

U.S. Department of Labor

Office of Administrative Law Judges
Washington, DC



Date : December 14, 1987

Case No. 87-JSA-1

J.S. Case Nos. 4630-83-17
4630-83-50

IN THE MATTER OF

LEROY AZOR, ET AL., AND
SIDOLES PERSI, ET AL,
Complainant

v.

HEPBURN ORCHARDS, INC.
Respondent

BEFORE: Robert J. Shea
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Wagner-Peyser Act of 1933, 29 U.S.C. § 49 et seq., and the regulations governing the Job Service System found at 20 C.F.R. Part 658.

STATEMENT OF THE CASE

The Complainants, migrant farm workers, were referred for fruit harvesting employment with the Respondent Hepburn Orchards through the Interstate Job Clearance System, pursuant to job order 4072460 filed by Hepburn on March 22, 1983. Complainants Leroy Azor, Evaleri Blaise and Joirjlus Pierre started working at Hepburn Orchards on or about July 20, 1983. Complainants Sidoles Presi and Pauleus Blanc started work on August 3, 1983. Both the first and second groups of the Complainants were assigned housing at Hepburn's labor camp on Maryland Route 615 (camp #3). However, the Complainants were informed that neither employment nor housing was available for their families. On August 12, 1983, and October 4, 1983, the Complainants filed a Job Service complaint with the Maryland Employment Security Administration alleging violations of General Administration Letter (GAL) N0.46-81, Attachment 1, item 6(k) p. 7, which proposed requiring the grower to make unutilized housing

available for family members of domestic workers.

The Respondent maintained that he did not have housing appropriate for family members, that the job order clearly stated his intention to offer individual housing only, that he would have to open another camp to provide family housing and finally, that he was not required to offer family housing since it was not the prevailing practice in the community.

By letters of Samuel Pruett, (on September 1, 1983 for the first group and on October 14, 1983 for the second group) the Hagerstown Employment Service Office adopted the position of the Respondent, pointing out that the U.S. Department of Labor had withdrawn the proposal which required family housing in favor of continuing to rely on 20 C.F.R. § 655.202(b)(1).

The Complainants, on September 6, 1983 and February 7, 1984, appealed this decision to the Director, Maryland Department of Employment and Training. On October 21, 1983, and March 29, 1984, the Director affirmed the decision of the Hagerstown office. The Director decided the Respondent did not violate the terms and conditions of the job order since he found the prevailing practice was to provide individual housing only and the available housing was not suitable for family housing.

On November 3, 1983, and April 16, 1984, the Complainants appealed the Directors' decisions. Thereafter, on December 20, 1984 Special examiner Martin A. Ferris conducted a hearing at which the complaints of Leroy Azor et al. and Sidoles Presi et al. were consolidated. On March 15, 1985, the Special Examiner rendered his decision. The Special Examiner found that the area of intended employment included Washington County, Maryland; Franklin and Fulton Counties, Pennsylvania; Jefferson and Berkeley Counties, West Virginia; and Hampshire County, Frederick County and Clarke County, Virginia. The Special examiner also found that it is the prevailing practice in the area of intended employment to provide family housing. Despite these findings, the Special Examiner affirmed the decision of the Director, holding that the Respondent's "good faith" belief that he had acted in conformity with the Regulations rendered it "grossly unfair" to censure the Respondent for a violation of 20 C.F.R. § 655.202(b)(1).

Pursuant to 20 C.F.R. § 658.418, on April 12, 1985, the Complainants appealed the decision of the Special examiner to the Regional Administrator, Employment and Training Administration, U.S. Department of Labor. In a decision rendered May 16, 1986, the Regional Administrator affirmed the decision of the Special Examiner. The Regional Administrator went further, however, and limited the area of intended employment to "the geographical area (Hancock, Maryland and vicinity within Maryland) of the Respondent orchard." The Regional Administrator then found that the prevailing practice within that area was to provide individual housing only.

This is an appeal of the Regional Administrator's decision. A formal hearing was held before the undersigned in Hagerstown, Maryland on March 25, 1987, at which time all parties were afforded full opportunity to present evidence and argument, pursuant to 20 C.F.R. § 658.425.

