



DATE: SEP 19 1994

CASE NO.: 94-JSA-3

IN THE MATTER OF:

VICTOR POLEWSKY,
Complainant,

v.

VERMONT DEPARTMENT OF EMPLOYMENT AND TRAINING, ET AL.,
Respondents.

Appearances:

Victor Polewsky, Pro Se

David Copeland, Vermont Department of Employment and Training

Susan Jerome, Vermont Department of Employment and Training

Yvonne K. Sening, United States Department of Labor

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 issued at 20 C.F.R. Part 658.

Procedural History

Complainant, Victor Polewsky, filed a complaint against Eastern Electric (Eastern) on January 7, 1992. Mr. Polewsky alleges that he was instructed to contact Eastern to schedule an interview and that Eastern failed to respond to his many phone calls. As a result, Mr. Polewsky asks that the Vermont Department of Employment and Training (Department) not refer workers to Eastern until Eastern pays every worker referred to it 150 hours at \$8.00 an hour. On January 13, 1992, Susan D. Auld, Commissioner of the Department, issued a determination that the Department would not be seeking sanctions against Eastern.

On January 21, 1992, Mr. Polewsky filed his appeal of the Department's determination. Additionally, Mr. Polewsky filed a complaint against the Department alleging that the Department's determination violated 20 C.F.R. §§ 658.416(d) and 658.416(d)(3). Specifically, Mr. Polewsky claims that the determination was not sent by certified mail and that the determination did not contain an explanation required by the regulations. By letter dated February 10, 1992, Mr. Polewsky requested that the state hearing officer subpoena several employees of the Department. Mr. Polewsky contended that the testimony of these employees would support his complaint against the Department. On February 11, 1992, the state hearing officer held that Mr. Polewsky did not demonstrate a need to compel the Department's employees to testify.

A hearing in this matter was conducted before a state hearing officer on February 14, 1992. At the hearing, Mr. Polewsky again made a motion to subpoena the employees (Audio Transcript of the State Hearing, hereafter A.T.). The state hearing officer denied Mr. Polewsky's motion and Mr. Polewsky refused to testify at the hearing (A.T.). Thereafter, the state hearing officer issued a decision on February 19, 1992 holding that "[t]here is absolutely nothing in the record to reflect that the employer in this case acted in violation of any job service related regulation, law or agreement." Furthermore, the state hearing officer ruled that the Department's actions with respect to this complaint were proper.

Mr. Polewsky appealed the state hearing officer's decision to the Regional Administrator, Employment and Training Administration of the U.S. Department of Labor (RA). In a decision issued on November 25, 1992, the IW affirmed the state hearing officer's decision that the regulations do not provide a basis for relief with respect to Mr. Polewsky's claim.

Mr. Polewsky states that he appealed the RA's decision to this office on December 9, 1992. Due to an apparent administrative error, this case was not docketed in this Office. However, Mr. Polewsky's appeal was accepted, and the case has been treated as if it was referred to this Office on June 14, 1994. On June 24, 1994, 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 decision based on the record. Mr. Polewsky filed a Petition for Hearings on July 8, 1994. On July 15, 1994, the United States Department of Labor, Office of the Solicitor (DOL) filed a letter representing the RA. DOL states that the RA's determination should be affirmed and indicates that it will present no further arguments in this matter. By letter dated July 20, 1994, the Department maintains that the RA's findings should be affirmed. On August 3, 1994, the undersigned redocketed this appeal as case number 94-JSA-3.

Relevant Factual Background

On January 6, 1992, Mr. Polewsky received a job referral from the Department.¹ The prospective employer was Eastern. The job referral instructed Mr. Polewsky to telephone Eastern for an interview. At 4:14 p.m., Mr. Polewsky called Eastern. The person who answered the phone asked him to call back between 7:00 and 8:00 p.m. that evening. At 6:40 p.m., Mr. Polewsky called Eastern and left a message with a number he could be reached at that evening. Mr. Polewsky attempted to call Eastern ten more times between 7:30 and 9:13 p.m. On the first nine calls, Mr. Polewsky received a busy signal. At 9:13 p.m., Mr. Polewsky again left a message. Mr. Polewsky then obtained the owner of the business' home phone number by contacting the owner's mother. New England Telephone informed Mr. Polewsky that the owner's home phone number was disconnected. After not hearing from Eastern, Mr. Polewsky filed his complaint on January 7, 1992.

Issues

The first issue in this case is whether the undersigned should hold an additional hearing in this matter. If an additional hearing is unnecessary, the undersigned must determine whether the RA's decision should be affirmed.

Legal Standard

In accordance with 20 C.F.R. § 658.425(b), the decision in this case is based on the entire Record submitted to this Office, including any legal briefs, the Record before the state agency, the investigation and the determination of the RA. Additionally, this decision is the final decision of the Secretary. See 20 C.F.R. § 658.425(c).

Discussion

According to 20 C.F.R. § 658.424(b), the administrative law judge "shall decide whether to schedule a hearing, or make a determination on the record." Twenty C.F.R. § 658.417 sets forth procedures and legal standards for hearings conducted by state hearing officials. The state hearing official has the authority to reschedule a hearing, as appropriate (20 C.F.R. § 658.417(c)(2)) and shall, among other things, assure that all relevant issues are considered. 20 C.F.R. § 658.417(d)(3). Additionally, a state hearing officer need not conduct a hearing pursuant to the technical rules of evidence. See 20 C.F.R. § 658.417(i). However, a state hearing officer should apply, where reasonably necessary, rules and principles designed to assure that the most credible evidence available is produced and that testimony is subjected to cross-examination. Id.

