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

In the Matter of:	)	Labor Case No. 17-019
Zajradhara, Zaji O.,	)	
Complainant,	)	
	)	**ADMINISTRATIVE ORDER**
v.	)	
	)	
Karis Company, Ltd.,	)	
Respondent.	)	
	)	

This case came on for hearing on December 12, 2017, in the Administrative Hearing Office of the CNMI Department of Labor. Complainant Zaji O. Zajradhara appeared without counsel. Respondent Karis Company, Ltd. appeared through its General Manager, Han Eun Soo, and its registered agent, Cho Jin Koo. The Department of Labor Enforcement Section appeared through its investigator Patrick C. King. James Ulloa of the Department's Employment Services Division, testified by telephone. Mr. Cho also served as translator for Mr. Han. 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:

FINDINGS OF FACT

This labor complaint was brought by a U.S. citizen job applicant, Zaji O. Zajradhara ("Complainant") against Karis Company, Ltd. ("Employer"), alleging that the Employer violated the CNMI job preference laws by failing to consider Complainant's application for a job that Employer advertised in March 2017. Complainant requests damages against Employer pursuant to 3 CMC § 4528(a). [Complaint at Hearing Exhibit 1, filed on 6/2/2017; Testimony of Mr. Zajradhara.]

Employer operates a bed and breakfast business in Saipan, known as "Karis Villa," as well as a wholesale business and a retail shop. [Testimony of Mr. Han.] The company employs 6 full-time employees: 4 CW-1 status workers and 2 U.S. citizens or green card holders. [Testimony of Mr. Han; Total Workforce Listings entered into evidence as Hearing Exhibits 7a-c.]

On March 22. 2017, Employer posted a job vacancy announcement ("JVA") – JVA no. 17-03-47920 – on the Department of Labor ("DOL") website for the job of Assistant Manager. [A copy of the JVA for Assistant Manager was entered into evidence as Hearing Exhibit 3.] The JVA was listed as being open from March 22 through April 6, 2017. The JVA listed an "anticipated start date" for the job as October 1, 2017. *Id.*

As of March 2017, Employer already employed a CW-1 status worker, named Ms. Kim Jung Jon, in the position of Assistant Manager. In March 2017, Employer, with the help of its agent, Boo Boo Office, was preparing to file a CW-1 Petition with the U.S. Citizenship and Immigration Services ("USCIS") to renew Ms. Jon's job as Assistant Manager. Employer's document handler, the Boo Boo Office, prepared both the renewal Petition and the JVA for the Assistant Manager job. [Testimony of Mr. Cho.]

Complainant read the JVA for "Assistant Manager" on the DOL website and decided to apply for the job. On March 26, 2017, Complainant emailed the Employer, attaching his resume, and sent the email to the email address that Employer had posted on its JVA: han_karisco@yahoo.com. [1] Shortly thereafter, Employee received an error message (daemon message) indicating that the email could not be delivered because the recipient email address was invalid. [A copy of error message was entered into evidence at Hearing Exhibit 2.]

On March 27, 2017, Employee forwarded the error message to James Ulloa, then-acting Director of DOL's Employment Services Division. Mr. Ulloa also attempted to send an email message to that same email which was listed on Employer's JVA, but the message bounced back with the same error message indicating that Employer's email address was invalid. Mr. Ulloa testified that he took no further action regarding this Employer, because he was busy with many other employment-related matters. [Testimony of Mr. Ulloa]

Employer's JVA for Assistant Manager received 3 online responses on the DOL website from three potential U.S. citizen applicants. [See Hearing Exhibit 8 - copy of the JVA printout listing the responses.] All three responses were logged on

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[1] Employer (Mr. Han) testified that the email address, han_karisco@yahoo.com, was closed by yahoo and has not worked for several years. Mr. Han testified that he had not realized that the wrong email address was listed on the JVA because he never looked at the JVA. Employer's valid email address is karissaipan@karissaipan.com. After the case was filed, In about August 2017, Mr. Cho inserted the correct email address for Employer into the records of DOL's Employment Services. [Testimony of Mr. Han.]

March 22, 2017, the opening date of the announcement. (Complainant's name was not listed because he had not applied through the DOL website system, but had applied directly to Employer's listed email address.) *Id.*

Employer never reviewed, contacted or interviewed any of the job applicants who had posted responses to the JVA. [Testimony of Mr. Han.] Employer testified that in April 2017, Employer's document handler, Mr. Cho of the Boo Boo Office, printed out the names of responders to the JVA and showed them to General Manager Han. [Testimony of Mr. Cho and Mr. Han.] Mr. Han admitted that he had received the list from Mr. Cho but stated that had not contacted or reviewed any of the names on the list because he had "already submitted the CW-1 Petition" to renew his co-worker, Ms. Kim Jung Jun. [Testimony of Mr. Han.]