The issues on appeal are as follows:

- A. Whether the Complainants are United States workers within the meaning of 20 C.F.R. § 655.202(b)(1);
- B. Whether the Complainants' spouses and children constitute families within the meaning of 20 C.F.R. § 655.202(-b)(1);
- C. Whether the "prevailing practice within the area of intended employment," as set out in 20 C.F.R. § 655.202(b)(1), is to provide family housing; and
- D. Whether, upon a finding that the Respondent violated the Regulations or failed to comply with the terms of its 1983 job order, the proper remedy is decertification under 20 C.F.R. § 655.210 or a discontinuation of the services of the United States Employment Service system under 20 C.F.R. § 658.500.

FINDINGS OF FACT

Hepburn Orchards, Inc. is a fruit grower located in Hancock, Maryland. Hepburn Orchards' operations are situated in the western-most portion of Washington County, Maryland at a point where the Maryland state boundaries narrow to approximately four miles wide in a north-south direction between the borders of neighboring West Virginia and Pennsylvania. Complainants' State Hearing Exhibit 2 (map of region). A portion of Hepburn's orchard extends into Pennsylvania as well. Transcript of Federal hearing, March 25, 1987 (hereafter "TR"), at 56.

Hepburn's operations are located within a four state area in the upper Shenandoah River valley which is a heavily concentrated and unified apple-growing region. Complainants' State Hearing (hereafter "SH"), Exhibit 9 (James Holt, An Assessment of Factors Affecting employment of Temporary Foreign Labor in the east Coast Apple Harvest), at 42. The counties within the four states that have the heaviest concentration of fruit producing trees include Franklin and Adams Counties in Pennsylvania; Washington County, Maryland; Hampshire, Berkeley and Jefferson Counties, West Virginia; and Frederick and Clarke Counties, Virginia. SH Exhibit 9 at 42, n. 2.

Fruit Dickers routinely commute throughout the four state area seeking work on the orchards in the area. It is not uncommon for workers to commute to western Maryland Orchards from points in Pennsylvania, West Virginia and Virginia. SH at 128-130; TR at 63-67, 67-71, 155-60, 160-63, and 164-69. Farm worker employment services also refer workers to jobs throughout the four state contiguous area. TR at 237-38, 240-42 and 285.

Since about 1976, Hepburn orchards has utilized temporary foreign workers (in the H-2 program) to assist in the harvesting of its fruit crops. TR at 44. Prior to 1973 Hepburn harvested its crops entirely with domestic labor. SH at 207. During the years that Hepburn Orchards relied on domestic labor, the orchard provided some family housing. TR at 76-77; SH at 197; SH, Complainants' exhibit 24 at 10. The family housing provided was usually for husbands and

wives who both worked at the orchard. From the time that Hepburn Orchards entered the H-2 program, the orchard has moved away from hiring or housing the spouses and children of male workers. TR at 42-46..

In 1983, Hepburn Orchards had available three migrant labor camps to house its harvest workers. Two of these camps (camps #1 and #2) share a common site on Timber Ridge #1 while the third camp (camp #3 or the Marvania camp) is located on Maryland Route 615. Camp #1 has a capacity of 57 persons. There are approximately 13 rooms housing four individuals each and another room housing 5 individuals. Camp #1 has three bathrooms and a common central mess area. TR at 36-37; SH at 203-04. Camp #2 consists of two buildings. One building includes the kitchen and bathrooms while the other building includes the sleeping quarters. The building containing the sleeping quarters in camp #2 has six rooms, each accommodating 10 persons. TR at 40. Camp #3 (the Marvania camp) is a three-story structure. Kitchen and bathroom facilities are situated on the first floor. The second floor is a large dormitory room accommodating 50 individuals. The third floor includes a large dormitory room, as well as five small partitioned rooms. TR at 41; SH at 201-03. According to Maryland state health department officials, Hepburn's facilities at its Camp #1 and #3 could accommodate family members. SH, Complainants' Exhibit 23 at 9-11. TR at 291-93. From time to time after 1976, wives, who assisted in food preparation, were allowed to stay with their husbands in Camps #1 and #3. TR at 60-61, 109, 111, 140, and 144.