¹ Because Mr. Polewsky refused to testify at the hearing, this factual background is based solely on the information presented in Victor Polewsky's complaint (Exhibit #1). Unless otherwise specified, all exhibit numbers correlate to Section III of the Regional Administrator's Administrative file.

Furthermore, the state hearing officer may exclude immaterial, irrelevant or unduly repetitious evidence. Id.

Mr. Polewsky claims that the Department violated 20 C.F.R. §§ 658.416(d) and 658.416(d)(3) because the determination was not sent by certified mail and it did not provide “[a]n explanation why the complaint was not resolved.” See 20 C.F.R. 658.416(d)(3). In order to support his claim against the Department, Mr. Polewsky requested that the state hearing officer subpoena several employees of the Department (Exhibit #6 and A.T.). The state hearing officer denied this motion (Exhibit #8).

The record adequately supports a finding that it is not necessary to compel these employees to testify. First, whether or not the determination provides an explanation can be discerned from the document itself. Second, it is not necessary to compel the Department’s employees to testify as to whether the determination was sent by certified mail. Mr. Polewsky received the Department’s determination and was able to file a timely appeal. Hence, Mr. Polewsky’s preparation for the hearing was not prejudiced by the uncertified service of the determination.

Mr. Polewsky was afforded a full and fair hearing at the state level. While Mr. Polewsky refused to testify at the hearing, the state hearing officer based his decision on the most credible evidence available. Furthermore, the state hearing officer did not exclude any material or relevant evidence. Accordingly, there is no need for a further hearing in this matter.²

² The undersigned takes note of the RA’s discussion of the state hearing in his determination. With respect to the issues raised by Mr. Polewsky at the state hearing, the RA states:

The Complainant also raised numerous objections based on the process of scheduling and conducting the hearing by a “biased Referee”. These allegations may or may not have merit. However, the [RA] finds that such allegations even if proved would not change the conclusion that he lacks the authority to grant the requested remedy. Even further, by providing the appeal process, the regulations contemplate that the subsequent steps in the process will allow any error that may have resulted as a consequence of the actions or inactions of those responsible for its implementation to mend or correct itself.

This statement is disturbing. It is true that Mr. Polewsky did raise several objections and, eventually, declined to testify at the state hearing. Furthermore, I find that the actions taken by the state hearing officer were appropriate given Mr. Polewsky’s statements at the hearing.

However, to state that the allegations raised by Mr. Polewsky at the hearing are without merit because the basis for his claim is at fault is simply wrong, Mr. Polewsky has the right, regardless of the merits of his case, to participate in the entire administrative process afforded to him under the Job Service regulations. Thus, he has a right to a hearing to present his case. The

(continued...)

In light of the foregoing, the remaining issue will be decided based on the record forwarded to this office.

A careful review of the record reveals that neither the Wagner-Peyser Act nor the Job Service regulations issued thereunder require that an employer interview an applicant under the circumstances in this case. An employer is only required to interview an applicant in order to protect employment opportunities for domestic workers. See generally 20 C.F.R. Part 658. Protecting domestic workers' opportunities is not at issue in this case. As such, the RA has correctly determined that Mr. Polewsky's claim against Eastern has no merit with respect to this issue. In light of the foregoing, the RA's determination, as to the complaint against Eastern, must be affirmed.

Mr. Polewsky's additional request that the Department not refer workers to Eastern until Eastern pays every worker referred to it 150 hours at \$8.00 an hour is without merit. Assuming that the undersigned were to compel Eastern to interview Mr. Polewsky, neither the Wagner-Peyser Act nor the Job Service regulations authorize such sanctions. Accordingly, the RA's determination must be affirmed with respect to this issue.

As to Mr. Polewsky's complaint against the Department, the determination clearly explains why Mr. Polewsky's complaint was not resolved. The determination states that the Department will not be seeking a discontinuation of services against Eastern because Eastern did not violate the Job Service regulations. Furthermore, Mr. Polewsky's claim that the Department failed to send the determination by certified mail is without merit. Even if the Department failed to send the determination by certified mail, this fact did not prejudice Mr. Polewsky's case. Mr. Polewsky still received the determination and was able to appeal the Department's determination in a timely manner. Thus, making such a hyper-technical application of the rules of procedure in this case is unwarranted. Accordingly, the RA's determination, as to the complaint against the Department, affirming the decision of the state hearing officer, must be affirmed.

ORDER

²(...continued)

RA, in his discussion, sidesteps the issues raised at the state hearing by stating that, regardless of the merits of Mr. Polewsky's objections, his case should be denied because of the nature of the claim itself. However, if Mr. Polewsky was denied the right to a fair hearing at the state level, he should have a right to a new hearing where, perhaps, he could clarify the requested relief in his complaint.

Additionally, the RA's statement that the "appeal process" itself will correct errors made by those implementing the regulations essentially passes the buck to another agency to resolve issues that should have been resolved in the first place. See e.g. 94-JSA-5; 94-JSA-6. Such an approach in these cases deprives complainants to their right to administrative due process and assesses unnecessary costs on both the agencies and the parties.

In light of the foregoing, it is hereby ORDERED that the Notice of Determination of the Regional Administrator sustaining the decision of the state hearing officer in this matter is AFFIRMED.

JOHN M. VITTONI
Deputy Chief Judge

JMV/dcm/eca