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

In the Matter of:	)	**Labor Case No. 18-059**
Zaji O. Zajradhara,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
v.	)	
Woo Jung Corporation,	)	
Respondent.	)	

I. INTRODUCTION

This matter came for an Administrative Hearing on May 8, 2019 at 9:00 a.m. in the Administrative Hearing Office of the CNMI Department of Labor. Complainant Zaji O. Zajradhara (hereinafter, "Complainant") appeared without counsel. Respondent Woo Jung Corporation ("hereinafter, "Respondent") appeared without counsel and was represented by Secretary Eunhee Chung and Translator/Agent for Service of Process Jin Koo Cho. The Department's Enforcement Section ("Enforcement") was also present and represented by Investigators Jerrick Cruz and Bonifacio Castro.

II. LEGAL STANDARD

The Administrative Hearing Office has original jurisdiction to resolve all employment preference claims. 3 CMC § 4525(b).

"Citizens and CNMI permanent residents and U.S. permanent residents shall be given preference for employment in the Commonwealth." 3 CMC § 4521; *see also* NMIAC § 80-20.1-101 ("It is the policy of the Commonwealth that citizens, CNMI permanent residents and U.S. permanent residents shall be given preference for employment in the private sector workforce in the Commonwealth. . . .").

"A citizen or CNMI permanent resident or U.S. permanent resident who is qualified for a job may make a claim for damages if an employer has not met the requirements of 3 CMC § 4525, the employer rejects an application for the job without just cause, and the employer employs a person who is not a citizen or CNMI permanent resident or U.S. permanent resident for the job." 3 CMC § 4528(a)[1]; *see also* NMIAC § 80-20.1-455(f) ("Any citizen, CNMI permanent resident, or U.S. permanent resident who is qualified for a job, as described in a job vacancy announcement, may file a complaint making a claim for damages if an employer rejects an application for the job without just cause and the employer employs a person who is not a citizen, CNMI permanent resident, or U.S. permanent resident for the job."); *see also* NMIAC §80-20.1-220(a) ("No employer may hire a foreign national worker, transitional worker, or other nonimmigrant alien if a qualified citizen, CNMI permanent resident, or U.S. permanent resident applied for the job in a timely fashion.").[2]

The Department's regulations provide further guidance.[3] Thereunder, "[t]he term 'just' cause' for rejecting an application for employment includes the lawful criteria that an employer normally applies in making hiring decisions such as rejecting persons with criminal records for positions of trust, rejecting persons who present fraudulent or inaccurate documentation in support of the application; rejecting persons without an education degree necessary for the position, rejecting persons with unfavorable recommendations from prior employment, rejecting persons with an employment history indicating an ability to perform the job successfully, rejecting persons with an educational background making it unlikely that the necessary education or training to hold the position could be accomplished successfully within a reasonable time; and similar just causes." NMIAC § 80-20.1-455(f)(1). Notably, the aforementioned list of "just causes" is not exhaustive. "Any criteria in making hiring decisions advanced in

[1] Section 4525 states, "[i]n the full-time workforce or any employer, the percentage of citizens, U.S. permanent residents, and CNMI permanent residents and their immediate relatives employed shall equal or exceed the percentage of citizens, U.S. permanent residents, and CNMI permanent residents and their immediate relatives in the available private sector workforce unless attainment of this goal is not feasible within the current calendar year after all reasonable efforts have been made by the employer." 3 CMC § 4525. "The current percentage specified by the Department . . . is 30%." NMIAC § 80-20.1-210(c)(3). This provision, however, "shall not apply to employers of fewer than five employees, provided however, the Secretary may, by regulation, require each business to have a least one employee who is a citizen or CNMI permanent resident and U.S. permanent resident, or remove the exemption available to employers against whom two or more judgments are entered in Department proceedings in any two year period. "No waivers are available with respect to the workforce participation objective." NMIAC 80-20.1-210(f); *contra* NMIAC §80-20.1-215.

[2] "The Secretary shall promulgate regulations to implement the intent of this chapter pursuant to the Administrative Procedures Act including any delegation of the Secretary's duties as imposed herein to any employee of the Department." 3 CMC § 4530.

