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

DATE: February 28, 1987
CASE NO. 86-TAE-2

IN THE MATTER OF:

GOLDEN HARVEST FARMS, INC.
AND ALAN J. GROUT, PRESIDENT
Complainants

against

WILLIAM E. BROCK, SECRETARY OF
LABOR, UNITED STATES DEPARTMENT
OF LABOR
Respondent

Alan J. Grout, pro se
For the Complainants

Leslie Paul Brody, Esq.
For the Respondent

BEFORE: DAVID W. DI NARDI
Administrative Law Judge

DECISION AND ORDER

This is a claim for disciplinary measures under the Immigration & Naturalization Act (The "Act") 8 U.S.C. §1101 et seq. and the regulations promulgated thereunder, specifically 20 C.F.R. §655.200, et seq. The hearing was held -- on May 28, 1986 in Albany, New York, at which time all parties were given the opportunity to adduce testimony, offer documentary evidence and make oral arguments. The following references shall be used herein: TR for the official hearing transcript, CX for Respondent's exhibits and RX for complainants' exhibits.

The following post-hearing evidence (with the exception of . RX 10) has been admitted into the record:

NUMBER	ITEM	FILING DATE
RX 10	Summation of Alan J. Grout's Opening Statement. (for identification only)	5/28/86
C X 6	Thomas E. Hill's June 4, 1986 letter to Lillian Roberts, Commissioner, New York State Department of Labor.	6/9/86
RX 11	Complainants' Proposed Findings of Fact.	6/20/86
CX 7	Respondent's Proposed Findings of Fact and Conclusions of Law.	7/l/86

STIPULATIONS

The testimony of Mr. John Castellani, Regional Director of the Office of Employment and Training Administration, was stipulated into evidence at the hearing.

ISSUES

The unresolved issues are:

1. Did Complainants' temporary labor certification application operate as a completed contract between Complainants and the United States Department of Labor?

2. Did Complainants effectuate a unilateral change in the terms and conditions of this contract?

3. Did Complainants have the authority to make this unilateral change? Was this unilateral change:

    a) a breach of the parties completed contract;
    b) a violation of the regulations concerning the amending of such applications?

4. Are Complainants amenable to sanctions pursuant to 20 C.F.R . §655.210(a)?

For the reasons stated herein, the Court finds that the application operated as a completed contract between Complainants and the United States Department of Labor and that the Complainants had no authority to effectuate a unilateral change in its terms and conditions. The Court further finds that Complainants' unilateral change in the methodology of payment breached

the parties completed contract and violated the relevant regulations, thus subjecting Complainants to the sanctions provided in 20 C.F.R. §655.210(a).

SUMMARY OF THE EVIDENCE

On April 19, 1985, Alan J. Grout, President of Golden Harvest Farms, Inc., (herein jointly referred to as Complainants) submitted to the New York State Department of Labor Service Division a temporary labor certification application in order to recruit alien migrant workers for the 1985 apple harvest season. (RX 9) This application, which was approved in its entirety by Regional Administrator Thomas E. Hill, consisted of a clearance order, a signed set of employer assurances and an application for alien employment certification. See 20 C.F.R. §655.201(a)(l) and (b)(l). In the clearance order, Complainants requested a total of twenty workers to report to Golden Harvest -Farms for the period of August 15, 1985 through November 15, 1985 and agreed to pay them on a piece rate basis - $.46 per 1 1/8th bushel of apples - with the guarantee that all workers would receive hourly the 1985 adverse effect wage rate (AEWR) whenever it was established. (RX 9, Item 9)

