

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

In the Matter of:)	D.C. No. 17-007
Herman’s Modern Bakery, Inc.,)	
Appellant,)	ADMINISTRATIVE ORDER
)	
v.)	
)	
Department of Labor – Citizen Job Availability)	
and Citizen Job Placement Section,)	
Appellee.)	
)	

This denial appeal came on for hearing on April 6, 2017, in the Administrative Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. Appellant Herman’s Modern Bakery, Inc., was represented by its General Manager, Anna G. Hayes, and its President, Herman T. Guerrero. The Department’s Citizen Availability and Citizen Job Placement Section (“Job Placement”) was represented by James Ulloa. 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 appellant’s timely appeal of a Notice of Denial (“Denial”) issued by the Job Placement Section on March 8, 2017. [A copy of the Denial was entered into evidence as Hearing Exhibit 1; a copy of the Employer’s letter of appeal, dated March 22, 2017, was entered into evidence as Hearing Exhibit 2.]

Appellant Herman’s Modern Bakery, Inc. (“Employer”) operates a bakery, food service and catering business with several locations on Saipan. The Job Placement Section denied Employer’s request for a Certification of Good Standing, citing three grounds:

- (1) Employer failed to post Employer Declarations with respect to 17 JVAs posted by Employer in 2016 and 2017, as required by the Employer Rules and Regulations (“Regulations”), codified in the Northern Mariana Islands Administrative Code (“NMIAC”), at § 80-20.1-235(e);

(2) Employer provided insufficient justification for its failure to hire a status qualified citizen or permanent resident for the JVA (No. 16-05-38238) posted for the job of “restaurant server,” as required by Regulations at NMIAC § 80-20.1-235.

(3) Employer failed to submit a Total Workforce Listing for the 2nd quarter of 2016, as required by Regulations at NMIAC § 80-20.1-505(b).

1. **Failure to Post Employer Declarations With Respect To 17 Posted JVAs.**

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. [Regulations at NMIAC § 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 the Denial, Job Placement charged that Employer had failed to post timely Employer Declarations in connection with 17 JVAs that Employer posted in 2016 and 2017. [Hearing Exhibit 1.] These JVAs were for the following positions: catering coordinator, baker, cook, expeditor, baker, executive secretary, maintenance technician, food service manager, cake decorator, cook assistant, packer, production manager, production clerk, refrigeration and aircon technician, maintenance technician, sales representative, food service worker, sales representative and baker’s helper. [Hearing Exhibit 1 - Determination at pp. 1-2.]

At Hearing, Employer admitted that it had not posted responses to responders to any of the above-listed JVAs. Ms. Hayes, who oversees Employer’s compliance matters, testified that the company had assigned a Human Resources assistant to oversee labor matters, but that person resigned in February 2016. Thereafter, the company began neglecting its obligation to file declarations. Nevertheless, Ms. Hayes testified that Employer had reviewed many of the responders’ resumes to determine whether they were qualified. Ms. Hayes notes that the vast majority of referrals lacked qualifications for the JVAs. Furthermore, Employer notes that it hired many U.S. citizens or permanent residents for these open positions. [Testimony of Ms. Hayes.]

Employer also complained that most of the online responses posted with respect to JVAs turn out to be unqualified or not interested in the jobs. Yet, DOL regulations require an employer to review each response and then post a response as to why that person is not being considered for the job. Employer notes that this process wastes valuable management time and constitutes a burden. [Testimony of Ms. Hayes; Employer's appeal letter at Hearing Exhibit 2.]

DOL maintains an automated system of job referrals that automatically forwards many job applicants' names and resumes in response to JVAs based on pre-programmed criteria. [Testimony of Mr. Ulloa.] Admittedly, this system results in many responders being forwarded to JVAs on jobs for which they are not qualified. Correcting this system lies beyond the capability of the Hearing Office. However, the Hearing Officer notes the burden that the current automated system places on employers to post responses to unqualified responders.