[3] Section 4530 states, "The Secretary shall promulgate regulations to implement that intent of this chapter pursuant to the Administrative Procedures Act including any delegation of the Secretary's duties as imposed herein to any employee of the Department." 3 CMC § 4530.

support of just cause must be consistent with the published job vacancy announcement for the job and must be a part of the employer's established hiring procedures." NMIAC § 80-20.1-455(f)(2).

Violations of the Commonwealth employment preference statute may result to a damage award of up to six months' wages, as well as sanctions of up to $2,000 against the employer. 3 CMC § 4528(f)(1) and (f)(2). Appeals and judicial review, if any, are governed by 3 CMC § 4528(g) and (h), respectively.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On December 21, 2018, Complainant filed a labor case against Respondent.

2. The aforementioned complaint *simply* alleged:

> Woo Jung Corporation
> 18-09-63127
>
> On 9-30-2018, I sent a request to the Secretary of the CNMI dept [*sic*] of labor to please forward my resume to the company above-stated. I was informed that said request has been fulfilled. I was neither contacted nor interviewed. Through, the position was for a CW-1 Visa.
>
> I am requesting full back pay; plus disciplinary action taken upon this employer.

3. Complainant did not identify the legal basis of his claim and failed to cite the statute for the alleged violation. Based upon the record and verbal confirmation by the Complainant, the undersigned construes Complainant's claim to be a violation of the Commonwealth Employment Act of 2007, Public Law 15-108, and codified under 3 CMC §§ 4511 et. seq.

4. The Administrative Hearing Office has original jurisdiction of this claim.

5. Pursuant to NMIAC § 80-20.1-465(a), a mediation was noticed and held on February 27, 2019 at 1:30 p.m. at the Administrative Hearing Office. The parties failed to resolve the dispute.

6. Pursuant to 3 CMC §4528(c) and NMIAC § 80-20.1-470(a), the case was referred to the CNMI Department of Labor Enforcement Section ("Enforcement") for investigation.

7. An investigation was conducted and a written determination was issued, filed, and served by Enforcement.

8. A prehearing conference was noticed and held on May 8, 2019 at 9:00 a.m. at the Administrative Hearing Office. At that time, the parties waived conflicts for recusal. Subsequently, as required pursuant to the Notice of Prehearing Conference issued April 9, 2019, the parties exchanged witness lists, exhibits to be introduced at the Administrative Hearing, a declined to engage in additional settlement negotiations. Further, the Administrative Hearing Officer denied Complainant's request for additional discovery of USCIS Petitions ever filed by Respondent between a period of several months. In support of the denial, the Administrative Hearing Officer stated, on the record, that the request was overbroad and irrelevant and unnecessary to Complainant's preference claim in consideration of the proposed exhibits exchanged, specifically, the Respondent's workforce listing. The Administrative Hearing Officer granted Complainant's request to provide notice to Mr. James Ulloa from CNMI Department of Labor, Division of Employment Services ("DES") to attend the scheduled administrative hearing. No other motions or requests were submitted or filed with the Administrative Hearing Office.

9. An administrative hearing on the abovementioned complaint was held on May 8, 2019 at 9:00 a.m. at the Administrative Hearing Office.

10. During the administrative hearing, Complainant called two witnesses: (1) Mr. James Ulloa of DES; and (2) Mr. Jerrick Cruz of Enforcement.

11. Mr. Ulloa testified, in part, that:

    a. Respondent advertised a new position for a rental sales agent under Job Vacancy Announcement # 18-09-63217 ("JVA 18").
    b. The Opening Date for JVA 18 was September 21, 2018.
    c. Pursuant to his request, Complainant was referred to JVA 18 by the Department of Labor on October 1, 2018.
    d. The Closing Date for JVA 18 was October 6, 2018.
    e. There were 10 responses to or applicants for JVA 18.
    f. Respondent failed to respond to any of the applicants.

g. JVA 18 was ultimately cancelled on April 16, 2019 due to the devastation and reduction in business caused by Super Typhoon Yutu.
h. To date, no one—much less, a foreign worker—was hired in connection to JVA 18.