On August 6, 1985, Mr. Grout notified the local job service office of the New York State Department of Labor that he wished to amend his clearance order. (TR 109; RX 2) On August 13, 1985, Raymond C. Seiger, Clearance Supervisor for the local office, sent this request to the attention of Ralph Muniz, at the Regional Office of the Employment Training Administration (ETA) of the United States Department of Labor (USDOL) and also telephoned Mr. Muniz that this request would be forthcoming. (TR 110; RX 3) On August 15, 1985, when the migrant workers reported to the Complainants' orchard, Mr. Grout informed them of a different method of payment - from the piece rate referenced herein to an hourly rate of $4.32 (the AEWR for 1985) plus a bonus of $.50 per 1 1/8th bushels in excess of ten 1 1/8th bushels picked per hour. (RX 1) In a letter dated August 12, 1985 and received in the Regional Office of ETA on August 19, 1985, Mr. Grout officially notified the Regional Office of his desire for this change. (TR 39, 50; CX 2 611; RX 9) Mr. Seiger telephoned Mr. Muniz again on August 20, 1985 as a follow up to the situation and was informed that no action as yet had been taken, because John Castellani, Regional Director, was away from his office on official business. (TR 39-40, 51, 110)

On or about August 26, 1985, Mr. Castellani returned and was informed by Mr. Muniz of the Complainants' requested change. (TR 40-41, 100) Mr. Castellani then contacted John Hancock, the USDOL's expert on temporary labor certification, at his office in Washington, D.C. Mr. Hancock informed Mr. Castellani, on August 29, 1985, that the amendment "could not be approved under any circumstances." (TR 101; see also TR 41-42) Briefly, the ETA's position was that the request was not timely, as the agency did not have the required eighty day time limit, pursuant to 20 C.F.R. §655.201(c), to retest the labor market for the adverse effect rate and the effect on domestic workers attributable to the change from a piece rate to an hourly rate. (TR 43, 100-102) Later that day, Mr. Castellani telephoned Mr. Seiger, reported to him that Complainants' request could not be granted and briefly outlined the ETA's position. (TR 47, 101, 110) On August 30, 1985, Mr. Castellani sent Mr. Seiger written confirmation of this telephone call and further articulated the ETA's position. This correspondence provides in pertinent part:

> [w]e cannot accept this amendment since Part 655 . . . indicates a determination MUST be made as to "whether the employment of aliens for such temporary work will adversely affect the wages or conditions of similarly employed U.S. workers." Given the circumstances surrounding this situation, we must advise there is sufficient time to make a determination of this nature (CX 2 Part II; see also TR 49)

At this point, a disagreement developed between federal and state agencies involved in this matter. Mr. Castellani stood firm in his denial of the request and Mr. Seiger felt the request should be granted as he opined that it had been submitted timely and that the migrants would receive more money for their work. (TR 102, 110; contra TR 111) Mr. Seiger and his superior, Mr. Masterson, returned the letter of August 30, 1985 to Mr. Castellani, advising him that his interpretation of the regulations was incorrect; Complainants had the right to amend unilaterally the clearance order; and that once such an amendment was requested it became "part and parcel" of the clearance order. (TR 118, 126-127, 137) Mr. Seiger further informed Mr. Castellani that this agency could not effectuate the denial as there was no mechanism to afford Complainants a hearing on this matter. (TR 103, 111; RX 3)

Mr. Castellani then wrote to Mr. Grout, on September 13, 1985, giving him direct notice of the denial of the requested amendment. (RX 8) This commenced a chain of written correspondence and verbal communications between Mr. Castellani and Mr. Grout, which chain is essentially repetitive of the facts on or about September 13, 1985 (RX 8); September 18, 1985 (RX 7); October 9, 1985 (RX 6); October 28, 1985 (RX 5); and December 12, 1985 (RX 3, 4). Finally, on January 6, 1986, Regional Administrator, Thomas E. Hill informed Mr. Grout that his unilateral change in the methodology of payment since August 15, 1985 violated 20 C.F.R. §655.210 and that he would be ineligible for a temporary labor certificate for the 1986 harvest season, clearly explaining the reasons therefor. (RX 4) Complainant Grout requested a hearing and reiterated his position. (RX 3) On February 19, 1986, pursuant to 20 C.F.R. §658.424 the file was forwarded by Mr. Hill to the Office of Administrative Law Judges for a formal hearing. (CX 1)

On the basis of the evidence presented and the entire record, this Court makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Immigration and Naturalization Act (the "Act"), 8 U.S.C. §1101 et seq., regulates the admission of aliens into the United States and provides at 8 U.S.C. §1101(a)(15)(H)(ii) that selected aliens may be granted visas to work temporarily in the united States. Typically, these selected persons are migrant agricultural workers who are recruited for a specific harvest season and are employed only after the Attorney General, through the Immigration and Naturalization Service, determines that no United States workers are available to fill the job opportunities in question and that the wages of United states workers in similar positions will not be adversely affected. 8 C.F.R. §214.2(h)(3)(i); 20 C.F.R. §655.0(a)(l).

