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

In the Matter of:	)	CAC No. 16-003-06(T)
Department of Labor Enforcement Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Star Marianas Air, Inc.,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on October 7, 2016, before the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department's Enforcement Section was represented by investigator Ramona P. Cabrera-Viches. Respondent Star Marianas Air, Inc. appeared through its President, Shaun Christian, and its counsel, Timothy Bellas. Respondent's employees, Alma Canlas and Hilary San Nicolas, testified in support of Respondent. Peter H. Palacios testified in support of Complainant. [The parties appeared at the Tinian Labor Office; Hearing Officer Jerry Cody presided over the Hearing via Skype, from the Hearing Office in Saipan.]

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

This case is based on an Amended Determination, Notice of Violation and Notice of Hearing ("Determination") filed by Tinian Labor's Enforcement Section ("Enforcement") in the Hearing Office on September 21, 2016, against respondent Star Marianas Air, Inc. ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 1.]

In its Determination, Enforcement charged Employer with violating two basic Departmental Regulations: one regarding Employer Declarations and the other regarding CNMI job preference laws. Each charge will be discussed separately below.

1. Failure to Post Employer Declarations

The Department's "Employer Declaration" Regulation requires an employer to post an online "declaration" on the Department of Labor ("DOL") website (www.marianaslabor.net) in cases where the employer has rejected a U.S.-status qualified worker for a particular job and instead, hired a foreign national worker for the position. [Employment Rules and Regulations, codified in the Northern Mariana Islands Administrative Code ("NMIAC") at § 80-20.1-235(e).] In such cases, the regulation requires the employer to post a short response on the website, explaining: (1) the action it took with respect to each applicant who posted a response to the job vacancy; and (2) the reason(s) why that person was not hired for the position. *Id.*

In its Determination, Enforcement charged that Employer violated the above-cited regulation by failing to issue "declarations" to two job applicants: Cynthia Santos and Peter H. Palacios. [Hearing Exhibit 1 at ¶¶ 5-6, 9.]

In its defense, Employer complained that it had experienced technical problems in 2015 when it tried to post responses on the DOL online response system. As demonstrated in the printout of the JVA for the Director of Customer Service job (Hearing Exhibit 2), DOL's website printed duplicates of certain names of job applicants, which then caused confusion between Employer and DOL. [Testimony of Mr. Christian.]

At Hearing, the parties discussed these technical issues and Enforcement (Ms. Cabrera) admitted that DOL's website and reporting system has had technical problems in the past. Enforcement then stated that it was willing to dismiss the charge against Employer for failing to issue a declaration as to Ms. Sanchez. [Testimony of Ms. Cabrera.] The Motion to Dismiss the charge was granted by the Hearing Officer.

As to Employer's failure to post a declaration for Mr. Palacios, the Hearing Officer notes that it is not altogether clear whether there was a violation of the regulation. The "Employer Declaration" Regulation [NMIAC § 80-20.1-235(e)] states, in part: "the employer shall file a declaration ...in digital format with respect to the 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*." *Id.* (emphases added). This Regulation is not a model of clarity. Its wording suggests that employers are required to respond to those applicants who post online responses for the job and/or were "referred" to the employer by

the DOL. In this case, Mr. Palacios did not apply online and he was not referred by DOL; rather, he was a walk-in applicant who approached DOL with his resume and then obtained Employer's application form and submitted it, himself, to the Employer. [Testimony of Mr. Palacios.]

Based on the wording of the Regulation, it is not clear whether an employer is required to issue online "declarations" to walk-in applicants; therefore, it appears that Employer has a technical defense to this alleged violation.

Whether Employer's conduct violated the letter of the law, it certainly violated the spirit of the regulation. Given that Mr. Palacios applied and was interviewed, Employer should have notified Mr. Palacios after it made its hiring decision, giving him the reasons why he was not hired for the position of Director of Customer Service. Indeed, at the time he was interviewed, the interviewer told Mr. Palacios that the company would notify him in the future about the position. [Testimony of Mr. Palacios.] In the end, Employer failed to notify Mr. Palacios that someone else had been hired.

