



DATE: MAY 27 1992

CASE NO: 92-JSA-2

In the Matter of:

GEORGE G. HENREY,
Complainant

v.

**ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS,
SYLACAUGA EMPLOYMENT SERVICE OFFICE,**
Respondent

Appearances:

George G. Henrey, Pro Se
Yvonne K. Sening, For the Solicitor

BEFORE: John M. Vittone
Deputy Chief Judge

DECISION AND ORDER

This matter arises under the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. § 49 et seq., and the Department of Labor regulations promulgated thereunder at 20 C.F.R. Part 658.

Procedural History

Complainant, George G. Henrey, filed a complaint against the Sylacauga Employment Service Office ("SESO") on April 10, 1991, alleging that SESO denied him an equal employment opportunity by not referring him to a pipefitter position at the Kimberly Clark Corporation. A hearing in the matter was conducted before a State Hearing Officer in the Alabama Department of Industrial Relations on August 1, 1991.

The Hearing Officer issued a decision on September 17, 1991. The Hearing Officer made the determination (1) that SESO had unintentionally violated its own policy in processing a job order by referring individuals who had been pre-selected by Kimberly Clark, but (2) that it had not been conclusively established that Complainant would have been referred if the job order had been properly processed, or that Complainant was more qualified than the individuals referred. Hearing Decision at p. 2. As a remedy, the Hearing Officer adopted SESO's offer to refer the Complainant to the first available job opening for which he is qualified.

Complainant appealed the state Hearing Officer's decision to the Regional Administrator ("RA") of the Employment Training Administration of the U.S. Department of Labor. In a decision issued on October 30, 1991, the RA found no violation of the Job Service regulations and adopted the findings and conclusions of the State Hearing Officer.

Complainant timely appealed the RA's decision to this Office on November 14, 1991, and requested a formal hearing. On February 7, 1992, by a Notice of Docketing, I ordered the parties to submit any legal arguments and documentation and notified the parties that a decision would be made whether to schedule a hearing or make a determination based on the existing record. Respondent filed a letter on March 4, 1992 contending that no additional hearing is necessary and that the RA's decision should be affirmed. No response has been received from Complainant.

Statement of Facts

The Sylacauga Employment Service Office is part of the Alabama Department of Industrial Relations. SESO acts as a job placement agency. In this regard, SESO retained an exclusive referral agreement with Kimberly Clark. Tr. 15. This meant that Kimberly Clark was supposed to conduct all of their hiring through SESO, and not through outside sources. Tr. 17-18.

The normal referral process begins when an individual comes in to SESO and completes an application, indicating any skills or trades. Tr. 14-15. Applicants are grouped or filed according to their trades. As in the case with an employer such as Kimberly Clark, there is a special screening form which interested applicants are required to fill out. Tr. 15. A separate file is kept for Kimberly Clark applicants according to specialty area. Tr. 15. According to the SESO office manager, there were approximately 50-60 pipefitter/welder applicants in the Kimberly Clark file.

When a job order is placed with SESO, the proper procedure entails SESO selecting the referrals from the appropriate file. It is not clear whether the selection is done randomly or based on qualification. The SESO office manager states that the selection is conducted on a random basis. Tr. 16-17. But the SESO employee who took the Kimberly Clark job order stated that selections could also be based on applicants' qualifications. Tr. 33-34. In any event, it is clear that the proper procedure is performed independently of the employer and does not entail accepting a list of pre-selected individuals from employer. See Tr. 22, 28.

The Complainant registered for work with SESO on February 22, 1991. A pipefitter and a welder by trade, he filled out a screening application for referral to Kimberly Clark. Tr. 7, 40.

On March 20, 1991, at approximately 4:30 p.m., a SESO employee received a job order over the phone from Kimberly Clark. Tr. 33, 40. The order was for approximately 20 pipefitters to work during a plant shutdown. Tr. 15, 48. Kimberly Clark informed the employee that it was a "rush job" and gave her a list of names of approximately 20-30 pipefitters that it wished to have referred to interview the next day. Tr. 15-16, 21-22, 35, 38, 48. The pre-selected applicants were to report to SESO the following morning at 8:00 a.m. The SESO employee who took the job

order apparently was not familiar with the rules and policies governing job orders. Since the SESO employee who took the job order was to be absent from work the following day, the list was left for another employee to act upon.

Early the next morning at approximately 8:00 a.m., the pre-selected applicants reported to SESO, registered and obtained referral cards, and then reported to Kimberly Clark for an interview. Tr. 42-43. The Complainant was not among the applicants requested by Kimberly Clark, and was not otherwise referred to Kimberly Clark.

When the SESO office manager discovered the fact that Kimberly Clark had submitted the list of pre-selected applicants to be referred, and that the applicants were not selected by proper SESO procedures, the job order was revoked and credit for the job placement was not taken. Tr. 22, 49: Subsequently, SESO held meetings with the personnel officials at Kimberly Clark to reiterate the proper referral procedures. Kimberly Clark officials were informed that designating individuals was not an acceptable practice and that SESO would have to make selections on any future referrals. Tr. 28.