2. Failure to Hire a U.S. Status-Qualified Worker For A Restaurant Server Position as Advertised in JVA No. 160-05-38238.

In its Denial, Job Placement charged that Employer provided insufficient justification for its failure to hire a status qualified citizen or permanent resident for the JVA (No. 16-05-38238) posted for the job of "restaurant server" from May 19 to June 3, 2016. [Regs. at NMIAC § 80-20.1-235. A copy of the JVA was entered into evidence as Hearing Exhibit 7.]

At Hearing, Ms. Hayes testified that, in fact, Employer had hired a U.S. citizen for the posted job of "restaurant server" in June 2016. That job applicant, who was a walk-in applicant, was hired on June 7, 2016, but did not last more than a month. In mid-July 2016, Employer hired a second U.S. citizen for the position. That person began working for Employer on July 28, 2016, then resigned on September 19, 2016. [Testimony of Ms. Hayes.]

Evidently, Employer never informed the Job Placement Section that a U.S citizen had been hired for JVA No. 160-05-38238. The Regulations (Regs. at NMIAC § 80-20.1-235) clearly state that if an employer hires a U.S. citizen or permanent resident for a posted job vacancy, the Employer has no obligation to post declarations to responders, or even to notify DOL of the hiring.¹ Nevertheless, as

¹ Regulation section 80-20.1-235(e) states: "Employer Declaration. In the event that a citizen, CNMI permanent resident, or U.S. permanent resident was not hired,...the employer shall file a declaration...with respect to the

a practical matter, Employers would be well advised to notify Job Placement when a U.S. citizen is hired for a posted position, in order to avoid misunderstandings with the Department of Labor.

3. Failure to Submit A Quarterly Total Workforce Listing for the 2nd Quarter of 2016.

DOL Regulations require employers to submit information *on a quarterly basis* regarding “the number and classification of employees for whom wages were paid during the quarter.” [Regs. at NMIAC § 80-20.1-505(b).] This information is submitted in a document called the “Total Workforce Listing.” The Department requires employers to submit this information in order to qualify for a Certificate of Good Standing. [Testimony of Mr. Ulloa.]

The evidence established that Employer had submitted two Total Workforce Listings to DOL for 2016: one Listing covered the period from October 2015 through April 2016; the second Listing covered the period from May 2016 through January 2017. [Copies of these Total Workforce Listings were entered into evidence as Hearing Exhibits 5 and 6, respectively.]

The above-noted Listings included the months of the second quarter of 2016; however, the three months comprising the second quarter were not segregated from other months. After receiving the Denial, Employer prepared and submitted a Total Workforce Listing that tracked only the 2nd Quarter of 2016, covering only those three months of the second Quarter (April, May and June of 2016). [A copy of the Total Workforce Listing for the 2nd Quarter of 2016 was entered into evidence as Hearing Exhibit 3.]

Ms. Hayes explained that Employer had not realized that the Department wanted the information tracked *by each quarter*. As soon as Employer realized its mistake, it took immediate steps to correct the deficiency by producing the missing document.

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citizens and permanent residents who applied for the job....**No declaration is required if a citizen or permanent resident is hired.**” [Emphasis added.]

DISCUSSION

The evidence established that: Employer neglected to post “declarations” as to numerous JVAs posted in 2016 and 2017 [Regs. at NMIAC § 80-20.1-235]; but Employer did not commit the second violation noted in the Denial. The third alleged violation was excused after it was shown that Employer had submitted the information in a different format. As soon as Employer discovered the mistake, it corrected the deficiency by submitting the correct quarterly Total Workforce Listing in 2016 (Hearing Exhibit 3). [Regs at NMIAC § 80-20.1-505(b-d).]

At Hearing, Employer asked that the Denial be reversed and any sanction be reduced or eliminated. As to the first charge, Employer admitted that it had not posted “declarations” to online responders, but Employer presented uncontested evidence that it actually reviewed and considered many of the responders. Many of the U.S. citizens who were interviewed and hired by Employer were walk-in applicants who had seen the job vacancy posted on the website, but chose to come to Employer in person. [Testimony of Ms. Hayes.]

