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

In the Matter of:	)	CAC No. 16-019-11
Department of Labor Enforcement	)	
and Compliance Section,	)	
Complainant,	)	**ADMINISTRATIVE ORDER**
	)	
v.	)	
	)	
Japan Enterprises Corporation,	)	
Respondent.	)	
	)	

This Compliance Agency Case came on for hearing on February 16, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The Department of Labor Enforcement and Compliance Section was represented by James Ulloa. Respondent Japan Enterprises Corporation appeared through its Manager, Felipe Kalen,[1] and its representative, Ray P. Chrisostomo. Hearing Officer Jerry Cody, presiding.

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 a Determination, Notice of Violation and Notice of Hearing ("Determination") filed by the Department of Labor Enforcement and Compliance Section ("Enforcement") in the Hearing Office on December 7, 2016, against respondent Japan Enterprises Corporation ("Employer"). [A copy of the Determination was entered into evidence as Hearing Exhibit 2.]

The Determination alleges that Employer failed to give job preference to U.S. citizens and permanent residents in violation of the Employment Rules and Regulations ("Regulations"), codified at the Northern Mariana Islands Administrative Code ("NMIAC") at section 80-20.1-220(a). Specifically, Enforcement alleged that Employer failed to properly review and consider 56

[1] The President of Japan Enterprises Corporation, Takaharu Komoda, signed a letter authorizing Mr. Kalen to represent the corporation in the Hearing of this case. Hearing Exhibit 1 (letter from Mr. Komoda, dated 2/15/17).

responders to a job vacancy announcement ("JVA") posted by Employer for five openings for the position of "Maintenance Cleaner." Hearing Exhibit 1 at ¶¶ 5-11.

At Hearing, testimony was taken and business licenses were submitted to establish the nature of Employer's business. According to Employer's authorized representative, Manager Felipe Kalen, Mr. Takaharu Komoda owns sole or controlling interest in three CNMI corporations: Japan Enterprises Corporation, Jaguar Limited Corporation and World International Corporation. [Test. of Mr. Kalen.]

Japan Enterprises Corporation (Employer) has two businesses: a nightclub called the "Micronesia Club" and a business consulting service. Jaguar Limited Corporation holds a business license for a nightclub called "Club Mermaid" and a business management service; World International Corporation is a general construction contractor. [Hearing Exhibit 10 – copies of business licenses.]

Based on a recently produced Total Workforce Listing document, Employer has a total of six full-time workers: 2 U.S. citizens, 3 CW-1 status workers and one employee (President Komoda) holding E2-visa status. [Hearing Exhibits 3 and 4.][2]

The facts of this case are as follows. On April 28, 2016, Manager Kalen visited the Department's Citizen Job Placement Section ("Job Placement") to post job vacancy announcements for Japan Enterprises Corporation and Jaguar Limited Corporation. Mr. Kalen had no experience posting JVAs, therefore he asked Job Placement staff Manny Iguel to assist him in filing the JVA. For Japan Enterprises Corp. (Employer), the JVA listed 5 openings for the position of "Maintenance Cleaner." For Jaguar Limited Corp., the JVA listed 5 openings for the position of "General Maintenance." About one week later, Mr. Kalen posted a JVA for World International Corporation, listing 5 openings for the position of "Building Maintenance Repairer." Mr. Kalen posted all of these JVAs based on the instructions of his boss, Mr. Komoda. [Testimony of Mr. Kalen. Copies of the three JVAs were entered into evidence as Hearing Exhibits 5, 6 and 7, respectively.]

The present case only concerns the JVA posted by Employer - Japan Enterprises Corporation. Department records show that 56 responses were posted to the JVA.

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[2] After appearing for the initial Hearing of this case on February 14, 2017, without having filed a Total Workforce Listing in 2016, Employer was given two days to produce the documents. On February 16, 2017, Employer produced Total Workforce Listings for the 3rd and 4th Quarters of 2016. (These documents were entered into evidence as Hearing Exhibits 3 and 4, respectively.)