In 1983 Hepburn Orchards, Inc. filed agricultural and food processing clearance orders seeking harvest workers for its fruit crops. One of these clearance orders, number 4072460, sought 78 workers to perform peach and apple harvesting labor on Hepburn's operations between July 12 and November 4, 1983. Job Order No. 4072460, dated March 22, 1983. TR, Exhibit 3 at 32. Hepburn Orchards' clearance order number 4077460 was circulated through the interstate job clearance system. As a condition of this clearance order being accepted into the interstate job clearance system, the wages and working conditions offered were required to be not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment. 20 C.F.R. § 653.501(d)(4). Clearance order 4072460 was submitted in conjunction with Hepburn Orchard's application for temporary labor certification for agricultural workers pursuant to 20 C.F.R. § 655.200, et seq. The clearance order contained an assurance by Hepburn that it would provide housing as required by 20 C.F.R. § 655.202. Job Order No. 4072460 at 4.

Complainants are Haitian nationals who are residents of Immokalee, Florida. Complaints were paroled into the United States and granted employment authorization by the Attorney General pursuant to 8 U.S.C. § 1182(d)(5). These aliens have been granted special parole status as Cuban-Haitian entrants. See 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure, 2-188.3. Most of the Complainants came to the United States from Barredars, Haiti, a rural community in Haiti, where they worked as farmers.

Complainants Sidoles Presi, Joirilus Pierre and Evaleri Blaise were paroled into the United States by the Immigration and Naturalization Service before October 11, 1980. Complainant Pauleus Blanc was paroled into the United States on December 19, 1980. All these

Complainants were given employment authorization and documents designating them as “Cuban/Haitian entrants.” TR at 135-137, 102-104: SH, Respondent’s Exhibit vi. Complainant Leroy Azor entered the United States in 1981. He was issued employment authorization by the INS and a document permitting him to lawfully reside and seek employment in the United States. The employment authorization document placed no time limitation on Azor’s ability to seek employment in the United States. TR at 146-47.

The Complainants were referred to Hepburn Orchards through the interstate job clearance system, pursuant to Job Order No. 4072460. All Complainants were assigned housing at Hepburn Orchards camp #3. TR at 106-07, 117, 133; stipulation before state hearing officer, Exhibit 2. Each of the Complainants was accompanied to the Hagerstown area by a woman with whom he was residing at the time. Complainants provided support for these women and, in the case of Complainant Pauleus Blanc, support for Esnol Blanc, the child of his union with Niliane Dimanche, both of whom accompanied him to Maryland. TR at 107-08, 132-133, 138-39 and 149.

The Complainants had entered into “placage” unions with these women. TR at 206-07. “Placage” is a consensual union common in rural Haiti. It is an agreement between two individuals that involves an exchange of obligations and duties, co-residence and the rearing of children. It is recognized as marriage by the public, Haitian law and the Catholic church. “Placage” is the most common form of marriage in rural Haiti. TR at 204-06, 208.

Upon commencing work at Hepburn Orchards, Complainants requested housing for their families. Consistent with its policy of refusing to house non-working family members of fruit pickers, Hepburn Orchards denied this request. TR at 106, 110-11, 140, and 149. Since Complainants could not have their families with them at the labor camp, they were forced to locate apartments in Hagerstown, approximately 35 miles from Hancock. Complainants visited their families on weekends and occasional weekdays, making the trip by commercial bus. TR at 110, 112-13, 116, 141-144, and 150-53. Rent for the apartments was an additional expense for the Complainants. Pauleus Blanc and Sidoles Presi each spent \$300 per month in rent for the two months their families resided at one apartment in Hagerstown. TR at 114. Another apartment was shared by the families of Complainants Leroy Azor, Evaleri Blaise and Joirilus Pierre. TR at 142-43 and 151. Over the four month period their families resided at the apartment in Hagerstown, Complainants Azor, Blaise and Pierre each spent an average of \$100 per month in rent and utility expenses. TR at 143-44, 151, and 153. While the number of visits to their families varied, Complainants Azor, Blaise and Blanc traveled to and from Hagerstown at least once per week during their time at Hepburn Orchards. The one-way bus fare for this trip was \$6.80. TR at 116 and 144.