12. Mr. Ulloa also testified, that:
    a. Respondent advertised a renewed position for a rental sales agent under Job Vacancy Announcement # 19-03-70102 ("JVA 19").
    b. The Opening Date for JVA 19 was March 6, 2019.[4]
    c. There were 5 responses to or applicants for JVA 19.
    d. Complainant was not referred to and did not apply for JVA 19.
    e. The Closing Date for JVA 19 was March 21, 2019.
    f. Again, Respondent failed to respond to any of the applicants.

13. Mr. Ulloa's testimony was credible and uncontested. Further, Mr. Ulloa's testimony was corroborated by printouts of the above-referenced JVA's with notations from the internal system.

14. Of the proposed exhibits submitted during the Prehearing Conference, only the following Exhibits were admitted into evidence:

    a. Exhibit # 1 – JVA 18-09-63127 (i.e., "JVA 18")
    b. Exhibit # 2 – JVA 19-03-70102 (i.e., "JVA 19")
    c. Exhibit # 3 – Respondent's Total Workforce Listing for the 4th Quarter of 2018.

15. Mr. Cruz testified, in part, that:

    a. He was the assigned investigator to this case.
    b. Mr. Cruz conducted the interviews and investigation between the parties in this matter.
    c. During an interview with Respondent, a representative stated he was unaware of their responsibility to cancel JVA 18 if they no longer intended to hire a new rental sales agent.
    d. Mr. Cruz informed Respondent of their responsibilities and referred Respondent to DES, namely, Mr. Ulloa.
    e. Based on his interview and investigation, Mr. Cruz submitted a written determination recommending judgment in favor of Respondent.
    f. The written determination and recommendation stands as Complainant never applied for JVA 19.

[4] Notably, this opening date was well after Complainant filed the present complaint.

16. Complainant argued that informing Respondent of an employer's responsibility to respond and cancel was an improper impediment to the ongoing investigation. Complainant's argument is unpersuasive for the following reasons. First, advising the public of the Department's rules and regulations is a practice of Enforcement and there was no malicious intent or ulterior motive behind that practice other than general education and future compliance. Second, cancellation of the JVA has no prejudicial consequence in this particular claim since cancellation is not an element of Complainant's labor claim, rather speaks to Respondent's compliance with agency regulations. Complainant failed to understand that issue remains whether a foreign worker was hired over him.

17. Complainant argued certain points in the written determination should be considered "moot." Complainant's argument is unpersuasive and irrelevant in satisfying the elements of the preference case. Enforcement's written determination is simply a product of their investigation and recommendation to the administrative hearing officer. It is not binding or assigned any particular amount of deference during an Administrative Hearing. This is particularly true when any written or testimonial evidence to the contrary is introduced. While a written determination is reviewed and helpful in certain complex or adversarial cases, a written determination is taken in a totality of circumstances. Further, any findings, decisions, or orders will be based on the full record and credibility of witnesses. Therefore, a finding of mootness is not necessary and counterproductive to the issue at hand.

18. A complainant has the burden to prove the elements of his or her claim. In order to prevail on a claim for damages under the employment preference statute, a complainant must prove all four elements of the statute: (1) that he/she was qualified for the job; (2) that his job application was rejected by the respondent/employer without just cause; (3) the respondent/employer then hired a foreign national worker for that positions and; (4) the respondent/employer failed to meet the 30% workforce objective requirement. 3 CMC § 4528(a).

19. Complainant fails to meet all the elements of his claim in connection to JVA 18. Here, there is no evidence to show that Respondent hired anyone, much less a foreign worker, over Complainant. In fact, evidence shows that no one was hired because Respondent cancelled the JVA as a business decision due to the devastation of Super Typhoon Yutu.[5] Accordingly, there is no showing that: (1)

[5] "After receiving a referral from the [Department], an employer may take any of the following actions: . . . (4) Employers may reevaluate employment needs and hire no one for the proposed position. In this case, the employer shall notify the Department that the vacancy no longer exists." NMIAC § 80-20.1-235(c)(4).