The JVA closed on May 13, 2016, but Employer posted no response to those responses for five months. In October 2016, Employer posted the same response to each responder, stating that the responder had "no experience" to qualify for the job. [Hearing Exhibit 1 at ¶¶ 5, 7.]

Enforcement charged Employer with failing to give job preference to the citizen and permanent resident responders who sought employment as maintenance cleaners. Mr. Kalen admitted that in evaluating responders to the "maintenance cleaner" JVA, Kalen had applied a requirement of "2-3 years of experience in building maintenance" rather than "cleaning" experience.

After hearing Mr. Kalen's explanation, Enforcement contended that Employer applied the wrong "job experience" requirement for this position. The Department noted that 2-3 years of experience was not justified by the ONET entry for the position of "janitor or cleaner." [See ONET entry for "janitors and cleaners" at Hearing Exhibit 13.] Furthermore, the JVA filed by Employer had listed the required work experience for this job as: "a few months working with experienced employee." [See JVA at Hearing Exhibit 5.]

Employer offered a somewhat novel defense. Mr. Kalen testified that the job title of "maintenance cleaner" had been posted by mistake. Kalen claimed that when he met with the DOL employee (Manny Iguel) at Job Placement who helped him file the JVAs on April 28, 2016, Kalen had not requested the title of Maintenance Cleaner. He stated that Mr. Iguel must have mistakenly added that job title to the JVA without Kalen's knowledge.[3] Kalen testified that after filing the JVA, *he never reviewed the job title in the JVA*, but he did review and contact the responders by telephone and determined that none of them were experienced in building *maintenance*.[4] Based on Kalen's belief that the job required specific experience in building "maintenance," he rejected each of the online responders. [Testimony of Mr. Kalen.] Employer never hired anyone for the maintenance cleaner position.

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[3] Mr. Iguel testified that he had worked with Mr. Kalen, who was new to the system, to explain the website and post an accurate JVA. Iguel recalled that he input the job title that Mr. Kalen requested – "maintenance cleaner." Mr. Iguel did not recall there being any confusion about the job that was being advertised. [Testimony of Mr. Iguel.]

[4] Kalem claimed that out of the 56 responders posted on the JVA, he was able to contact about 46 people by telephone to confirm that they did not have the requisite experience in "building maintenance." The remaining 10 people could not be reached and were not located. [Testimony of Mr. Kalen.]

In support of its contention that Kalen never intended to post a JVA for a "cleaner," Employer introduced a copy of a newspaper ad that it took out in the Saipan Tribune on April 27, May 4 and 11, 2016, advertising a job in "General Maintenance." That advertisement stated that Employer was seeking someone with "at least 2-3 years experience as a Commercial Building Maintenance ...Preferably in Carpentry and Masonry." [Hearing Exhibit 9 (Certificate of Publication, issued by Saipan Tribune on 5/11/16).]

DISCUSSION

Departmental Regulations state that "Employers shall give qualified citizens, CNMI permanent residents and U.S. permanent residents preference in employment in the private sector workforce in the Commonwealth over foreign national workers, transitional workers, and nonimmigrant aliens." [Regs. at NMIAC at § 80-20.1-220(a).]

In order to ensure maximum participation of citizens and permanent residents, Employers are required to post job vacancy notices on the Department's website. *Id.* at §§ 80-20.1-220(b) and 225(a). In the event that the citizen or permanent resident is not hired, the Employer is required to file an online declaration on the Department's website, addressed to each responder, explaining the action taken on each application and a short statement on the reasons each applicant was not hired. *Id.* at § 80-20.1-235(e).

In its Determination, Enforcement charged that Employer had failed to give job preference to citizen and permanent residents who responded to Employer's JVA for maintenance cleaner. Testimony showed that Employer had improperly imposed a requirement of "building maintenance" experience that was not required for the "maintenance cleaner" position, then rejected job candidates who did not have such experience. Because Employer imposed a requirement on the maintenance cleaner job that was not listed in the JVA or the ONET, Enforcement alleged that Employer, in essence, had failed to give proper job preference to the U.S. citizen or permanent resident responders. [Determination at Hearing Exhibit 2.]