Throughout the period Complainants were employed by Hepburn Orchards, the orchard had migrant labor housing which was permitted for occupancy and was vacant. TR at 62-63.

The unavailability of housing for non-working family members has a serious detrimental effect upon the successful recruitment of domestic fruit pickers. Department of Labor General Administration Letter 46-81 (September 11, 1981, Attachment 1 at 7; TR at 154, 178-79, 245,

and 286. Domestic fruit pickers who would go to Washington County, Maryland to work do not go since there is no housing available for their families.

In Frederick County, Virginia, of four permitted migrant labor camps, housing to non-working family members, including children, is normally offered at three of these camps. TR at 130, 176-77, 194; SH at 149-50; Complainants' State Hearing Exhibits 18 and 20.

In Clarke County, Virginia, there are four permitted migrant labor camps. Housing to non-working family members, including children, is normally offered at three of these four camps. TR at 128, 173-75; Complainants' Exhibit 3.

In Berkeley, Jefferson and Hampshire Counties, West Virginia, there are approximately 32 migrant labor camps. Of these camps, approximately 20 offer housing to non-working family members, with 16 housing children. TR at 243, 245; SH Complainants' Exhibit 1; SH at 142, 147. In Washington County, Maryland, there are approximately nine growers who operate permitted migrant labor camps. Of these employers, six have housed family members in the past. The prevailing practice in Washington County, Maryland is not to offer family housing. That has been the practice since the late 1970's -- about the same time Washington County growers began participating in the H-2 program.

In Adams County, Pennsylvania, there are approximately 80 migrant labor camps. Of these 80 camps, 57 have offered housing in recent years to non-working children of farm workers. TR at 226. Complainants' Exhibits 8 and 9.

In Franklin County, Pennsylvania, there are approximately 23 permitted migrant labor camps. Of these camps, at least 16 offer housing to non-working family members, including children. TR at 227, 283-84; Complainants' Exhibit 9.

Prior to 1983, there had never been a survey conducted on the prevailing practice of Maryland growers with regard to provision of housing to non-working family members. SH, Complainants' Exhibit 10. Prior to 1983 Hepburn Orchards never inquired of the United States Department of Labor, the Maryland employment service or the Maryland Department of Health and Mental Hygiene as to the prevailing practice with regard to provision of housing to non-working family members. TR at 58-59; SH at 214-15.

CONCLUSIONS OF LAW

A. THE COMPLAINANTS ARE U.S. WORKERS WITHIN THE MEANING OF 20 C.F.R. § 655.202.

1. Discussion

So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, each employer's job offer to U.S. workers must

offer U.S. workers at least the same benefits which the employer is offering to temporary foreign workers. 20 C.F.R § 655.202(a).

More specifically, the Regulations provide that, in order to protect U.S. workers, every employer of temporary foreign workers must provide housing without charge to every U.S. worker. “When it is the prevailing practice in the area of intended employment to provide family housing,” the employer must provide housing to the families of such workers as well. 20 C.F.R. § 655.202(b)(1).

Since the purpose of the Part 655 Regulations is not intended to benefit alien workers, but to protect U.S. workers, Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 596 (1982), an initial hurdle to overcome before benefits are available under the Regulations is U.S. worker status. A U.S. worker is defined in the Regulations as “any worker who, whether U.S. national, citizen or alien is permitted to work permanently within the United States. 20 C.F.R. § 655.200(b). Since the Complainants here are neither U.S. nationals nor U.S. citizens, it is necessary to define “permanently” to see if the Complainants are U.S. workers. The Immigration and Nationality Act provides that:

(31) the term “permanent” means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

8 U.S.C. § 1101(a)(31). The section has been interpreted to establish that “‘permanently’ does not mean ‘forever.’” Sudomir v. McMahon, 767 F.2d 1456, 1462 (9th Cir. 1985); 553 F.2d 845, 851 (2d Cir. 1977) cert. denied sub nom. Shang v. Holley, 435 U.S. 947 (1978).

Sudomir and Holley concerned aliens’ eligibility for the Aid to Families with Dependent Children (AFDC) program under the requirements of 42 U.S.C. § 602(a)(73). Those cases revolved around the meaning of “permanently residing” and looked to 8 U.S.C. § 1101(a)(31) to uncover that meaning. While this case concerns permission to work rather than permission to reside, the principles are related. Permission to work implies permission to reside.

