U.S. Department of Labor Office of Administrative Law Judges
Washington, DC

In the Matter of:

ROBERT ACKERMAN Case No. 82-TAE-00003
Complainant

v.

MOUNT LEVELS ORCHARDS AND
HOMER FELLER
Respondents

and

LUCIUS DONALDSON
Complainant

TRI-COUNTY LABOR CAMP, INC. AND
RUSSELL PITZER
Respondents

EDWARD GIGNAC
Complainant

v.

TRI-COUNTY LABOR CAMP, INC
AND RUSELL PITZER
Respondents

DECISION AND ORDER

Preliminary Statement

The three cases arise under the Wagner-Peyser Act of 1933 as amended, 29 U.S.C. 49 et seq (hereinafter the "Act") and the regulations issued thereunder governing the Employment Service System. Unless stated otherwise, the Section numbers referred in this decision are those of Title 20.

The general facts of these cases are: Respondents, Mount Levels Orchards and Tri-County Labor Camp, filed applications for temporary labor certifications to import foreign workers for apple picking season. In connection with these applications, respondents made written assurances required by Section 655.203(c) & (d) that before hiring foreign workers they "will cooperate with employment service system in the active recruitment of U.S. workers" and "no U.S. worker will be rejected for employment for other than a lawful job-related reason." Complainants, Lucius Donaldson and Edward Gignac, sought employment unsuccessfully at Tri-County Labor Camp and Complainant, Robert Ackerman, sought employment unsuccessfully at Mount Levels Orchards. For this reason complaints were filed against the respective respondents alleging violation of their written assurances. One of the common issues in these cases is whether each Complainant is entitled to monetary award, if it should be determined there was such violation. Because of the common issue, this office determined on November 10, 1982 to consolidate these cases and render decisions on the record without further hearing. Although such hearing was requested by respondents, granting such request is within the discretion of the DOL Administrative Law Judge. Section 658.424(b).

On December 6, 1982 I was assigned these cases. As required by Section 658.425(b), I have carefully considered the entire record in each case, which consists of the state case file and federal case file transmitted by the Regional Administrator (of the Employment and Training Administration of the U.S. Department of Labor) and legal arguments and supporting documents transmitted by the parties in connection with the appeal. Based on the record in each case, I have made the following findings of fact and conclusion of law in each case. I note that State Administrative Law Judge Gary Johnson conducted extensive hearings in Donaldson & Ackerman. Since Judge Johnson had the opportunity to evaluate witnesses's demeanor, I have accorded due deference to his credibility determination of the witnesses.

Donaldson (Complainant) v. Tri-County Labor Camp Inc. and Russell Pitzer (Respondents).

Findings of Fact and Conclusions of Law

Tri-County Labor Camp Inc. filed a temporary labor certificate application dated June 2, 1980 for the apple harvest season, September 8, 1980 to Nov. 15, 1980. The written assurance pursuant to Section 655.203(c) & (d) was executed by its manager, Mr. Russell Pitzer. On October 1, 1980, Complainant, Mr. Donaldson and another migrant farmworker, Mr. Willie Brown, went to the Martinsburg office of West Virginia Department of Employment Security (WVDES) looking for work. WVDES referred both workers to Tri-County Labor Camp. Mr. Donaldson was advised by WVDES personnel that his "certification of residence, proof of age" form was sufficient identification to obtain employment. On October 2, 1980 both Mr. Donaldson and Mr. Brown went to the Offices of Tri-County and each was separately interviewed by Mr. Pitzer. After Mr. Brown's interview, Mr. Donaldson was interviewed by Mr. Pitzer. Mr. Pitzer asked Mr. Donaldson for proof of U.S. citizenship and Mr. Donaldson produced his "certification of residence, proof of age" form. Mr. Pitzer did not hire Mr. Donaldson because Mr. Donaldson did not have what Mr. Pitzer considered sufficient proof of U.S. citizenship. Neither Mr. Brown nor Mr. Donaldson was hired by respondents. Mr. Brown

told Mr. Donaldson that he had showed Mr. Pitzer his "declaration of citizenship" form which is deemed acceptable evidence of U.S. citizenship under 29 C.F.R, 40.51(p)(l). Even though Mr. Donaldson subsequently obtained his declaration of citizenship form, he never returned to Tri-County for the reason that Mr. Brown was not hired even though he had such identification.