Respondent rejected Complainant's job application without just cause; and (2) Respondent hired a foreign national worker for the advertised position. Accordingly, Complainant's claim must fail.

20. It is well established precedent that a respondent's failure to hire a foreign worker over a U.S. citizen, U.S. permanent resident, or CNMI permanent resident is fatal to a complainant's claim for damages under the employment preference statute. *Zajradhara v. SPN China News Corporation*, LC-17-021 (Administrative Order issued July 12, 2018 at 4) ("There are several problems with Complainant meeting the elements of this claim, based on the facts of this case. Most important is the fact that Employer never hired a foreign national worker, or anyone to fill the advertised position. The gravamen of the statutory violation of 3 CMC § 4528(a) is that Employer has hired a foreign national worker over a qualified U.S. citizen [or permanent resident]. In this case where no one was hired for the vacant job, Complainant cannot prove this important element of the offense."); *see also Zajradhara v. Haitan Construction Group*, LC-17-052 (Administrative Order issued May 25, 2018 at 4) ("Complainant Failed To Prove that Employer Had Filled the Vacant or Renewed Positions with Foreign National Workers; Therefore, Complainant Cannot Prevail under 3 CMC § 4528(a)").[6]

21. It is unknown whether any of the 5 responses to or applicants for JVA 19 were US citizens, US permanent residents, or CNMI permanent residents. It is further unclear whether Respondent actually renewed a *foreign worker employee* for the position advertised under JVA 19.[7] The above-mentioned issues have no consequence for this particular labor case for the following reasons:

    a. The complaint in this matter never alleges a claim in connection to JVA 19; and,
    b. Complainant never applied for JVA 19.

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[6] Pursuant to the Administrative Procedures Act, agency orders are generally not valid or effective onto any person or party until published and filed with the Commonwealth Register and the Governor. 1 CMC § 9102(d). That provision, however, is not applicable to any person or party with actual knowledge of the order. *Id*. Here, the undersigned finds that reference to the yet published orders is valid and effective given that Complainant was a party to those cases and served with the order, thus had actual knowledge.

[7] Respondent's Total Workforce Listing for the Fourth Quarter of 2018, admitted into evidence as Exhibit #3, list two sales representatives with green cards. Respondent did not verify which employee, if any, was renewed under JVA 19.

22. Complainant argued that, since he applied for JVA 18, Respondent should have also considered him for JVA 19—despite the fact he never applied for JVA 19. Complainant failed to provide any legal support for this argument.[8]

23. Failure to respond to, self-refer, be referred to, or otherwise apply for an announced position is fatal to a claim for damages under the employment preference statute. To hold otherwise would be illogical, impracticable, and most importantly, unsupported by the requirements under law.

24. Further, precedent supports the finding that Complainant's argument with respect to JVA 19 must fail. *Zajradhara v. Karis Company, Ltd.*, LC-17-019 (Administrative Order issued December 28, 2017 at 6 ("Complainant failed to take reasonable steps to deliver his job application to Employer. Because Employer never received a job application or resume from Complainant, Complainant cannot prove that his application was unjustly rejected by Employer. Given that this is a requisite element of the job preference claim, failure to prove this element means that the alleged charge must fail."); *see also Zajradhara v. Li Feng*, LC 17-043 (Administrative Order issued July 11, 2018 at 6) ("Complainant failed to establish that Employer rejected Complainant's job application without just cause because Complainant declined Employer's offer to interview him for the job . . . The Hearing Officer notes that scheduling a job interview requires the cooperation of both parties. If Complainant fails to act responsibly, such conduct, in effect, gives Employer an excuse not to go forward with considering the job applicant for the vacant (or renewed) position."); *see also Zajradhara v. Yen's Corporation*, LC-17-040 (Administrative Order issued July 11, 2018 at 6).

25. The logic and reasoning in LC-17-019, LC-17-043, and LC-17-040 extends to a complainant who fails to even apply for a particular job or JVA. Entering into an employment relationship requires the participation of an applicant and employer. If an applicant does not submit an application in response to the JVA, the employment preference statute does not impose any additional requirements or duties onto the non-applicant.[9] Further, the Complainant cannot meet the elements of his claim, namely, to show that Respondent unjustly rejected his job application when he never applied for the job advertised under JVA 19.

