

U.S. Department of Labor

Office of Administrative Law Judges
Washington, DC



Date Issued: JUL 22 1987

Case No. 87-JSA-5

In the Matter of

ALSON CLAYTON and
OSCAR MARSHALL
Complainants

v.

TRI-COUNTY GROWERS, INC.
Respondent

and

UNITED STATES DEPARTMENT OF
LABOR
Party In Interest

Gary G. Geffert, Esq.
For the Complainants

Clarence E. Martin III, Esq.
For the Respondent

Susan M. Jordan, Esq.
For the United States
Office of the Solicitor
Department of Labor

Before: GLENN ROBERT LAWRENCE
Administrative Law Judge

DECISION AND ORDER

This case arises under the Wagner-Peyser Act, as amended, 29 U.S.C. 49 et seq.; and the regulations at 20 C.F.R. Part 655. Complaints were filed under the Job Service Complaint system

claiming violations of 20 C.F.R. 655.203(b), (c), (d) and other employment regulations. It was alleged that the respondent agricultural employer failed to provide employment and/or housing to United States workers in 1983 when it was recruiting foreign workers under an agricultural clearance order. On February 5, 1987, the Regional Administrator, U.S. Department of Labor, Employment and Training Administration, Philadelphia (DOL) issued a decision that the complaints were valid and that the respondent was not eligible to apply for a temporary labor certification in the coming year. This decision reversed decisions of West Virginia Department of Employment Security as well as a decision by a West Virginia administrative law judge, based on an oral hearing, which had dismissed as groundless the complaints. The respondent on February 12, 1987 filed a request for a hearing before this Office appealing the Administrator's Decision. On 20 February, 1987, the complainants also appealed to this Office the Administrator's decision on the grounds that the complainants were not awarded restitution or for the injuries they suffered. On 27 April 1987, this Office issued an order requiring the parties in support of their respective case to file their arguments and documentation. The last submission in that regard was received June 4, 1987. On examination of these submissions, which includes a transcript of the oral hearing, it is found that there was no need for further oral hearing. Accordingly, the record is now closed and the matter is ready for decision.

Findings of Fact, Conclusion of Law and Discussion

1. On June 15, 1983, the respondent applied through the West Virginia Department of Employment Security (WVDES) to hire 575 workers under Agricultural and Food Processing Clearance Order No. 0469727. DOL declined the application.

2. Respondent thereafter obtained a temporary labor certification from the United States District Court. The certification required:

"During the period for which the temporary labor certification is granted, the employer will comply with applicable Federal, State, and local employment-related laws, including health and safety laws;" 20 C.F.R. 203(b).

"The job opportunity is open to all qualified U.S. workers without regard to race, color, national origin, sex, or religion, and is open to U.S. workers with handicaps who are qualified to perform the work. No U.S. worker will be rejected for employment for other than a lawful job related reason;" 20 C.F.R. 203(c).

"The employer will cooperate with the employment service system in the active recruitment of U.S. workers until the foreign workers have departed for the employers place of employment." 20 C.F.R. 655.203(d).

3. The respondent advised DOL firstly that the clearance order start date was to be changed to September 12, 1983 and then September 19, 1983.

4. In early September 1983, Complainant Clayton sought employment through WVDES. He was referred to the respondent and was advised the work wouldn't start until September 12, 1982. He

visited the respondent on September 8, 1983 and was hired. He was told to return.³ September 19, 1983 when work would commence. On September 19, 1983 he again applied at the respondent's premises. However, there was a sign on the door that the respondent had closed its operations due to a creditor attachment. No information was provided as to when work would start up. Complainant could not therefore commence work with the respondent. On September 23, 1983, the complainant Clayton filed a complaint with WVDES.

5. Complainant Marshall after looking without success early in September 1983 for a position proceeded to the Martinsburg office of WVDES and learned respondent was closed. The complainant's attorney called the respondent's attorney and was advised by a letter from him that the operation was closed because of the creditor attachment. Complainant Marshall filed a complaint on September 26, 1983 with VDES alleging a violation of 20 C.F.R. 655.203(d)(f) for failure to affirmatively recruit United States workers.

6. WVDES on September 27, 1983 denied both complaints. The complainants appealed this decision to WVDES on September 29, 1983. WVDES by separate letters on October 14, 1983 reiterated the denials. The complainants on October 18, 1983 appealed the findings to WVDES and requested a hearing. A state administrative law judge held the hearing on January 11, 1985.¹ By a decision dated October 30, 1985, the administrative law judge affirmed the prior denials by WVDES. This decision was appealed to the Regional Administrator DOL on January 6, 1986. DOL on February 5, 1987 reversed WVDES and the administrative law judge and held the complaints were justified. It determined that the respondent was not eligible to apply for a temporary labor clearance in the coming year.