On October 3, 1980, Mr. Donaldson filed a complaint against Tri-County. The complaint was investigated by WVDES and a determination was made on December 18, 1980 by the State Monitor Advocate, finding the complaint invalid. Mr. Donaldson thereafter requested a hearing which was held on September 2, 1981 before State Administrative Law Judge Gary Johnson. In his decision dated October 14, 1981, Judge Johnson dismissed the complaint. Judge Johnson further held that in any case he has no authority to award monetary damages. In dismissing the complaint, Judge Johnson did not discuss the evidence in the record that Mr. Willie Brown was not hired even though he showed Mr. Piotzer his "declaration of citizenship" form, Judge Johnson also did not discuss the testimony of Mr. William Rich of the WVDES' Martinsburg office that several other workers who had "declaration of citizenship" forms were also not hired by Mr. Pitzer.

Pursuant to Section 658.418(c), Mr. Donaldson on November 10, 1981 appealed Judge Johnson's decision to the Regional Administrator. In a decision dated February 4, 1982, the Regional Administrator held there was violation of the written assurances and because of such violation Mr. Donaldson was entitled to monetary damages. The Regional Administrator held that unless there was timely request for hearing before a DOL Administrative Law Judge, the state agency will be directed to terminate all JS services in 20 work days if respondents did not satisfactorily resolve the complaint with the Complainant and make adequate assurances that there will be no future violations.

The respondents filed a timely appeal of the Regional Administrator's decision and I have considered the entire record in this case. Respondents argue that Judge Johnson's decision should be affirmed because Mr. Donaldson did not show Mr. Pitzer sufficient proof of U.S. citizenship. Under 29 C.F.R. 40.51(p), I note, employers such as respondents have the duty to "refrain from recruiting, employing or utilizing with <u>knowledge</u> the services of any person who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment. . .". (emphasis added) In this case, Mr. Donaldson's "certification of residence, proof of age "form clearly indicates he was born in the United States and therefore he is a U.S. citizen. See U.S. Constitution, Art. XIV. Because of such showing Mr. Pitzer clearly would not have violated his duty in hiring Mr. Donaldson. Furthermore, the fact that Mr. Brown and others who had sufficient proof of U.S. citizenship were not hired further supports a conclusion that insufficient proof of U.S. citizenship was not the real reason for not hiring Mr. Donaldson. Under the circumstances I must conclude respondents violated their assurances made pursuant to Section 655.203.

Section 658.401(a)(l) states, "the types of complaints (JS related complaints) which shall be handled to resolution by the JS complaint system are as follows: (i) Complaints against an employer about the specific job to which the applicant was <u>referred by the JS</u> involving violations of the terms and conditions of the job order or employment-related law . . ." (emphasis

added) Since Mr. Donaldson was referred by the JS system his complaint clearly comes within the Job Service Complaint System. Although the Job Service regulations do not specifically enumerate the remedial powers of the state hearing official, the Regional Administrator and the DOL Administrative Law Judge, these individuals do possess broad authority to undertake any actions or impose any sanctions which are consistent with the effectuate the purpose of the Act and Regulations. See Section 658.418(a)(4), Section 658.425(a)(4). An integral and vital component of such complaint system, whether or not directly expressed, is the ability to provide redress for any actions which constitute violations under that system. If an applicant failed to get employment due to an employer's violation of assurance, one traditional remedy to satisfactorily resolve his complaint is to award monetary damages, based on what he would have earned had there been no violation.

The Regional Administrator awarded Mr. Donaldson monetary damages of $558.50. As his decision indicates, this amount is based on $3.60 hourly rate set by the job order and the number of working days Mr. Donaldson could reasonably have worked until the expiration of the job order period, November 15, 1980. This amount also takes into account mitigation of damages in the amount of $470.75 representing Mr. Donaldson's earnings between October 2, 1980 and November 15, 1980.