[8] "A motion to recover sanctions and attorney's fees for an opposing party's advocation of a claim or defense that is frivolous, without merit, or in bad faith shall be permitted pursuant to § 80-20.2-140 of this subchapter." NMIAC § 80-20.2-130(c)(5). "Any complainant or respondent may by motion, file and recover sanctions and attorney's fees for an opposing party's advocation of a claim or defense that is frivolous, without merit, or in bad faith." NMIAC § 80-20.2-140.

[9] Federal regulations, which falls outside the jurisdiction of this office, may differ.

26. This matter alludes to certain compliance violations, particularly, failure to take action on referrals pursuant to NMIAC § 80-20.1-235(c) and good faith effort to hire prior to renewals of foreign workers under NMIAC § 80-20.1-235(d). However, such violations are only brought forth by the discretion of the Department's Enforcement Section. Here, Enforcement did not file or consolidate a compliance case against Respondent. Imposition of sanctions for noncompliance, if any, without notice and opportunity to respond would be contrary to due process and improper under the Administrative Procedures Act. *See* 1 CMC §§ 9108-9110. Accordingly, the undersigned declines to make any findings or conclusions with regards to said compliance issues.

27. During closing arguments Complainant complained that the undersigned hearing officer interrupted him and was argumentative. Upon review of the record, the undersigned hearing officer finds that disruptions were appropriate since Complainant often mischaracterized testimony, spoke of matters that were not entered into evidence or wholly outside the record, was testifying instead of asking questions to his witnesses, was presenting cumulative evidence, and was asking questions not relevant to the elements of his claim. The undersigned hearing officer also finds that the interruptions was necessary to control the proceedings in consideration of Complainants violent and disruptive history at the Administrative Hearing Office. *See Zajradhara v. Yen's Corporation*, LC-17-040 (INTERLOCUTORY ORDER RE: Closing of Evidentiary Record; Respondent's Closing Argument; Sanction of Complainant issued January 22, 2018 at 1) (Complainant was sanctioned pursuant to NMIAC § 80-20.1-480(c) when he "erupted in an unprovoked outburst, then stormed out of the hearing room.").

28. Complainant also stated that "he's not an attorney" and, in sum, should not be expected to adhere to the legal processes and rules. However, during the prehearing conference, the parties were advised that, pursuant to NMIAC § 80-20.1-480(e), the Commonwealth Rules of Evidence applies to the Department's Administrative Hearings. While, strict adherence is not required and added accommodations are provided, enforcement of relaxed rules of evidence were necessary to prevent confusion of the issues and prejudice unto the opposing party. Both parties, who were unrepresented by counsel, were provided added accommodations in that the Hearing Officer instructed them as to process, made clarifying statements, cited rules and regulations verbatim, and examined witnesses with follow up questions in order to make a complete record of relevant facts.[10] Further, the undersigned finds that the rules are necessary to provide

[10] For instance, when Complainant forgot to question Mr. Ulloa on a relevant piece of evidence, namely Exhibit 2 or JVA 19, the undersigned hearing officer did so. Further, when Complainant questioned a witness regarding an unidentified Department Memorandum that was not entered into evidence, the undersigned hearing officer corrected

structure and guidance to unrepresented parties. Instead, Complainant is attempting to abandon all rules and structure to make arguments unsupported by law or any legal authority. Providing legal counsel and completely waiving all rules goes far beyond a hearing officer's duty to provide added accommodations. *See Zajradhara v. Nippon General Trading Corp. dba Country House Restaurant*, LC-17-018 (Administrative Order issued March 19, 2019 at 2).

IV. JUDGEMENT

Accordingly, based on the above findings of fact and conclusions of law, judgement is hereby entered in favor of Respondent, Woo Jung Corporation.

So ordered this **16th** day of May, 2019.

/s/
Jacqueline A. Nicolas
Administrative Hearing Officer

Complainant that what he was actually referring to was an Executive Order suspending provisions regarding reductions in force, a matter wholly unrelated to a employment preference violation.