7. The respondent failed to encourage the hiring of United States workers after September 13, 1983 and discouraged such hirings by sign postings, newspaper adds, and advice to WVDES. From the close down September 13, 1983 until the foreign workers departed for the respondent's work place on September 23, 1983, the United States workers were denied job opportunities with respondent.

8. On September 24, 1983, the respondent commenced operations using foreign workers and allegedly some United States Workers. It continued its effort to obtain foreign workers through United States Immigration and Nationalization Service (INS). Later it went to the courts for visa's when INS refused to issue them.

9. Respondent in its supporting papers to the District Court (C 10) represented that it was actively recruiting U.S. Workers. At or about the same time it advised visitors to its premises, WVDES, and the newspapers that its operation was closed. This inconsistency engenders substantial doubt that it intended to comply with 20 C.F.R. 655.203(d) from September 13, 1983 through September 21, 1983 or that it was actively seeking U.S. workers. Complainants argue that respondent is estopped from arguing it was seeking U.S. workers and cites Zurich Insurance Company 667 F.2d 1162, 1162, 1166 (4th Cir. 1982). With respect to the Zurich case there may

¹T: reference to the transcript.

be some merit in respondent's argument that this is not a true estoppel situation. However Complainant's argument also is properly concerned with the inconsistent representations to the courts and WVDES. These inconsistencies have not been reconciled and there is negative inference that respondent did not intend to hire U.S. workers during the period in question.

10. The intention of the respondent is also illustrated in the episode involving the execution of the judgment. The execution was advanced as the reason for the shut down on September 13, 1983. As implied in the testimony of Pitzer (T 58), respondent reopened the business not on account of the lifting of the execution, but when it received authorization from DOL and the Court to hire the foreign workers. Further, the evidence establishes that the respondent must have had operating capital in excess of the amount of the execution. Indeed, it did run its business with the execution on its truck.

11. Further, it had to meet a \$12,000 payroll. This was far less than the \$2,200 execution. Accordingly, respondent's argument that it had to close on account of the execution does not appear plausible and is not entitled to credit.

12. Additionally, it is noted that there was manifested a pattern of respondent's reluctance to hire U.S. workers and subvert the regulations. See Robert Ackerman v. Mount Laurels Orchards and Homer Feller, Respondents and Lewis Donaldson complainant vs. Tri-County Labor Camp Inc. and Russel Pitter, Respondents, Edward Gegnir, Complainant v. Tri-County Labor Camp Inc. and Russel Pitzer Respondents, 82 TAE 0003 (1983); Dievnais Sejour, et ad. Complainants vs. Tri-County Labor Camp, Incorporated, and Russel Pitzer, 83 WPA, (1985).

13. The RA denied restitution to the complainants. Such a denial was only partly warranted. Complainant Marshall was not referred by the Job Service because respondent advised the Service that their operation was closed. under 20 C.F.R. 658.401(a)(1)(i) it is clear that the referral must occur to trigger the regulation. Cited by the Complainant in Support of a more liberal interpretation is NAACP, Western Region v. Brennan, 360 F. Supp. 1006, 1014 (D.C.C. 1973); 45 Fed. Reg. 3954 (June 10, 1980) and Soliz v. Plunk, 615 F.2d 272, 275 (5th Cir. 1980). These cases do not vary the clear language of 20 C.F.R. 658.40 (a)(1)(i) limiting use of the complaint system to instances where there was a referral. Accordingly, only Complainant Clayton is entitled to restitution for lost wages.

14. Respondent's Job offer guaranteed employment for 45 hours a week and 3/4 of the total work period in force (C 7). The average paid an hour (T 51-52) was \$5.89 and this is an appropriate standard inasmuch as it is not possible to calculate on a piece work basis how much respondent would have earned. Respondent occasioned this loss to complainant as it failed to provide Employment Service 10 days notice of the postponement of its need date. Accordingly, Clayton lost 45 hours as alternatively argued by the Complainant (p. 39) or \$265.05. He might have lost an additional period, but for illness(D 18, 25, 26) prevented him from work. Sufficient medical proof would be necessary to support complainant's argument that failure to secure the job made him ill. That proof has not been furnished. No housing restitution is warranted inasmuch as the State paid for the housing (T 26). Perhaps the state has a claim for restitution of its housing payment.

ORDER

It is ordered that:

1. The respondent not be issued a temporary labor certification for the coming years.
2. The respondent pay to the complainant Alson Clayton \$265.05 back pay for 45 hours guaranteed work during the week of September 19, 1983.

GLENN ROBERT LAWRENCE
Administrative Law Judge

GRD:crg