



DATE: JAN 26 1995

CASE NO.: 94-JSA-4

IN THE MATTER OF:

VICTOR POLEWSKY,
Complainant,

v.

VERMONT DEPARTMENT OF EMPLOYMENT AND TRAINING,
Respondent.

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 the Vermont Department of Employment and Training (Department) on January 21, 1992. The Complaint alleged that the Department failed to refer Mr. Polewsky to several job referrals for which he was qualified. Pursuant to 20 C.F.R. § 658.413(c), the Department requested that Mr. Polewsky provide further information regarding his complaint (Exhibit #2).¹ Mr. Polewsky provided eight (8) job order

¹All exhibit numbers correlate to Section III of the Regional Administrator's

(continued...)

numbers representing vacancies which he believed the Department failed to refer him, even though he met the minimum qualifications (Exhibit #3). The state hearing record revealed that seven (7) of these job orders were with one employer, Diversified Telecommunications. The state hearing record further revealed that the eighth job order was not relevant in this matter.

On March 10, 1992, Robert Ware, Director Jobs and Training for the Department issued the Department's determination. The determination states that Ms. Jerome, the Department's Assistant Manager for the Barre District Office, did refer Mr. Polewsky to positions for which he met the minimum qualifications.

On March 29, 1992, Mr. Polewsky filed his appeal of the Department's determination. A hearing was conducted before a state hearing officer on April 20, 1992. The state hearing officer issued a decision on April 28, 1992, holding that Mr. Polewsky's claim had no basis in fact.

Mr. Polewsky appealed the state hearing officer's decision to the Regional Administrator, Employment and Training Administration, U.S. Department of Labor (RA). Pursuant to 20 C.F.R § 658.421(e), the RA further investigated Mr. Polewsky's claim against the Department. The RA asked Diversified Telecommunications to submit a copy of Mr. Polewsky's resume into the record. Diversified Telecommunications faxed the RA a copy of Mr. Polewsky's resume on November 4, 1992 (Exhibit #11). Additionally, the RA asked the Middlebury Assistant Manager to provide information as to what happened to Mr. Polewsky's resume. Finally, the RA asked Ms. Jerome to submit nine (9) pages of documents, which included the relevant Job Order Information and Referrals (Exhibit #12). In a decision issued on November 25, 1992, the RA affirmed the state hearing officer's decision.

Mr. Polewsky states that he appealed the RA's decision to this office on December 8, 1992. Due to an apparent administrative error, this case was not docketed in this office. In any event, Mr. Polewsky's appeal will be considered, 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 re-docketed this appeal as case number 94-JSA-4.

Relevant Factual Background

Ms. Jerome, the Department's Barre District Office Assistant Manager testified that she faxed Mr. Polewsky's resume to the Middlebury Office on January 20, 1992 (Audio Transcript

¹(...continued)
Administrative file.

of the state hearing, hereafter A.T.).² This action was taken at Mr. Polewsky's request (A.T.). Mr. Polewsky demonstrated an interest in seven (7) different job orders in the Middlebury area (A.T.). Diversified Telecommunications did not contact Mr. Polewsky for an interview (A.T.), but the record shows that Diversified did, in fact, receive Mr. Polewsky's resume (Exhibit 11). However, an employer would not contact a potential employee unless it wanted to interview that applicant (A.T.). Thus, the fact that a resume is referred to an employer does not mean that all prospective employees will be contacted by the employer.

Issue

The first issue in this case is whether the undersigned should hold an additional hearing in this matter. If a hearing is not necessary the undersigned shall make a determination based on the record referred to this office.

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 and the investigation and 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."

Shortly after the April 20, 1992 hearing began, Mr. Polewsky requested a continuance. Mr. Polewsky contends that the Notice of Hearing did not provide sufficient information to inform him about the subject matter of the hearing (A.T.). A careful review of the Notice of Hearing shows that Mr. Polewsky may not have known which one of his claims was before the state hearing officer on April 20, 1992 (Exhibit #6). The Notice of Hearing merely states "Employment Service Related Complaint."

However, review of the hearing shows that, after the state hearing officer denied the request for continuance, Mr. Polewsky participated in the hearing and was well aware of its subject matter. Although Mr. Polewsky refused to testify, he did cross examine Ms. Jerome about whether she properly forwarded his resume. Additionally, Mr. Polewsky stated himself, in response to the state hearing officer's question, that his claim is based on the sole contention that "he was not referred to the seven job orders" at Diversified.

Twenty C.F.R. § 658.417 sets forth procedures and legal standards for hearings conducted by state hearing officers. The state hearing officer has the authority to reschedule a

²Review of the record also demonstrates that Ms. Jerome assisted Mr. Polewsky in updating his resume and allowed him to make use of a personal computer to complete this task.

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, & 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 is produced and that testimony is subjected to cross-examination. Id. Furthermore, the state hearing officer may exclude immaterial, irrelevant or unduly repetitious evidence. Id.

Review of the hearing shows that the state hearing officer adequately assured that the most credible evidence was received into the record. In fact, the state hearing officer should be commended for obtaining any relevant evidence in light of Mr. Polewsky's conduct at the hearing. Mr. Polewsky continually objected to the hearing itself because witnesses from Diversified Telecommunications were unavailable to state whether they had received his resume. The record is clear, however, that Diversified did receive Mr. Polewsky's resume. Ms. Jerome's testimony, as well as Diversified's faxed copy of the resume to Mr. Pedro at the U.S. Department of Labor (Exhibit #1), establishes Diversified's receipt of the resume. Thus, witnesses from Diversified were not necessary at the hearing.

Accordingly, I find that the state hearing officer adequately developed the record and, therefore, an additional hearing is unnecessary.

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

Mr. Polewsky accuses the Department of not properly referring his resume for seven (7) different job referrals at Diversified Telecommunications. As just discussed, the record demonstrates that the Department did refer his resume to Diversified in accordance with Departmental policy. In fact, Ms. Jerome went beyond the call of duty and assisted Mr. Polewsky with his resume. See n. 2. I find that Mr. Polewsky's claim against the Department is frivolous and that the RA's decision, affirming the decision of the state hearing officer, must be affirmed.

ORDER

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

JOHN M. VITTONI
Deputy Chief Judge

JMV/eca/mb