The Hearing Officer finds the testimony of Mr. Kalen, that he mistakenly allowed a JVA to be posted for the *wrong* job title, to be credible.[5] Indeed, the testimony

[5] The Hearing Officer believes that Mr. Iguel's testimony is credible as well. However it occurred, it appears that Mr. Kalen misunderstood that the job title for the posted position was going to read "maintenance cleaner." It is possible and, indeed, probable that Mr. Kalen caused the confusion in his description of the position. Moreover, Kalen should have reviewed the full text of the JVA as Mr. Iguel prepared to post it.

shows that Employer was grossly negligence in failing to properly review and manage its own job vacancy announcement, but the basic "story" that Mr. Kalen mistakenly allowed the wrong job title to be affixed to the JVA, is believable. Employer compounded the problem by not noticing the error in its job title; thus, it failed to inform Job Placement about the error and failed to change the JVA. Instead, Kalen simply pretended that the JVA had been for a "maintenance" job and then rejected all responders who did not have maintenance experience in their backgrounds.

Holding: The actions of Employer - listing an incorrect job title and rejecting responders based on unwritten job requirements - were completely negligent and wasteful of the Department's and the responders' time and effort. Technically, however, Employer's actions did not deprive citizens and/or permanent residents of job preference for the stated "maintenance cleaner" position because Employer never intended to hire anyone for that job and no foreign national workers, transitional workers or other nonimmigrant aliens were hired in place of citizens or permanent residents for that position. [Regs. at NMIAC at §§ 80-20.1-220(a) and 235(e).]

As to sanctions, there is no stated penalty for posting a bogus job that Employer does not actually intend to fill, then failing to correct the post through sheer negligence. Perhaps there should be a regulation that punishes an Employer for wasting the Department's time, but the Hearing Officer knows of no such regulation. Based on these facts, the Hearing Officer finds that this is not a "preference" violation, per se. Rather, this is an instance of sheer negligence on the part of Employer in arranging for a mistaken job announcement to be posted, then failing to read it. The employer declaration should have stated that the wrong job title had been listed and Employer should have apologized to responders for wasting their time and effort. Instead, Employer compounded its mistake by judging the responders by an unstated criteria of "maintenance experience" and rejecting them with the short notation of "no experience."

The Hearing Officer finds that Employer should not be sanctioned for its negligence, primarily because technically, no statute or Regulation has been violated. There was no "preference" violation as there was no intent to deprive citizens and permanent residents of jobs and nobody was hired for the maintenance cleaning position. Having said this, Employer is WARNED that it should carefully scrutinize all future JVAs to ensure that they accurately reflect the job that Employer intends to fill. Failure to do so may result in future sanctions, including but not limited to, the denial of a Certificate of Good Standing.

Finally, it is difficult to believe that these three corporations actually needed 15 maintenance-related jobs filled at about the same time, as Mr. Kalen claimed. However, a full examination of the hiring practices of all three of Mr. Komoda's companies lies beyond the scope of this case.

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Judgment is hereby entered in favor of Respondent Japan Enterprises Corporation on the charges of violating "preference rules" as set forth in the Determination. The Hearing Officer finds that Respondent acted negligently by posting an incorrect JVA, but Respondent shall not be sanctioned for its conduct.

2. **Posting on Website:** Respondent is WARNED to carefully scrutinize its future posts of job vacancies and renewals on DOL's website in accordance with Regulations at NMIAC § 80–20.1-225(a). Respondent shall be required to hire U.S. citizen and permanent resident job applicants when they are qualified to work.

3. **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 §§ 4948(a) and 4528(g).

DATED: February 24, 2017

Jerry Cody

Jerry Cody
Hearing Officer