However, Section 655.202(b)(6)(1), 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-fourth of the work days of the total period during which the work contract and all the extensions thereof are in effect, beginning with the first work day 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 (emphasis added).

Based on my calculation there were 6 weeks and 2 days from October 2, 1980 (the date Mr. Donaldson sought employment) to November 15, 1980. The job order, in question specifies 8 hours of work per day and 45 hours per week. Since the hourly rate was $3.60, had Mr. Donaldson been hired he would have had a guaranteed pay, during this period, of $771.75. Since he earned $470.75 during the same period, the monetary damage award should be $301.00

Gignac v. Tri-County Labor Camp Inc. and Russell Pitzer

Findings of Fact and Conclusion of Law

This case involves the same respondents and written assurance, as in Donaldson. By referral from the Martinsburg Office of WVDES, Complainant, Mr. Edward Gignac, went to Tri-County Labor Camp on October 3, 1980 seeking employment, and he was interviewed by Mr. Russell Pitzer. Mr. Gignac showed Mr. Pitzer his "declaration of citizenship" form but Mr. Pitzer stated he could not hire him until he could confirm his references in writing. Since Mr.

Gignac did not obtain employment he filed a complaint on October 6, 1980. After the complaint was investigated, the state monitor advocate held on December 18, 1980 that respondents violated the written assurances and therefore JS services to Tri-County would be discontinued. The respondents did not request a hearing before a state hearing official as they had such right under 658.502 (a)(3)(v). However, since Mr. Gignac did not obtain monetary award, he requested a decision from a state hearing official on the question of monetary damages, without a hearing. On November 24, 1980, state administrative law judge Gary Johnson issued a decision, holding he has no authority to award monetary award. On December 16, 1980 Mr. Gignac appealed Judge Johnson's decision to the Regional Administrator. On March 2, 1980 the Regional Administrator issued a decision, holding Respondents violated the written assurances and Complainant was entitled to the monetary award. The Regional Administrator further held that unless there was timely request for hearing before DOL Administrative Law Judge, all JS services to Respondent would be terminated if respondents did not satisfactorily resolve the complaint with complainant and give adequate assurance of no future violations.

In the appeal of the Regional Administrator's decision, Respondents submitted documents in support of their arguments. One document is a letter dated June 24, 1981 from Robert A. Hallowell, officer in charge of the Immigration and Nationalization Service in Pittsburgh. Since this letter states Mr. Edward Gignac was born in Canada and is a lawfully admitted permanent resident, Respondents apparently argue Mr. Gignac is not a U.S. citizen and therefore not entitled to employment under the written assurance. In response to this argument, Complainant submitted Mr. Hallowell's subsequent letter dated July 27, 1981 stating there are two Edward Gignacs and Complainant is not the Edward Gignac identified in his previous letter. The other document submitted by Respondents is a letter dated July 29, 1981, from Mr. John A. Canfield, Commissioner of West Virginia Department of Employment Security, to Mr. Russell Pitzer. This letter states that because of Mr. Pitzer's written assurances, the JS services have been restored on July 22, 1981. Based on this letter, Respondents now apparently argue that there is a final determination by the state authority of no violation of assurances. But as Complainant correctly points out, Commissioner Canfield's letter did not deal with monetary award in this case; furthermore Commissioner Canfield's decision to restore JS services was made ex parte, without Complainant's knowledge or participation. Commissioner Canfield's decision made under such circumstances surely can not have a binding effect in this case. For these reasons, I must reject respondent's argument.

Under 29 C.F.R. 40.51(p)(xi) the "declaration of citizenship" form Complainant showed Mr. Pitzer is an acceptable evidence of U.S. Citizenship. Having considered the entire record in this case, I must conclude respondents violated the written assurances required by Section 655.203.