Holding: The Hearing Officer finds that, given the wording of the Employer Declaration Regulation, Employer did not technically violate the regulation, and therefore, the charge is adjudged in favor of the Employer. [Regs. at NMIAC § 80-20.1-235(e).] Having said that, common decency and professionalism dictate that employers should notify interviewees about the results of their job interviews after the employer makes its hiring decision.

2. Failure to Comply with the Citizen Job Preference Requirement

Enforcement charged that Employer had rejected the job application of a qualified U.S. citizen (Mr. Palacios) without just cause and instead, hired a nonimmigrant alien, in violation of the CNMI's job preference statute and Regulations. [3 CMC § 4528(a) and Regs. at NMIAC §§ 80-20.1-220(a) and 455(i)(2).] Accordingly, the Department asked that Mr. Palacios be awarded actual and liquidated damages amounting to up to six months of wages. [3 CMC § 4528(f)(1); Regs. at §§ 80-20.1-455(i)(2) and 485(c)(1).[1]]

[1] Regulation Section 455(i)(2) states: "In the event that an employer...fails to hire a qualified applicant entitled to a preference and hires any nonimmigrant alien instead, the...Enforcement Section may file an administrative complaint with the Administrative Hearing Office on behalf of the applicant denied employment seeking damages, sanctions, and any other available relief."

Regulation Section 485(c)(1) authorizes the Hearing Officer in a job preference case to "award actual and liquidated damages in an amount up to six months' wages for the job for which a citizen...applied."

The Facts: The testimonial evidence established the following facts: In November 2015, Employer posted a JVA for the job of Director of Customer Service. A U.S. citizen named Peter H. Palacios obtained Employer's application form and applied for the job. Mr. Palacios believed he was qualified for the job because he had worked for 10 years (June 2003 – March 2014) as a Station Manager for Freedom Air in Tinian. Based on contacts made during his former job, Mr. Palacios was known both personally and professionally by Employer's President. Employer reviewed the application and Employer's Human Resources division interviewed Mr. Palacios for the position. Ultimately, Employer's President, Shaun Christian, decided to hire someone else – a CW-1 status worker - for the position. The person hired, Mr. Que, had worked as a VIP coordinator for the Tinian Dynasty; Mr. Que was also known personally and professionally by Employer's President.

Mr. Palacios interviewed for the DCS job in November 2015. Mr. Palacios waited several months after his job interview but heard nothing from Employer. When he learned in April 2016 that Employer had hired a CW-1 status worker for the position, Mr. Palacios complained to the Department of Labor, which opened an Agency investigation. [Testimony of Mr. Cabrera-Viches.]

After an investigation, the Department determined that Mr. Palacios had been qualified for the Director of Customer Service ("DCS") position and therefore, it charged that Employer had violated CNMI's job preference law [3 CMC § 4521; Regs. at NMIAC § 80-20.1-220(a)] by not giving Mr. Palacios preference for the job over the CW-1 status worker who was hired as Director of Customer Service. [Determination at Hearing Exhibit 1.]

The law: The preference laws of the CNMI require employers to give preference in hiring to all qualified U.S. citizens or permanent residents over foreign national workers. 3 CMC § 4521; Regs. at NMIAC § 80-20.1-220(a).[2] Under CNMI law, as well as USCIS Regulations, if a U.S. citizen applicant is "qualified" for a job vacancy, he or she should be given preference in hiring for the position over a

[2] DOL Regulations state: "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. This requirement underlies all regulations with respect to the hiring, renewal, transfer and termination of employees everywhere in the private sector in the Commonwealth." Regs. at NMIAC § 80-20.1-101(a). 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 applies for the job in a timely fashion.").

CW-1 status worker. Thus, one central question in this case is whether Mr. Palacios should be deemed "qualified" for the DCS position.

Furthermore, 3 CMC section 4528(a) creates a cause of action against an employer which the rejects the job application of a U.S. citizen **"without just cause"** and then proceeds to hire a foreign national worker for the position. 3 CMC § 4528(a); Regs. at § 80-20.1-485(c)(1).] The Regulations provide the following guidance with respect to the term "just cause:"

> **Just cause.** The 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 educational degree necessary for the position, rejecting persons with unfavorable recommendations from prior employment; rejecting persons with an employment history indicating an inability 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*. [Regs. at NMIAC § 80-20.1-455(f)(1). Emphases added.]

