



COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:) CAC No.: 19-001-03T
CNMI Department of Labor,)
Labor Enforcement Section)
Complainant,) ORDER
v.)
Star Marianas Air, Inc.,)
Respondent.)

I. INTRODUCTION

This matter came for an Administrative Hearing on June 11, 2019 at 9:00 a.m. at the Administrative Hearing Office of the CNMI Department of Labor. CNMI Department of Labor, Labor Enforcement Section, (hereinafter, "Enforcement") appeared telephonically and was represented by Investigator R. Casandra P. Cabrera-Viches. Respondent Star Marianas Air, Inc. (hereinafter, "Respondent"), was physically present¹ and represented by Attorney Joey P. San Nicolas.

II. BACKGROUND

This matter concerns an alleged violation of NMIAC § 80-20.1-235(e). On April 10, 2019, Enforcement filed a Determination, Notice of Violation & Notice of Hearing at the Administrative Hearing Office. Therein, Enforcement alleged, in part, that in connection to Job Vacancy Announcement 19-02-67446, Respondent failed to provide Applicants

¹ Specifically, President Shaun R. Christian, HR Specialist Hilary San Nicolas, Administrative Associate Melanie B. Cruz, and Management Advisor William Ling were present.

Sara Frost and Berlyne P. Higgins with Employer Declarations, as required by NMIAC § 80-20.1-235(e). Enforcement is seeking a monetary fine of \$2,000 per violation and that Respondent be ordered to comply with the Employer Declaration Requirement.

On May 14, 2019, Respondent, by and through their Attorney, filed a Motion to Dismiss for lack of subject matter jurisdiction and failure to state a claim. Therein, Respondent argued that there was no statutory jurisdiction and the Declaration was not required because the company hired a U.S. Citizen.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing on the Determination and Respondent's Motion to Dismiss was held on June 11, 2019 at the Administrative Hearing Office.² The matter was taken under advisement and the undersigned now issues the following Findings of Fact and Conclusions of Law.

A. Jurisdiction is established by 3 CMC § 4942.

“The Administrative Hearing Office shall have original jurisdiction to resolve all actions involving alleged violations of the labor and wage laws of the Commonwealth, including but not limited to any violation of this chapter and regulations promulgated thereunder.”
3 CMC § 4942.

This matter concerns a violation of the Employer Declaration requirement promulgated under Title 80 of the NMI Administrative Code. Title 80 was promulgated, in part, due to the statutory authority cited above. Accordingly, subject matter jurisdiction is established by 3 CMC § 4942.

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² Enforcement did not file a response to the Motion to Dismiss. During the June 11 Administrative Hearing, Enforcement indicated that it did not wish to dismiss the matter and wanted to proceed with the Hearing.

B. Respondent’s Motion to Dismiss pursuant to Lack of Subject Matter Jurisdiction is Denied.

Respondent argues that this matter should be dismissed for lack of jurisdiction pursuant to Rule 12(b)(1) of the Commonwealth Rules of Civil Procedure.³ Motions to dismiss are permissible under NMIAC § 80-20.2-130(c)(1). Thereunder, “[a] motion to dismiss may be filed on the following grounds: (A) Lack of jurisdiction over the subject matter; (B) Lack [of] jurisdiction over the person; (C) Insufficiency of process; (D) Insufficiency of service of process; [and] (E) Failure to state a claim upon which relief can be granted.

As discussed above, jurisdiction is established by 3 CMC § 4942. Accordingly, Respondent’s Motion to Dismiss for lack of jurisdiction is denied.

C. Respondent Motion to Dismiss for Failure to State a Claim is Granted.

CNMI law requires employers to give qualified citizens, CNMI permanent residents, and U.S. permanent residents preference for employment in the Commonwealth over foreign national workers, transitional workers, and nonimmigrant aliens. *See* 4 CMC § 4928; *see also* NMIAC § 80-20.1-220(a). To effectuate this employment preference and ensure maximum participation, notice of every vacancy in a full-time job in the private sector in the Commonwealth for which any person other than a citizen, CNMI permanent resident, or U.S. permanent resident may be hired must be given” NMIAC § 80-20.1-220 (b)(c). Generally, the employer gives said notice by posting a job vacancy announcement on the Department’s website, www.marianaslabor.net.” NMIAC § 80-20.1-225(a). Employers must take appropriate actions on referrals or applications received in connection to the online job vacancy announcement. *See* NMIAC § 80-20.1-235(c).

³ It is important to note that the Administrative Hearing Office has not adopted the CNMI Rules of Civil Procedure. Further, the undersigned knows of no other legal authority binding the Administrative Hearing Office to the CNMI Rules of Civil Procedure. Although the CNMI Rules of Civil Procedure, and its progeny of cases, are not binding in administrative adjudications at the Administrative Hearing Office, it may be instructive.