Since the Complainant was referred by WVDES to Tri-County, his complaint clearly comes within the JS Complaint System. Section 658.401. In such situation, I have already concluded that the State hearing official, Regional Administrator, and DOL Administrative Law Judge, have broad authority to impose sanctions, including the authority to award monetary damages to Complainants wronged by violation of assurances made under Section 655.203. The Regional Administrator has awarded monetary damages of $990.00, based on the $3.60 hourly

rate and the number of workdays complainant could reasonably have worked until the expiration of the job order period, November 15, 1980. Based on my calculation, the time period from October 3, 1980 to November 15, 1980 is 6 weeks and 1 day. However, as in Donaldson, the employer only guarantees work for three-fourth of the workdays, by virtue of Section 655.202(b)(6)(i). Based on a 45 hour workweek and 8 hour workday, Complainant therefore is entitled to a monetary award of $748.80, based on my computation.

Since the complaints in Donaldson & Gignac fall within the JS Complaint System, 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. The appropriate restitution is Mr. Donaldson's lost wages of $301.00 and Mr. Gignac's loss wage of $748.80. This remedy is neither unreasonably harsh on the respondents nor inappropriate under the present circumstances. The respondents violated Job Service regulations and they are now liable for monetary damages. Discontinuation of services merely acts as a further incentive for the employer to make prompt restitution to the complainants and to undertake timely implementation of any necessary corrective action. Reinstatement of employment services, of course, occurs at the time that the respondents prove they are in full compliance with the terms of this Decision and Order. If the respondents 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.

Robert Ackerman (Complaint) v. Mount Levels Orchards and Homer Feller (Respondents)

Findings of Fact and Conclusion of Law

Respondent, Mount Levels Orchards, filed an application for temporary labor certification, on June 2, 1980 for the apple harvest season, September 10, 1980 to November 15, 1980. The written assurance required under Section 655.203 was signed by Mr. Homer Feller. In the first week of June 1980, Complainant, Mr. Robert Ackerman, and three others, went to Mount Levels Orchards seeking employment. They did not see Mr. Feller but saw Ms. Diane Lee, a secretary. Mr. Ackerman and the three others returned to Mt. Levels Orchards about two weeks later and at that time they were told to come back around July 4, 1980. On July 4, 1980 they returned but were told there was no work available. At that time they left a phone number with Ms. Lee to call if there was work. Although Mt. Levels Orchards never called Mr. Ackerman or the three others it used a substantial number of foreign workers for the apple harvest season. Because Mr. Ackerman did not obtain employment, he filed a complaint against the respondents on November 10, 1980. This complaint was investigated, and on March 12, 1981, the state monitor advocate found no basis for the Complaint. As result of this determination Mr. Ackerman requested a hearing before a state hearing official on March 23, 1981. Such hearing was held by state Administrative Law Judge Gary Johnson on September 2, 1981. In Judge Johnson's decision dated November 24, 1981, he held there was violation of the

assurance made under 655.203 but he had no authority to award monetary damages. Because of this split decision, Mr. Ackerman filed an appeal to the Regional Administrator on December 28, 1981 and Respondents an appeal on December 29, 1981. In his decision dated March 3, 1982, the Regional Administrator held that the respondents violated their assurances and that the Complainant is entitled to monetary award. The Regional Administrator held that unless there was a timely request for a hearing before DOL Administrative Law Judge, all JS services would be terminated in 20 workdays if respondents did not make adequate monetary restitution to Complainant and adequate assurances that there will be no future violation.