An employer seeking to hire such migrants must file a temporary labor certification application consisting of the application (20 C.F.R. §655.201), a set of assurances (20 C.F.R. §655.203), and a job offer (20 C.F.R.§655.202) with the local office of the United States Employment Services (USES) at least eighty days in advance of his date of need - usually the anticipated date the harvest season will commence. 20 C.F.R. §655.200(a). During this time period, USES and the ETA utilize an intra and interstate clearance system within which they use the job offers to recruit united States workers for the anticipated number of available positions. 20 C.F.R. §655.205(a). Only after it has exhausted this avenue and determined that the hiring of foreign migrants would not adversely affect the conditions of the united States workers' labor market, does the system approve the employers as "criteria" employers and certify the hiring of migrants. 20 C.F.R. §655.206(a).

It is the conclusion of this Court that an approved application operates as a completed contract between the filing employer and the USDOL, subject to its stated terms and conditions. This is also the position of the USDOL (TR 162) and the clear understanding of Mr. Grout. (TR 164) Moreover, 20 C.F.R. §655.202 repeatedly refers to the "work contract." Thus, this Court has no hesitation in finding that Complainants' fully approved temporary labor certification application operated as a completed contract between Complainants and the USDOL.

The terms and conditions, specifically the method of payment, in Complainants contract mandated that Complainants were to pay the migrants $.46 per 1 1/8th bushel of apples picked, i.e., a piece-rate basis. (RX 9, Item 9, Pages 1, 3, 11) Complainants further agreed that "an hourly rate of not less than the current year's adverse effect rate is guaranteed to the worker for the period of employment" and "to pay all workers employed in the 1985 season at the 1985 AEWR when it is established." (RX 9, Item 9, Page 2) Clearly, the Complainants' agreed method of payment was by piece-rate, with the stipulation that the migrants' total earnings, when viewed at hourly intervals, would equal the 1985 AEWR. The AEWR is the wage rate which the Administration of USES has determined, at a minimum, must be offered and paid to migrants so that the wages of similarly situated United States workers will not be adversely effected. 20 C.F.R. §655.200 (b). The AEWR for 1985 was $4.32. (TR 163).

Although Complainants are correct in the contention that hourly rates are listed alongside the piece-rates, (TR 74; R X 3) these reflect estimated hourly rates received from the employer/applicant and not the AEWR. Accordingly, there is no question that Complainants' contract, when viewed in its entirety, required that the Complainants pay the migrants on a piece-rate basis and not solely the hourly AEWR. Complainant Grout's August 12, 1985 written request for an amendment of the wage rates to the hourly AEWR plus bonuses (RX 9, Page 18) only serves to further clarify the proper interpretation of Complainants' original clearance order. As Complainants introduced the revised method of payment on or about August 15 or 16, 1985 (CX 4, 5; RX 71, this Court finds that Mr. Grout commenced his actions without the prior approval of the ETA (TR 39, 50) and in subsequent violation of the Regional Administrator's formal denial of the request. (CX 2 Part II; RX 4) Thus, by the nature of Mr. Grout's conduct, referenced herein, it is abundantly clear to this Court that Complainants effectuated a unilateral change in the terms and conditions of the completed contract.

Although Complainant Grout does not seriously dispute the nature of his actions, he does contend that he has the authority to effectuate such a unilateral change. In reliance on his claimed authority, Mr. Grout asserts that the clearance order, specifically Item Five and Item. Nine, afford him the authority to amend unilaterally. (RX 2, 5) Item Five states:

> Because this order is processed well in advance of the period of employment the stated period . . . is approximate and subject to change. The employer will immediately notify the order holding office of any factors that change the terms and conditions of employment.

