affidavit of Donald A. Ladd, accountant/bookkeeper for Corriveau Logging, Inc. According to Mr. Ladd's affidavit, the complainant earned \$896.96 in wages from Corriveau during the period starting October 8, 1980, and ending November 5, 1980, and approximately \$700 per month thereafter in workers' compensation payments. The respondent is now entitled to a reduction of the back pay award by \$2,973.90, an amount equivalent to that which the complainant collected in other employment and workers' compensation during the unexpired portion of the three-fourths

⁸ The Administrative Law Judge also possesses the authority to impose any necessary sanctions upon final review of the Regional Administrator's determination. Section 658.425(a) directly provides that the Administrative Law Judge, in addition to ruling on jurisdiction, withdrawal of the appeal, and abandonment of the appeal, may "[r]ender such other rulings as are appropriate to the issues in question."

guarantee.⁹ After allowing for this reduction, the net back pay award to the complainant amounts to \$1,488.34.

The regulations at Section 658.501 *et seq.* specifically provide for the discontinuation of all employment services as a substantive sanction which can be invoked against an employer who violates the Job Service regulations. This discontinuation remains in effect until such time as the employer provides assurances that corrective actions have been taken and the same or similar violation is not likely to occur in the future, and until the employer provides adequate evidence that appropriate restitution has been made. See 20 C.F.R. §658.504.

In his determination, the Regional Administrator also ordered the Maine Job Service to initiate proceedings to discontinue services to the respondent. This remedy is neither unreasonably harsh on the respondent nor inappropriate under the circumstances of this case. The respondent violated the Job Service regulations by wrongfully terminating the complainant, and he is now liable for payment of back wages to the complainant. Discontinuation of services

⁹ Since the respondent is only liable for back wages for the unexpired portion of the three-fourths guarantee, he correspondingly is only entitled to a deduction from the back pay award for the outside wages and workers' compensation paid to the complainant during that same three-fourths period. At the time of his termination on October 6, 1980, the complainant had worked 80 of the required 163.5 workdays under the guarantee, and there remained 83.5 workdays for which he should have received compensation from the respondent. During these 83.5 workdays subsequent to his termination, the complainant earned the following outside wages and workers' compensation payments:

<u>Amount</u>	<u>Time Period</u>	<u>Source</u>
\$896.96	10/08/80 to 11/05/80	Wages-Corriveau Logging, Inc.
\$589.44	11/06/80 to 11/30/80	Workers' Compensation prorated on the basis of 16 working days for remainder of November.
\$700.00	12/01/80 to 12/31/80	Workers' Compensation
\$700.00	01/01/81 to 01/31/81	Workers' Compensation
\$ 87.50	02/01/81 to 02/04/81	Workers' Compensation prorated on basis of 2 1/2 working days to fulfill 3/4 guarantee in February.

The total of \$2,973.90 is, therefore, the appropriate amount by which the award of back pay is reduced.

merely acts as a further incentive for the employer to make prompt restitution to the complainant and to undertake timely implementation of any other necessary corrective action. Reinstatement of employment services, of course, occurs at the time that the respondent proves to the satisfaction of the Regional Administrator that he is in full compliance with the terms of Decision and Order. If the respondent complies in a timely fashion, there should only be a brief disruption of services, if at all, and a minimal impact upon his business operation.

As a final sanction in his determination, the Regional Administrator told the respondent that the failure to provide continued employment to the complainant constitutes a failure to abide by the terms and conditions of the 1980-1981 Temporary Labor Certification, and that any additional violations will result in a denial of eligibility to apply for a temporary labor certification in the taming year. See 20 C.F.R. §655.210. The Regional Administrator did not actually declare the respondent ineligible to apply for temporary labor certification in the coming year, but instead informed the respondent of the potential consequences under the applicable regulations of any future violations. Since this aspect of the Regional Administrator's order is purely advisory in nature, there is no need to rule on its prospective applicability to the respondent. Any consideration of whether this is an appropriate remedy will have to wait until this sanction is actually invoked in the context of future violations, if any, by the respondent.

Interest

When a person is awarded back pay, the purpose of the award is to restore that party to a position as near as possible to the position he would have been in had the wrongful termination not occurred. In order to achieve this comparable position, I find that interest on the monies due as back wages must also be awarded. See Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), cert. denied, 99 S.Ct 1020 (1979).

The appropriate rate of interest shall be the rate, as adjusted every 6 months, established by the Secretary of the Treasury for use in computing interest on government contracts, as adopted by the Office of the Assistant Secretary for Administration and Management. Considering the development of financial and economic circumstances during the time period in which Mr. MacArthur has been deprived of his monies, I conclude that this is an adequate rate of interest.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Real Beauchesne shall pay David MacArthur back wages in the amount of \$1,488.34. This figure represents the amount Real Beauchesne should have paid David MacArthur for employment during three-fourths of the workdays contained in the work period running from June 17, 1980, to April 15, 1981, less the amounts David MacArthur earned in other employment and monies received by him as workers' compensation.

2. Maine Job Service shall initiate proceedings to discontinue employment services to Real Beauchesne until such time as Mr. Beauchesne satisfies the Regional Administrator that he has paid, in full, the back wages due to Mr. MacArthur.

3. Real Beauchesne shall pay David MacArthur interest on the back pay due at the rate, as adjusted every 6 months, established by the Secretary of Treasury for use in computing interest on government contracts, as adopted by the Office of the Assistant Secretary for Administration and Management. Such interest shall be computed from the date each salary payment was due to the date paid.

ROY P. SMITH
Administrative Law Judge

Dated: 13 DEC 1982
Washington, D.C.

RS/gaf