As the moving party, Enforcement had the burden of proving by a preponderance of the evidence (a) that Mr. Palacios was "qualified" for the DCS job; and (b) that Employer rejected Mr. Palacios's job application "without just cause." As explained below, the Hearing Officer finds that Employer applied "lawful criteria" in making its hiring decision and that there was insufficient evidence to prove that Employer had rejected Mr. Palacios's job application without just cause.

Employer's Hiring Decision: Employer's Human Resources Department ("HR") consists of three employees: Alma Canlas, Hilary San Nicolas and Manuela Cing. HR schedules and conducts interviews of prospective job applicants, but it does not make recommendations to management as to whom should be hired. That decision is typically made by Employer's supervisors in the area of expertise. [Testimony of Ms. Canlas and Mr. Christian.]

Mr. Christian, as President of Star Marianas Air, Inc., is responsible for the day-to-day operations of the company; he reports directly to the Board of Directors. President Christian was the person responsible for making the hiring decision for the job of Director of Customer Service. [Testimony of Mr. Christian.]

The job announcement in this case concerned the position of Director of Customer Service ("DCS"). The DCS job is described as a high level, managerial position at the company. The DCS supervises line leaders who, in turn, supervise a sales force of "customer specialists." Additionally, the DCS teaches skills to the staff with the goal of improving the company's interaction with customers. According to Mr. Christian, the DCS deals with the "front side" of the airline business in areas such as checking-in, greeting customers, dealing with agents, dealing with customer complaints, etc. This contrasts with the "ramp" side of the business which deals with the more technical, operational issues such as maintenance, flight operations, etc. *Id.*

As for experience, Mr. Christian noted that Mr. Palacios's prior job experience as Station Manager of Freedom Air had been primarily involved with mechanical operations (the so-called "ramp" side) rather than with the customer relations side ("front" side) of the business. Thus, Christian noted that Palacios's prior job with Freedom Air had not involved him in that much direct customer contact.

The most important factor in Employer's hiring decision seemed to be the fact that Employer's management had had five or more years to observe Mr. Palacios's management style and temperament on the job while he worked at Freedom Air. Unlike other job searches where an Employer must evaluate an unknown applicant, this Employer had observed Palacios's demeanor and management style while he worked next to Employer's office at the Tinian International Airport for five years. President Christian testified that his first-hand experience of observing Mr. Palacios during his former job, had convinced him that Mr. Palacios would not perform adequately as the Director of Customer Service.

In particular, Mr. Christian testified that he found Palacios's verbal communication skills and his choice of language to be a "concern from a business standpoint." He explained that Mr. Palacios has a personal habit and reputation of frequently using four-letter curse words in normal conversation. (Christian noted that Palacios's cursing habit was so pronounced that it caused local FAA officials to give him the nickname of "F-ing Pete.") Indeed, this cursing habit was in evidence during the job interview. Ms. Canlas, who interviewed Mr. Palacios for the company on November 30, 2015, testified that Mr. Palacios used the "F" word at least three times in the course of responding to interview questions. [Testimony of Ms. Canlas.] Mr. Christian explained that he viewed this trait as extremely inappropriate for someone serving in a supervisory role at the company. [Testimony of Mr. Christian.]

In summing up his opinion of this candidate, Mr. Christian stated: "His inter-personal interactions with a variety of customers were observed by us [over a period of about five years] and they did not live up to a standard that we are looking for in a Director of Customer Service." [Testimony of Mr. Christian.]

Another negative evaluation point regarding Mr. Palacios was his writing skills, or lack thereof. Although no formal writing sample was required, Christian noted that numerous grammatical mistakes were made in the applicant's resume and in a short email that Palacios had sent to the company to attach a document. *Id.*

At Hearing, Employer argued several points of a defensive nature. First, Employer noted that the fact that Mr. Palacios had worked for its competitor, Freedom Air, had nothing to do with Employer's decision not to hire Palacios. Mr. Christian testified that his company had hired six former employees of Freedom Air in the recent past. Second, Employer stated that although the ability to speak Mandarin had been a "preferred" skill, it was not a mandatory requirement for the position. Christian noted that the person who had been management's first choice for the job in late November 2015, a U.S. citizen living on Saipan,[3] did not speak Mandarin.

