

U.S. Department of Labor

Office of Administrative Law Judges
Washington, DC



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IN THE MATTER OF

MR. AND MRS. PEDRO OLIVO,
ET. AL.,
Complainants,

Date: 9 AUG 1985

Case No. 85-JSA-1

v.

NORMAN EGER

Job Service North
Dakota No. JS-1-84

and

JOB SERVICE NORTH DAKOTA,
Respondents.

Appearances:

Harold Menendez, Esq.
Legal Action of Wisconsin, Inc.
For Complainants

Gary L. Dreier, Esq.
Glinski, Haferman, Ilten,
Mills & Dreier, S.C.
For Respondent
Norman Eger

Michael J. Wilma, Esq.
Assistant Attorney General
For Respondent
Job Service North Dakota

Margaret A. Miller, Esq.
Office of the Solicitor
U.S. Department of Labor
On Behalf of
Employment and Training Administration,
U.S. Department of Labor

ment and held that Job Service North Dakota is liable for payment of a transportation allowance of \$160.00 per family, a total of \$960.00, which sum is not to be paid from Federal Funds. Job Service North Dakota requested a Formal Hearing before an Administrative Law Judge of the U.S. Department of Labor on March 25, 1985. The complete hearing file was directed to the Office of Administrative Law Judges on April 15, 1985 by the Regional Administrator in accordance with 20 CFR 658.424(a)(2). Complainants' appeal, limited to a finding that their "expectations that transportation expenses would be paid are not attributable to Eger or Job Service North Dakota, " filed with the Regional Administrator on April 8, 1985, was forwarded to the Office of Administrative Law Judges on April 15, 1985. Pursuant to 20 CFR 658.424(b), the parties, federal and non-federal, on May 14, 1985 were afforded, within the specified time frames, the opportunity to submit both legal arguments and supporting documentation to this Administrative Law Judge. The Motion of the Secretary of Labor for a time extension of ten(10) working days was granted on June 3, 1985.

A Brief was filed by Complainants' Counsel on June 24, 1985, by Job Service North Dakota on June 17, 1985 and by the Office of the Solicitor, U.S. Department of Labor on June 27, 1985. An order was issued on June 26, 1985 that a Decision would be issued on the record without an evidentiary hearing, as authorized by 20 CFR 658.425(b), since it appeared that the record was not lacking or deficient in any factual particulars and that only legal issues remained for resolution. Finally, on July 15, 1985, an Order was directed to all parties which terminated all conciliation rights at the end of the work day of August 9, 1985.

This decision is based on a careful and complete analysis and consideration of the entire record consisting of the State case file, the Federal case file and the Briefs of the parties.

Facts

-Norman

Eger, a Wautoma, Wisconsin farm operator, engaged in growing cucumbers for pickling, was unsuccessful in his attempts to find field pickers through Wisconsin Job Service. He telephonically communicated with the Grafton Office, Job Service North

Dakota in July 1.983 and thereafter travelled by aircraft to Grafton to recruit farm laborers. Moices Morones, Migrant Outreach Worker, Job Service North Dakota provided four migrant families for Mr. Eger after a local job order was taken, which was silent as to travel expense. Work agreements were executed and transportation expenses of \$160.00 to each of three(3) families and \$100.00 to one farm worker were paid by Norman Eger after it was agreed that the workers would arrive in Wautoma the I i.-5 -3.

Are transportation expenses incurred by interstate travelling migrant agricultural workers lawfully assessed against and payable by a State Job Service Agency which provided referral service to an out-of-state agricultural employer without an interstate clearance order being in full force and effect?

Conclusions of Law

ISSUE NO. 1

Norman Eger contends that he did nothing more and nothing less than to privately solicit workers for his own operation and that the Family Business exemption of the Act, therefore, is applicable and his activities protected. For unknown reasons, the Regional Administrator failed to address this issue. Nonetheless, the uncontradicted and uncontroverted evidence conclusively establishes that Mr. Eger did not privately locate and negotiate with migrant agricultural workers. Rather, he requested and received the services of Job Service North Dakota. Through Job Service, State Agency perSonnel, he met and contracted with Complainants. Thusly, he voluntarily subjected himself to the governing regulations under which a State Job Service must operate. While he may have received inaccurate, inadequate and/or Incorrect advice, direction and information from both Wisconsin Job Service and Job Service North Dakota, this fact is neither absolving nor does it detract from his demonstrated knowledge of the Regulations. He was obviously aware of the travel expenses requirement. To the first group of four(4) he made payment. To the last group of six(6), to and through a Job Service Outreach Worker, he unequivocally announced that he would not pay transportation costs. Clearly he was on notice and cognizant of the requirement which he sought to circumvent. I, therefore, are compelled to find, which I do without hesitation,, that Norman Eger is not exempt from the Act and the applicable regulations.

Issue No. 2

A stated purpose of the Act is "to assure necessary protections for migrant and seasonal agricultural workers" (29 U.S.C. 1801). Additionally, 20 CFR 653.501(d)(S) and 20 CFR 653.501(e)(l), as applied in this case, require the payment of travel expenses. To

deny transportation cost to the migrant worker not only offends the spirit and letter of the Act and Regulations, but is inequitable, if not unconscionable. I hasten to note that no party to this cause has argued that Complainants are not entitled to travel expenses and the fairness and adequacy of the amount set and determined by the Regional Administrator has not been a target for attack..I--7

-rules

and cannot be heard to complain when his avoidance tactics are determined to be ineffectual.

Scratching for supportive authority, Complainants suggest that 20 CFR 658.704 (Remedial Actions) permits the imposition of sanctions against Job Service North Dakota, which indeed it does. Neither this Regulation nor any other, however, provides that transportation expenses may be assessed against a State Agency. The solicitor relies upon 20 CFR 652.8 (more properly 20 CFR 652.8(9)(1)(1-v) for justification of the Regional Administrator's assessment of liability decision. Yet, the relevance of this section is questionable as it applies to the Job Training Partnership Act Amendments to the Wagner-Peyser Act (See 20 CFR 652.1(a)). While 20 CFR 653.501(a) does provide that a State Agency is not a party to any contract between an agricultural employer and migrant farmworkers and is not a guarantor of the accuracy and truthfulness of information contained in job orders, I find that Job Service North Dakota can take but limited solace therein and that 29 CFR 653.501(a) cannot be construed to preclude, effectively and finally, a sanction beyond what is specifically spelled out in 20 CFR 658.704. That a State Agency is neither a party to a contract nor a declaration guarantor does not, in my judgment, shield it from the inherent ability to exact reparations, whether directly expressed or not, for actions and failures which, as Complainant's aptly and appropriately note, "indicate a lack of regard for the Regulations and the rights of Complainants" (Complainant's Brief P. 14). Cautious and complete review and consideration of each Item of evidence herein and the applicable law directs the conclusion that transportation expenses may be assessed against both Job Service North Dakota and the Agricultural Employer, Norman Eger. Each is equally at fault and each shall equally right the wrong which it and he precipitated.

ORDER

It is ordered that:

1. Respondent, Job Service North Dakota, shall pay to Complainants, from non-Federal funds, the sum of \$80.00 per family for each of the six(6) Complainant-families for a total of \$480.00. Payment

shall be made within twenty (20) working days and the Regional Administrator shall be assured, in writing, that payment has been made. Respondent shall also fully and completely comply with any and every directive of the Regional Administrator designed to prevent any like or similar violation.

2. Respondent, Norman Eger, shall pay to Complainants the sum of \$80.00 per family for each of the six(6) Complainant-families for a total of \$480.00. Respondent shall not be the recipient of any.,