Without question, this language refers exclusively to the period of employment and not the method of payment. The appropriate interpretation of Item Nine already has been discussed. Not only are Mr. Grout's arguments flawed, but also his actions belie the position he now asserts. One claiming the authority to effectuate unilaterally a change certainly would not seek permission to amend as such. Thus, Complainants' unilateral change in the method of payment breached the terms and conditions of the completed contract.

At trial, it was Complainants' position, through the testimony of Mr. Seiger, that as soon as an amendment is forwarded to ETA, it becomes "part and parcel" of a clearance order and automatically effectuated. (TR 118, 126-7, 137) However, a painstaking review of the relevant statute, regulations and case law reveals no authority for this position. Thus, this Court concludes that the only means by which an employer can amend a clearance order is in accordance with the regulations.

20 C.F.R. §655.00 states in part:

> Pursuant to the regulations under this part, temporary labor certification determinations are ordinarily made by the Regional Administrator of an Employment and Training Administration region.

Taken to its logical conclusion, the Regional Administrator is the proper authority from whom to seek amendment of a clearance order, pursuant to a permissive however, do make one exception:

> Applications may be amended determination to increase the request. The regulations, at any time prior to RA number of workers requested in the original application for labor certification by not more than 15 percent without requiring an additional recruitment period for U.S. Workers. Requests for increases beyond 15 percent may be approved only when it is determined that, based on past experience, the need for additional workers could not be foreseen and that a critical need for the workers would exist prior to the expiration of an additional recruitment period. 20 C.F.R. §655.201(d)

As this is the only stated exception and as Complainants' situation does not fall within its perimeters, it is inapplicable to the instant case.

To support the claim of inherent authority, Complainants rely on 20 C.F.R. §653.502(a), (RX 2) which provides in pertinent part:

> If a labor demand State agency learns that a crop is maturing earlier than expected or that other material factors, including weather conditions and recruitment levels, have changed, the agency shall immediately contact the labor supply State agency, who shall in turn immediately inform crews and families scheduled through the JS clearance system of the changed circumstances and adjust arrangements on behalf of such crews of families.

However, this provision specifically refers to the authority granted to State agencies and not the unilateral authority of an individual employer. Similarly, Complainants cite 20 C.F.R. j655.201(e) which notes:

. .. In emergency situations, however, the RA may waive the time period specified in this section on behalf of employers who have not made use of temporary alien workers for the prior year's harvest or for other good and substantial cause, provided the RA has sufficient labor market information to make the labor certification determinations required by 8 CFR 214.2(h)(3)(i).

However, this provision also refers to the authority of another the Regional Administrator. Additionally, both provisions refer to alterations of procedure prompted by material and extenuating circumstances. Nowhere in Complainants' evidence or in Mr. Seiger's testimony are emergency or extraordinary circumstances cited as reasons for amending the method of payment. Moreover, Mr. Grout objected to taking the witness stand on his own behalf. (TR 146) [Although cautioned by the Court that these areas were important to the case and that Mr. Grout could avail himself of the opportunity to clarify the record, (TR 14811 Complainant Grout stated only that this change was an "advantageous option" (RX 5) and Mr. Seiger, Complainants' only witness, did not articulate any reason for the proposed amendment. (TR 135)

20 C.F.R. §655.201(e) crystallizes the essence of the ETA'S position in denying Complainants' request. The Regional Administrator may Only Waive the eighty day time period if he has sufficient information to make the factual determinations in 8 C.F.R. §214.2(h)(3)(i) and 20 C.F.R. §655.0(a)(l). AS Complainants' request was received in the Regional Office on August 19, 1985 - after the commencement of the apple harvest season - Mr. Hill was well within his authority to deny this request on the basis that "there was not sufficient time to make [these] determinations." (RX 4)

The overriding purpose of the "Act" and the regulations at 20 C.F.R. §655 is to ensure that United States workers, rather than alien migrants, are employed whenever possible, Arizona Farmworkers Union v. Buhl, 747 F.2d 1269 (9th Cir. 1984); Flecha v. Quiros, 567 F.2d 1154 (1st Cir. 1977), and that the employment of these migrants does not adversely affect the wages of United States workers similarly employed. Williams v. Usery, 531 F.2d 305 (5th Cir. 1976); 20 C.F.R. §655.0(a)(l). It is for these reasons that an eighty day testing period is afforded the ETA. To allow an individual employer the opportunity to amend unilaterally the method of payment

contractually stated in his clearance order and job offer, at a time after it has been filled, would not only undermine the mandated authority of the Regional Administrator, but also eviscerate the purposes of the "Act" and the implementing regulations. Thus, Complainant Grout's conduct, regarding the means by which he effectuated a change in the method of payment, violated the regulations concerning the amending of temporary labor certification applications.