Ultimately, in about late December 2015, Employer chose to hire a CW-1 status worker named George Que for the DCS position. Mr. Que had worked as the head of VIP Services for the Tinian Dynasty. In that position, Mr. Christian had observed Mr. Que interacting with customers in a positive manner. Christian concluded that Mr. Que's skills and experience would be a good fit for what management was seeking. Christian stated that the fact that Mr. Que speaks the Mandarin language and that about 60% of Employer's customers are from China, was an important factor, but not the primary or determinative factor, in making the decision to hire Mr. Que for the DCS position. [Testimony of Mr. Christian.]

Evaluating the Employer's Decision Not to Hire: The fact that this was an executive position does not exempt it from preference laws, but it does make the analysis more difficult than if it were a semi-skilled job.[4]

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[3] At Hearing, Mr. Christian characterized Mr. Hunter as Employer's "first choice" for the DCS job. Mr. Christian testified that in about October and November 2015, Star Marianas Air management had been very interested in pursuing Glen Hunter as a candidate for the DCS job. After some discussion with this candidate, in about mid-December 2015, Mr. Hunter informed management that he wanted to withdraw his name from consideration for the job. At that point, Employer turned to Mr. Que for the DCS position. [Testimony of Mr. Christian.]

[4] If a job requires a single basic skill (example: drill press operator) and the U.S. citizen has prior experience using that skill, it can be inferred that he is qualified for the position. On the other hand,

The Director of Customer Service is a multifaceted job that and entails supervising a large internal staff of sales people, handling a broad range of customer relations, and reporting to the highest level of corporate management. [Testimony of Mr. Christian.] The interpersonal skills required to succeed in such a position cannot necessarily be reduced to a simple checklist.

Employer's President and CEO observed Mr. Palacios's temperament and management style in a wide variety of situations over a five-year period and formed impressions of his capabilities and limitations. This assessment, which proved difficult for Mr. Christian to reduce to a simple formula, was largely negative. Ultimately, Employer's management concluded, based on their observations. that Mr. Palacios would not perform adequately as Director of Customer Service.

In particular, Employer disliked Palacios's habit of using curse words, such as the "F" word, on a regular basis in professional conversations. The use of curse words in casual conversation is, in some respects, routine, but Employer found it highly suspect for a job applicant to use such language in a job interview, as occurred in this case. Moreover, President Christian had personally observed Palacios using curse words constantly in his prior job while dealin```g with his staff. *Id.*

The Hearing Officer believes it was reasonable for management to be concerned about the "cursing" character trait in someone who was applying to be one of the company's primary public relations officers, assigned to interact with Employer's sales force and customer base. Again, the standard is whether the employer used "lawful criteria that an employer normally applies in making hiring decisions" to evaluate this job applicant. [Regs. at NMIAC § 80-20.1-455(f)(1).

Other reasons noted by Employer for not hiring of Mr. Palacios were his lack of experience in the "front" side (customer relations side) of the travel business, as well as his lack of writing skills. Standing alone, each of these factors may not have justified rejecting the application, but it was the totality of all factors combined that led Employer to reject this applicant.

Holding: Based on the foregoing, the Hearing Officer concludes that Complainant presented insufficient evidence to prove that Employer's rejection of Mr. Palacios for the DCS job was a decision made "without just cause." Likewise, there was

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certain jobs require multiple talents and interpersonal skills rather than mechanical abilities; such jobs will necessarily be more difficult to assess.

insufficient evidence that the citizen-applicant was "qualified" for the position. The evidence shows that Employer engaged in a careful review of Mr. Palacios's qualifications for this position and made a reasonable decision based on a totality of factors, as discussed above.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** For the reasons set forth above, judgment is hereby entered in favor of Respondent Star Marianas Air, Inc. on all charges brought under the Determination filed on September 21, 2016.

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4528(g) and 4948(a).

DATED: March 7, 2017

Jerry Cody
Hearing Officer