Further, in the event a citizen, CNMI permanent resident, or U.S. permanent resident is not hired for the announced position, employers must file a declaration.

Specifically,

In the event that a citizen, CNMI permanent resident, or U.S. permanent resident was not hired, within fourteen days after publication, the employer shall file a declaration on a standard form in digital format with respect to citizens and permanent residents who applied for the job, the action taken on each application, and a short statement of the reasons for rejecting any applicant who was referred. ***No declaration is required if a citizen or permanent resident is hired.***

NMIAC § 80-20.1-235(e) (emphasis added).⁴

Here, the Enforcement’s determination is silent on whether a citizen or permanent resident was hired—therefore it was unclear whether the Employer Declaration was required or whether NMIAC § 80-20.1-235(e) was violated by Respondent. Further, Respondent’s Motion to Dismiss, as well as testimony and exhibits from the Hearing, demonstrate that a US Citizen was hired. Specifically, the undersigned finds:

1. On February 18, 2019, Respondent posted a Job Vacancy Announcement, JVA No. 19-02-67446 (“JVA 19”), on the CNMI Department of Labor website for the position of Customer Service Specialist.
2. JVA 19 advertised five openings for a Customer Service Specialist.
3. The opening date for JVA 19 was February 18, 2019.

⁴ In consideration of the time it takes to interview and substantial good faith efforts to comply with the regulations, the Administrative Hearing Office previously interpreted the fourteen day to toll “after the date on which the hiring decision is made.” *DOL v. Kan Pacific Saipan Ltd.*, CAC No. 14-047-09 (Administrative Order issued Dec. 5, 2014 at 2). However, upon consultation with the Citizen Job Placement Section, the fourteen day deadline was calculated to start “after the closing date listed on the website.” *DOL v. Ganacias dba KWAU-FM*, CAC No. 14-067-11 (Administrative Order issued Dec. 31, 2014 at 2). The latter decision is consistent with the plain language of the text and computation of time periods under NMIAC § 80-20.1-605. Accordingly, the fourteen day deadline begins to toll the day after the closing date listed on the Job Vacancy Announcement.

4. There was a total of two online responses to JVA 19. On February 19, 2019, Applicant Sara Frost (“Frost”) responded to JVA 19. On February 25, 2019, Applicant Berlyne P. Higgins (“Higgins”) responded to JVA 19.
5. On March 4, 2019, Respondent hired Mr. Fradley Jepen for one of the open positions. Mr. Jepen is a United States Citizen.⁵
6. The closing date for JVA 19 was March 5, 2019.
7. Subsequently, Respondent’s Human Resource Specialist Hilary San Nicolas (“HR”), began to call applicants to schedule an interview.
8. With respect to Frost, HR called to schedule an interview on two occasions. Despite being called on two different days and two different times, there was no answer on the contact number provided. Accordingly, Frost was never interviewed or hired.
9. With respect to Higgins, HR called three times to schedule an interview. On the third call, an interview was scheduled for March 21, 2019. Ultimately, Higgins did not show for the interview. Accordingly, Higgins was never interviewed or hired.
10. Before notice of Enforcement’s Determination, Respondent responded to the online applicants using the Department’s website. Specifically, on March 25, 2019, Respondent indicated both applicants were “not selected.”⁶
11. According to HR’s verbal testimony, no other hires were made in connection to JVA 19. However, the hiring process is ongoing.

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⁵ The record does not indicate whether Mr. Jepen was a walk-in applicant, when Mr. Jepen applied for the job, or when Mr. Jepen interviewed for the position. While informative, it was not relevant to the present inquiry in this matter given Mr. Jepen’s citizenship status.

⁶ It is unclear whether the online reply as to “not selected” met the content requirements of the Employer Declaration pursuant to NMIAC § 80-20.1-235(e). Specifically, there is nothing in the record that the online reply indicated the following: (1) who applied for the job; (2) the action taken on each application; and (3) a short statement of the reasons for rejecting any applicant who was referred or responded to the JVA.

Accordingly, at this time, the Employer Declaration is not required to submit an Employer Declaration and there is no showing of a violation of NMIAC § 80-20.1-235(e). In consideration of above, dismissal is appropriate.⁷

IV. CONCLUSION

Based on the foregoing, the Respondent's Motion to Dismiss is hereby **GRANTED**.

So ordered this **14th** day of June, 2019.

/s/
Jacqueline A. Nicolas
Administrative Hearing Officer

⁷ See *DOL v. Kan Pacific Saipan Ltd*, CAC No. 14-047-09 (Administrative Order issued Dec. 5, 2014 at 2-3).