Factored into the Court's findings are certain issues, which, although tangential, deserve brief mention. The Court finds irrelevant the number of applications and amendments Mr. Seiger has processed and their ultimate resolution. This does not alter the Regional Administrator's position to make these determinations or his authority to act on those determinations, consistent with the regulations. Mr. Grout should have dealt with Mr. Hill, not Mr. Seiger, and should have placed no reliance on Mr. Seiger's past experience with clearance order amendments. Mr. Grout's past experience with these matters and his personal familiarity with the relevant regulations prevent him from asserting a contrary position. This Court further deems irrelevant to its findings the issue of which method of payment results in higher wages. Sufficient for this Court is the evidence necessary to establish Mr. Grout's lack of authority to effectuate a unilateral change.

Mr. Grout seems to contend vaguely that the denial of his prior requests for a hearing has prejudiced him. [TR 13; RX 2] As Mr. Grout was ultimately afforded a hearing on May 28, 1986 with the opportunity to present all relevant evidence and as Mr. Hill has stayed the imposition of penalties prescribed in 20 C.F.R. §655.210(a) pending this Court's decision, (CX 6) no prejudice has accrued to Complainants.

As a further note, Mr. Grout contends that the regulations afford only the Regional Administrator, Mr. Hill, the authority to act on these matters and not Regional Director Castellani. (TR 76; RX 3) Although Mr. Grout may be technically correct, there is no significance as to whether Mr. Hill himself or Mr. Castellani, his representative, made the determination or signed the final documents. while the sub-delegation of administrative power vested in particular governmental officers is limited in scope, a certain amount of such delegation is permissible and necessary for a governmental agency to operate. Thompson v. Department of the Treasury, 533 F. Supp. 90 (D. Utah 1981). "Allowing [it] permits, and may effectively cause, a more thorough examination by the decision-maker." Ashwood Manor Civic Association v. Dole, 619 F. Supp. 52, 65 (D. Pa. 1985). The sub-delegation of decision-making which occurred in the instant case, from Mr. Hill to Mr. Castellani, was neither arbitrary nor capricious nor prohibited by the legislative intent of the Act. Furthermore, Mr. Hill, by a letter dated January 6, 1986 (RX 4), later adopted the findings of Mr. Castellani, thus ratifying Mr. Castellani's conduct and decision.

On the basis of the foregoing, this Court must reach the issue of sanctions appropriate for Complainants' conduct. 20 C.F.R. §655.210(a) provides:

> If the RA concludes that the employer has not complied with the terms of the labor certification, the RA may notify the employer that it will not be eligible to apply for a temporary labor certification in the coming year.

The employer is amenable to no other penalty. See 20 C.F.R. §655.210(b). As Regional Administrator Hill stayed the imposition of penalties pending this Court's decision, the Complainants will not be eligible for temporary labor certification of alien migrant workers for the 1987 harvest season because the Complainants have violated the terms of their 1985 temporary labor certification.

ORDER

It is therefore ORDERED that Golden Harvest Farms, Inc. and Alan J. Grout, Complainants herein, will not be eligible for temporary labor certification of alien migrant workers for the 1987 harvest season.

DAVID W. DI NARDI
Administrative Law Judge

Dated: FE8 28 1987

Boston, Massachusetts

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NOTICE OF APPEAL RIGHTS

Any party dissatisfied with this Decision and Order may contest any denial before the Immigration and Naturalization Service (INS) pursuant to 8 CFR §214.2(h)(3)(i). See 20 CFR §655.201(C).