Even if the proper referral procedure had been followed, however, there was no assurance that Complainant would have been referred to Kimberly Clark. Tr. 28. Kimberly Clark wished to hire 20 pipefitters, but there were approximately 60 applicants alone in SESO's Kimberly Clark file. Tr 16. Nor was there any assurance that Complainant would have been hired, even if he had been referred for an interview. Tr. 28. Kimberly Clark alone & made the actual hiring decision on any applicant referred by SESO. Tr. 23.

Discussion

The first issue is whether to hold an additional hearing in this matter or make a determination on the existing record. See 20 C.F.R. § 658.424(b).

Within the federal system, the Administrative Procedure Act ("APA") establishes some minimum standards for administrative adjudications, or formal hearings, but only when "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a). This means that the APA's formal adjudication procedures are mandatory only when a statute directs the agency to conduct an evidentiary hearing in adjudicating particular kinds of cases. In this case, though, there is no requirement under the Wagner-Peyser Act for the Department of Labor to conduct an evidentiary hearing in adjudicating this type of case.

Even though the Wagner-Peyser Act is silent about a hearing, there remains a constitutional inquiry into whether Complainant's right to due process mandates a further hearing. As the Supreme Court ruled in Mathews v. Eldridge, the need for additional procedural rights is determined by balancing "the risk of erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. 319, 3341 (1976). In this case, Complainant was afforded all the components of a formal, APA-style hearing at the State level, of which he took advantage. He was advised of his right to have counsel, which he apparently declined. He was afforded the

opportunity to present his case, and he did present witnesses and documentary evidence at the hearing, and he did cross-examine the opposing witnesses. The decision maker was impartial and based the decision on the transcript and documentary evidence. Given that Complainant was afforded a "full and fair" hearing at the State level and that Complainant has not raised any material factual issues with respect to the Hearing Officer's decision, there appears to be little risk of erroneous deprivation in this matter by not conducting a further oral hearing, and the value of conducting an additional hearing appears duplicative and an inefficient use of government resources.

Moreover, oral hearings are useful primarily for resolving questions of fact. If there are no material issues of fact to be resolved, due process does not require a hearing. Mackey v. Montrym, 443 U.S. 1 (1979). Here, a review of the existing record does not disclose any material issues of facts to be resolved. In addition, Complainant has not disputed the factual findings made by the State Hearing Officer at any time during these proceedings, and has made no response to my Order calling for the submission of arguments and documentation.

Therefore, it is found that there is no need for further oral hearing. Accordingly, the record is now closed and the matter is ready for decision.

Considering the facts of this case, SESO officials admitted that its own rules governing referrals were not followed with the Kimberly Clark job order. Alabama Employment Service Rules provide that the Employment Service cannot take credit for placements made as a result of referrals of individuals who have been specifically designated by the employer. See Hearing Decision at p. 2. SESO unintentionally made a referral under these conditions through an employee who apparently was unfamiliar with the proper procedure. Because of this mistake, Complainant was deprived of an equal chance, among the other registered applicants in the Kimberly Clark file, of being selected to interview at Kimberly Clark.

Although SESO unintentionally made a referral contrary to its rules, SESO took remedial action consistent with the regulations at Subpart F of Part 658, which provides for enforcement measures against employers who violate the jobs service system. See 20 C.F.R. § 658.500 et seq. SESO first canceled the job order and did not take credit for the placements. SESO then held meetings with Kimberly Clark personnel officials to explain the rule that SESO would make the referrals independently of the employer's preference for certain individuals. SESO also emphasized that it would not tolerate pre-selection for any future job orders. As for the Complainant, SESO has offered to refer him to the first available opening for which he was qualified.

Even if the Regional Administrator had determined that a Job Service regulation had been violated by SESO, it appears that the corrective action taken by SESO and its proposed resolution to the Complainant would have satisfied the regulations at Subpart H, which provides a course of action for the Regional Administrator to follow when a state agency does not adhere to the Job Service regulations. The regulations provide that the Regional Administrator issues an initial finding of non-compliance and indicates the required "corrective action." 20 C.F.R. § 658.702(e). But if the state agency's response demonstrates that the violation has been corrected,

then. the RA need not impose a corrective action plan and may accept the state agency's resolution. 20 C.F.R. § 658.702(h). In the instant case, SESO took corrective action, informing Kimberly Clark of the proper policy, rejecting the job order, and offering to refer Complainant to the next available, relevant job opportunity.

In sum, I find that the State's remedy to refer Complainant to the first available opening for which he is qualified is a fair and equitable resolution to the complaint.

ORDER

Accordingly, it is hereby ORDERED that the Determination of the Regional Administrator concurring with the decision of the State Hearing Officer in this matter is AFFIRMED. The Sylacauga Employment Service Office is also hereby ORDERED to refer Complainant to the first available opening for which he is qualified.

JOHN M. VITTONI
Deputy Chief Judge

JMV/EWH