Employer submitted a Petition to USCIS to renew Ms. Jun's CW-1 status on March 29 or 30, 2017 – midway through the job announcement process. In May or June 2017, USCIS returned the Petition to Employer because of a problem with the amount of fees. [Testimony of Mr. Cho.] Within one day, the Employer corrected the fee and returned the Petition to USCIS. As of the date of Hearing, Employer has not received a decision from USCIS regarding the Petition. [Testimony of Mr. Cho and Mr. Han.]

Ms. Kim Jung Jon became ill in April 2017. Shortly after becoming ill, Ms. Jon left the CNMI to recuperate in another country. She has not returned to the CNMI since leaving in April 2017. Employer testified that he expects that USCIS will deny the renewal Petition in the near future. Meanwhile, the Assistant Manager position remains vacant at this time. [Testimony of Mr. Han.]

Determination: DOL's Enforcement Section investigated this case and concluded that Employer had violated 3 CMC § 4963(d), which states that an "Employer… shall not make a materially false statement or [give] materially misleading information, orally or in writing, to the Department or employee or officer of the Department…" [Determination at Hearing Exhibit 2.] Investigator Patrick King testified that Employer's placement of an incorrect email address in its JVA constituted a false or misleading statement giving rise to this violation. [Testimony of Mr. King.] For this violation, Enforcement requested a monetary sanction of $2,000. As for the U.S. job preference violation, DOL took no firm position in the Determination as to whether Employer had violated the law. [*Id.*; Determination at Hearing Exhibit 2.]

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CONCLUSIONS OF LAW

Complainant, a non-lawyer, did not cite the statute upon which his Complaint was based. The Hearing Officer construes the Complaint (Hearing Ex. 1) as alleging a violation of the CNMI job preference statute at 3 CMC § 4528(a).

The Commonwealth Employment Act of 2007, 3 CMC § 4528(a), states, in part, that "[a] citizen, CNMI permanent resident, or U.S. permanent resident who is qualified for a job may make a claim for damages if ...the 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."

In order to win his claim for damages under this statute, Complainant must prove all four elements of the statute: (1) that he was qualified for the job; (2) that his job application was rejected by the Employer without just cause; (3) that Employer then hired a foreign national worker for that position; and (4) that Employer failed to meet the so-called 30% requirement (ratio of citizens/permanent residents employed) in employer's full-time workforce. 3 CMC § 4528(a).

Three of the Four Elements of the Job Preference Charge Were Proven.

Based on the evidence presented, the Hearing Officer finds that Complainant proved three of the four elements of the Section 4528(a) offense.

First, evidence established that Employer has not met the 30% requirement of 3 CMC § 4525.[2] As of March 2017, Employer employed 5 full-time employees, consisting of one U.S. permanent resident and 4 CW1-status employees. [Total Workforce Listing submitted by Employer on 12/18/17.] Thus, Employer's workforce participation percentage was 20%, which was below the minimum requirement of 30%. Accordingly, this element of the offense is met.

Another element of a Section 4528(a) offense is to establish that Complainant was qualified for the job for which he applied. Employer posted simple qualifications on the JVA for this Assistant Manager position, such as: good communication skills, strong conflict resolution skills, team building capability, basic business math, etc. [See JVA at Hearing Exhibit 3.] Based on Complainant's work history

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[2] That statute requires employers to maintain a minimum workforce participation goal of 30%, meaning that 30% of Employer's full-time workforce must consist of U.S. citizens or U.S. permanent residents. [3 CMC § 4525 and Regs. at NMIAC § 80-20.1-210(c)(3).

as reflected in his resume, Complainant was arguably qualified for the Assistant Manager's job. [Complainant's Resume was submitted post-hearing, by stipulation, at Hearing Exhibit 9.] Therefore, this element of the offense was established.

Another element of a Section 4528(a) offense is satisfied if the employer, after rejecting the citizen, goes on to hire or renew a person who is not a citizen or permanent resident, such as a CW1-status worker. In this case, Employer re-hired its CW-1 status Assistant Manager, in essence, when it submitted a Petition to USCIS for her renewal on March 29 or 30, 2017. .

Complainant Failed To Prove that Employer had Unjustly Rejected His Job Application; Therefore, Complainant Cannot Prevail Under Section 4528(a).

Perhaps the most crucial element of a job preference case is proving that Employer rejected Complainant's job application without just cause. This Employer argued that it could not be found to have "rejected" Complainant's job application because it never received the application. The Hearing Officer finds this reasoning to be correct, and therefore, holds that this important element of the Section 4528(a) offense has not been proven.