Employer’s General Manager testified that the company has difficulty retaining the U.S. citizens that it hires to work in the bakery business. Ms. Hayes stated that management is forced to terminate dozens of local employees because they have poor work habits or dismal attendance records. To substantiate this point, Employer submitted a list of 71 U.S. citizens or permanent residents who Employer had terminated in 2016 and 2017 [Hearing Exhibit 4 – listing 71 citizens and/or permanent residents and 17 foreign workers terminated in 2016 and 2017.]

At Hearing, Job Placement, noting Employer’s good record of employing many U.S. citizens and permanent residents, recommended that the Denial be reversed and that Employer should not be sanctioned, but should receive a “warning” to file employer declarations in the future.

Sanctions:

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of \$2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that “[t]he hearing officer is

authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings.” [Regs. at § 80- 50.4-820(h) and (o).]

This Denial was based on three charges. First, the Department correctly faulted Employer for failing to post Employer Declarations with respect to numerous posted JVAs in 2016 and 2017. On the other hand, as stated, the employer had no obligation to post declarations if a U.S. citizen or permanent resident was hired for an advertised position (see footnote 1). At least some of the 17 JVAs noted in the Denial fall into this category. Also, Employer noted that its failure to post declarations was an oversight on its part that occurred after its Human Resource assistant resigned from the company. Employer also noted that it reviewed many of the responders’ resumes and found those responders to be unqualified for the offered jobs. The second charge of the Denial was countered by Employer’s uncontested testimony that it had hired a U.S. citizen for the “restaurant server” position. The third charge was satisfied when Employer produced the missing Total Workforce Listing in the correct format.

Employer presented other facts in support of its request for leniency. Employer noted that it is the oldest Chamorro-owned business in the CNMI and that it has been operating with a good labor record for decades. Ms. Hayes testified that the company remains deeply committed to hiring qualified local workers. Employer currently employs 122 full-time employees, consisting of 60 U.S. citizens or permanent residents, 56 CW1-status workers and 6 holders of EADs (Employment Authorization Documents). [Testimony of Ms. Hayes.] Employer’s Workforce Participation percentage is nearly 50%, which is well above the minimum of 30% mandated by CNMI statute and Regulations. [3 CMC § 4525 and Reg. at NMIAC § 80-20.1-210(c)(3).]


The Hearing Officer agrees that given Employer’s long-standing record of hiring U.S. citizens and permanent residents, the standard fine for Employer Declaration violations should be reduced to a warning in this instance. Based on the foregoing, the Hearing Officer holds that this Denial should be reversed, provided that Employer is given a warning: Employer is warned that any failure on its part to post declarations to online responders in the future, may result in Agency charges and substantial monetary sanctions.²

² Again, if a U.S. citizen is hired for a posted job announcement, the Employer is not required to post “declarations” but, as a practical matter, it should notify Job Placement that such hiring has occurred. [Regs. at NMIAC § 80-20.1-235.]

Good cause having been shown, IT IS HEREBY ORDERED:

1. **Denial is reversed:** For the reasons stated above, the Department's Denial of a Certificate of Good Standing for Appellant Herman's Modern Bakery, Inc., is hereby REVERSED, provided that Appellant complies with the terms of the Order, as set forth below. The Department is instructed to issue the Certificate of Good Standing to Appellant as soon as practicable.
2. **Warning:** Appellant Herman's Modern Bakery, Inc., is hereby WARNED that it has a continuing obligation to post online "employer declarations" to responders in cases where U.S. citizens or permanent resident applicants have not been hired and a foreign national worker has been chosen instead for the job. Any failure by Appellant to post such declarations in the future may be grounds for denial of a Certificate of Good Standing, and may subject Appellant to possible monetary sanctions after a due process hearing on the issue. 3 CMC §§ 4528(f)(2) and 4947(11).
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: April 12, 2017



Jerry Cody
Hearing Officer