In their appeal of the Regional Administrator's decision, the respondents have submitted written documents in support of their various arguments. The documents are: a letter dated December 24, 1981 from Mr. William Loy, the respondent's counsel, to Mr. John Canfield, Commissioner of West Virginia Department of Employment Security; a letter dated January 9, 1982 from Commissioner Canfield to Mr. Loy; a letter dated February 1, 1982 from Mr. Loy to Mr. Jack Friedman, chief counsel of West Virginia Department of Employment Security and; a letter dated February 11, 1982 from Commissioner Canfield to Mr. Homer Feller. A reading of these letters would indicate: that after Judge Johnson's decision on November 24, 1981, Respondents' counsel requested a meeting with Commissioner Canfield in order to present evidence to show there was full compliance with assurances contained in the job order; that in response Commissioner Canfield offered respondents such meeting to present evidence; that a meeting was held on January 20, 1982 with Commissioner Canfield and Chief Counsel Friedman to present evidence and; that on February 11, 1982 Commissioner Canfield decided to accept respondents' assurances given at the January 20, 1982 meeting and would certify to restore all JS services. Based on the above described letters, respondents apparently argue that since Judge Johnson's decision was reversed by Commissioner Canfield, the Regional Administrator was in error when he affirmed Judge Johnson's decision on the violation of assurance aspect.

I note that under Section 658.418(c) the decision of a state hearing official is to be directly appealed to the Regional Administrator. Consequently Judge Johnson's decision is not subject to review by a higher state official, such as Commissioner Canfield. It also cannot be overemphasized that Judge Johnson reached his decision on the basis of the record of a hearing in which both respondent and Complainant appeared in person and by counsel, whereas the respondent's meeting with Commissioner Canfield was without Complainant's knowledge or participation. An ex parte decision made under such circumstance surely cannot have any binding effect in this case.

There is no dispute that Mr. Ackerman and the three others never sought employment from Mr. Feller personally. However, there was conflict in various witnesses' testimony as to how many times Mr. Ackerman and the three others saw Ms. Lee, although she admittedly saw them at least once in June, 1980. Under these circumstances, respondents apparently argue that I must conclude there was no intentional violation of the assurance simply because Ms. Lee, a low level employee, failed to telephone Mr. Ackerman and the three others. The difficulty with this argument is that under the written assurance signed by Mr. Feller, he agreed to cooperate in the active recruitment of U.S. workers and he should have expected job applicants would visit his

business premises and speak to someone, in his absence. In addition, Judge Johnson, who conducted the hearing and had the opportunity to determine witnesses' credibility, found as a fact that Ms. Lee saw Mr. Ackerman and the others more than once, that on July 4, 1980 she wrote down a phone number and agreed to call should jobs became available and that there was never any attempt to made such call. There was no evidence that what Ms. Lee did was not authorized by Mr. Feller.

Respondents' final argument is that the present lawsuit is an "entrapment" initiated by Complainant's counsel, Mr. Gary Geffert. In support of this argument, they point to Complainant's testimony at Judge Johnson's hearing that the Complaint was filed because Mr. Geffert was looking for someone who had a "runaround" with Mr. Homer Feller. To my knowledge, "entrapment" is a defense only in a criminal case, and this is not such case. Further, there is no evidence that Mr. Geffert "entrapped" respondents to do what they did in regard to Complainant's employment.

Unlike Donaldson & Gignac, Mr. Ackerman did not visit Mount Levels orchards by referral from the Job System. For this reason his complaint does not come within the JS Complaint System. (Section 658.401(a)(l)) and there is no authority at the state level or federal level to award monetary damages. The Regional Counsel however is authorized to terminate JS services if he should determine there was violation of the written assurances and such determination is appealable to DOL Administrative Law Judge. Section 655.210(a). For the reasons stated above, I must conclude there was such violation.

ORDER

1. Respondents, Tri-County Labor Camp, Inc. and Russell Pitzer, are notified that all JS services will be terminated in twenty working days unless (1) $301.00 monetary damage is paid to Complainant, Lucius Donaldson, and monetary damage of $748.801 is paid to Complainant, Edward Gignac and adequate assurances is provided that any policies, procedures or conditions responsible for the violations have been corrected and the same or similar violations are not likely to occur in the future.

2. Respondents, Mount Levels Orchards and Homer Feller, are notified that all JS services will be terminated in twenty working days unless adequate assurance is provided that any policies, procedures or conditions responsible for the violation have been corrected and the same or similar violation are not likely to occur in the future.

VICTOR J. CHAO
Administrative Law Judge

Dated: MAY 5 1983
Washington, D.C.

VJC:crg