As stated in the Findings, Employer never received Complainant's job application. This occurred for two reasons: (1) because Employer posted an invalid email address at the front of the JVA that appeared on DOL's website; and (2) because Complainant took no steps to notify Employer after learning that his emailed application had not been delivered due to the invalid email address. While it is true that Complainant informed the Director of Employment Services about Employer's invalid address, this did not lead to Employer being informed about Complainant or his intention to apply for the Assistant Manager job.

At Hearing, Complainant argued that he had fulfilled his obligation by notifying DOL's Employment Services Director about Employer's invalid website. On the other hand, Employer argued that Complainant had not taken reasonable steps to get his job application to the Employer after he learned that the email address was invalid. Employer noted that Complainant could have used the telephone number printed on the JVA and telephoned Employer to ask how to apply for the job.

The Hearing Officer finds that Complainant failed to take reasonable steps to reach the Employer to apply for this job. First, as Employer noted, Complainant could have simply called the local telephone number printed on the JVA and asked

Employer for its correct email address. Complainant explained that he did not call employer because he was afraid of being misunderstood, maligned or misquoted by Employer. The Hearing Officer finds this excuse to be inadequate. The needed phone call would have consisted of a single question posed in ten seconds, such as: "I am trying to email a message to your company, but your email address seems to be incorrect; could you please give me your valid email address?"

Second, Complainant could have posted his resume using the DOL website, in which case he would have been automatically input into the official responses to the JVA. Again, the reasons Complainant gives for not using the website are confusing and unconvincing.[3] If Complainant had posted his response to the JVA using DOL's system, Employer could not have argued that it did not receive the application, as it would be deemed to have constructive notice of all applicants posting responses to the job application. Since Complainant chose to bypass the official DOL website system, given the evidence presented, Employer has a valid defense to the job preference charge that it never received Complainant's job application.

The Hearing Officer concludes that Complainant failed to take reasonable steps to deliver his job application to Employer. (Although notifying the Director of Employment Services was a responsible act, it did not result in Employer actually receiving Complainant's job application or resume.) 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.

Employer Violated 3 CMC § 4963(d) by Giving Materially Misleading Information to the Department of Labor.

Based on its investigation of this case, DOL's Enforcement Section concluded that Employer had violated 3 CMC § 4963(d) by posting an incorrect email address on its Job Vacancy Announcement. Section 4963(d) states that an "Employer... shall not make a materially false statement or give materially misleading information,

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[3] Complainant gave four reasons for not using the DOL website to post his response to a JVA: (1) it's "easier" to send his resume by email directly to the employer; (2) the DOL website is "cumbersome;" (3) the DOL email server does not detect false email addresses; and (4) it's "futile" to use that system because employers ignore the postings anyway. [Testimony of Mr. Zajradhara.] Complainant further testified that he did not wish to involve DOL in his job search because, as he stated: "I'm not going to go through an Agency that I know ain't doing nothing for my behalf." *Id.*

orally or in writing, to the Department or an employee or officer of the Department..." [See Determination at Hearing Exhibit 2.] At Hearing, Enforcement noted that Employer's placement of an invalid email address in its JVA constituted a false or misleading statement given to the Department; thus, giving rise to this violation. The Hearing Officer agrees that, at a minimum, posting the invalid email was misleading to the public, resulting in both a job applicant and the Director of Employment Services having difficulty in communicating by email with the employer. For this violation, Enforcement requested a monetary sanction of two thousand dollars.[4] The amount of the sanction is discussed below (see p. 8).

Employer Failed To Engage in Good Faith Hiring Practices and Failed to Give Preference in Hiring to Online Responders To the Employer's JVA.

CNMI job preference Regulations require all employers to give preference to U.S. citizens and permanent residents over foreign national workers in employment and obligate employers to engage in good faith hiring practices in this regard. [See Regs. at NMIAC §§ 80–20.1-220 and 235(d).]

Employer's testimony at Hearing shows that it completely neglected its own published JVA before moving to renew its CW-1 status Assistant Manager. Employer's General Manager admitted that the company filed its Petition to renew its CW-1 status Assistant Manager about one week after the JVA began being advertised for her position. In other words, Employer did not bother to wait for the job announcement to run its course before filing to renew its CW-1 employee. Moreover, Employer never even bothered to check the JVA before filing its Petition. If it had checked after the first day of the JVA, if would have discovered that three responses had been posted by citizens interested, or potentially interested, in the offered job. [See Hearing Exhibit 8 – JVA showing three responses posted on 3/22/2017.]

Mr. Han testified that his document handler did not give him a copy of the JVA with the responses until April 2017, weeks after Employer had sent in its Petition to renew its CW-1 worker for the Assistant Manager position. Moreover, Han

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[4] The Hearing Officer notes that if a DOL investigator, during the course of his investigation of the labor complaint, finds that Respondent committed other related labor violations, DOL may either file a separate Compliance Agency Case or add Agency charges to the Labor Case. If the charges are added to the Determination, Respondent may object to the adjudication of the charge and force a separate hearing on the matter. In this case, after this option was explained to Employer, Employer chose to waive any objection and allow the charge to be adjudicated in the present hearing. [Testimony of Mr. King and Mr. Han.]

admitted that once he received the list of responders from Mr. Cho, Han did not review the list or contact the applicants because he knew the Petition had already been filed. [Testimony of Mr. Han.]

Furthermore, Employer's conduct calls into question whether it engaged in fraud in connection with its CW-1 Petition. The USCIS Petition contains an "attestation clause" in which the employer is required to attest, under penalty of perjury, that no qualified U.S. citizens or permanent residents are available for the position. It is completely disingenuous for an employer to attest that no citizens are available and interested in the offered job if the employer has not allowed the JVA to run its course and has not reviewed the resumes of those who did, in fact, post interest in the advertised position. [It should be noted that determining whether federal immigration regulations or statutes have been violated lies beyond the scope of this case. Therefore, no findings or sanctions shall be issued with respect to the USCIS Petition.]

The above conduct demonstrates that Employer had no intention of looking in the available work force for a qualified citizen or resident. The fact that the Petition was filed even before the JVA had run and that Employer made no effort to review the responders' resumes shows that Employer was not looking for any job applicant other than the CW-1 employee who already held the position. Such conduct violated the above-cited CNMI job preference Regulations that obligate employers to engage in good faith hiring practices and require all employers to give preference to U.S. citizens and permanent residents over foreign national workers in employment. [Regs. at NMIAC §§ 80–20.1-220 and 235(d).]

Procedural Note: The above-noted evidence concerns Employer's conduct with respect to those U.S. citizen job applicants who posted on DOL's website in response to the Assistant Manager job. That issue was not specifically raised in the Complaint or the Determination. Although the matter was addressed at the Hearing with the implied consent of the parties [see Regs. at NMIAC § 80–20.1-480(j)], Enforcement never moved to add charges related to this conduct. Accordingly, the findings regarding Employer's failure to review the three online responders to the JVA shall not be used as a basis for additional sanctions against this Employer.

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SANCTIONS

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (3 CMC § 4527), the Hearing Officer is authorized to levy a fine not to exceed $2,000 for each violation. 3 CMC § 4528(f)(2). In addition, violations of 3 CMC § 4963(d) may result in a sanction of up to $2,000, pursuant to 3 CMC § 4964(j).

Based on the facts presented, the Hearing Officer agrees with the Enforcement Section that a sanction is justified. Employer posted false and/or misleading information in the form of an invalid web address which led to at least one applicant failing to have his application received by Employer. Such misinformation constituted a violation of 3 CMC § 4963(d), which justifies an assessment of monetary sanctions against Employer, pursuant to 3 CMC § 4964(j).

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).]

Based on the above facts, the Hearing Officer concludes that the Employer's violation of 3 CMC § 4963(d), as described above, justifies a monetary sanction of $1,000.

In summary, judgment shall be entered in favor of the Respondent (Employer) and against Complainant on the issue of Complainant's claim under 3 CMC § 4528(a). Because Complainant was not able to prove all the elements of an offense under 3 CMC § 4528(a), he shall not be awarded damages. However, Complainant should be commended for bringing this matter to the attention of the Department of Labor.

Secondly, judgment shall be entered in favor of the Department of Labor and against Respondent on the Agency charge of violating 3 CMC § 4963(d) (see Determination at Hearing Ex. 2), which was heard by stipulation of the parties. [Regs. at NMIAC § 80–20.1-480(j).] For providing false and/or misleading information to the Department in violation of 3 CMC § 4963(d), Respondent shall be sanctioned one thousand dollars ($1,000), pursuant to 3 CMC § 4964(j).

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The Department being fully advised and good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment (Labor Complaint):** Based on the above findings and conclusions, judgment is hereby entered in favor of Respondent Karis Company, Ltd. and against Complainant Zaji O. Zajradhara on the labor complaint filed on June 2, 2017 (Hearing Exhibit 1).

2. **Judgment (Agency Charge):** Based on the above findings and conclusions, judgment is hereby entered in favor of the Department of Labor and against Respondent Karis Company, Ltd. on the Agency charge of violating 3 CMC § 4963(d), which was heard by stipulation of the parties, pursuant to Regulations at NMIAC § 80–20.1-480(j).

3. **Sanctions:** Respondent Karis Company, Ltd. is hereby SANCTIONED in the amount of one thousand dollars ($1,000) for its submission of false and misleading information to the Department of Labor in violation of 3 CMC § 4963(d). Respondent is ORDERED to pay the fine (payable to the CNMI Treasury) no later than **thirty (30) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. [3 CMC § 3 CMC § 4964(j).]

4. **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: December 28, 2017

Jerry Cody
Hearing Officer