In the present case, the Haitian Complainants who arrived in the United States before October 11, 1980, are legally entitled to work indefinitely, according to Department of Labor policy. General Administrative Letter (GAL) No. 46-81 (change 1) at 3 (October 20, 1982 1. Haitians arriving after this time are legally bound to the time specified on their individual classification papers. Id.

A right to work indefinitely is a right to work permanently. As stated in Sudomir.

A residence may be “permanent” where the INS has permitted an alien to stay in the United States “so long as he is in a particular condition,” [quoting Holley], even though circumstances may change, and the alien may later lose his right to stay. A residence is temporary when the alien’s continued presence is

solely dependent upon the possibility of having his application for asylum acted upon favorably. Aliens who have official authorization to remain indefinitely until their status changes reside permanently.

Sudomir, 767 F.2d 1456, 1462 (9th Cir. 1985), emphasis added.

2. Application

Turning to the instance case, it is clear that the Complainants are U.S. workers within the meaning of 20 C.F.R. § 655.202.

All of the Complainants are legally entitled to work indefinitely in the United States. Complainants Blaise, Pierre and Presi fit this category by virtue of arriving in the United States prior to October 11, 1980. GAL No. 46-81 (Change I) at 3. Complainant Blanc fits this category by virtue of his designation as a “Cuban/Haitian entrant.” This designation grants him a special parole status. His entrance was lawful and he may seek employment in the United States as long as he remains in that condition. Under the analysis provided by Sudomir, he is entitled to work indefinitely in the United States. The reasoning in Sudomir also mandates that Complainant Azor receive indefinite status. He is lawfully authorized to seek employment in the United States and, since there is no time limitation on the documents he received, he is also legally entitled to work indefinitely in the United States. GAL No. 46-81 (Change 1) at 3. The Complainants’ presence has been legitimized by an affirmative act. They are entitled to seek employment indefinitely, and thus, permanently. Being entitled to work permanently they are U.S. workers within the meaning of 20 C.F.R. § 655.200(b).

Complainants Presi, Blaise and Pierre are also U.S. workers within the meaning of 20 C.F.R. § 655.200(b) by virtue of their entrance to the United States prior to October 11, 1980, under official Department of Labor policy. “The official DOL policy is that Cuban/Haitian parolees who entered the United States prior to October 11, 1980, are . . . ‘United States workers’ within the meaning of 20 C.F.R. [§ 655.200(b)].” April 7, 1983 telegram from Regional Administrator William Haltigan.

Finally, it is worthy of note that today the Complainants are eligible for permanent resident status. Congress has provided remedial legislation. While it is not controlling on this case, Congress has explicitly provided that Haitians, such as the Complainants here, who emigrated to the United States before January 1, 1982, would, upon application, have their status adjusted retroactively to establish them as permanent U.S. residents as of January, 1982. Pub. L. 99-603 § 202 (1986). Congress recognized that such Haitians have been “permanently residing in the United States under color of law” and expressed its intent to grant these Haitians formal status “consistent with the reality of their permanent residency in the United States.” H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 75-76 reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5679-80.

The Respondent’s argument to the contrary is not persuasive. The Respondent relies heavily upon Phillips v. Brock, 652 F. Supp. 1372, 1378 (D. MD 1987). Chief Judge Harvey in

Phillips did not hold that the plaintiffs were not U.S. workers within the meaning of 20 C.F.R. § 655.200(b). In Phillips, the court concluded only that Haitian plaintiff Marcel Joseph was not an adequate class representative.

B. THE COMPLAINANTS' SPOUSES AND CHILDREN CONSTITUTE FAMILIES WITHIN THE MEANING OF 20 C.F.R. § 655.202(b)(1).

Complainants' spouses and children constitute families within the meaning of 20 C.F.R. § 655.202(b)(1). Hepburn argues that Complainants have no standing to challenge his failure to provide workers with family housing under 20 C.F.R. § 655.202(b)(1). Hepburn argues that the Complainants' failure to be formally married removes any categorization of their spouses and children as their "families" under 20 C.F.R. § 655.202(b)(1). The validity of a marriage ceremony is to be determined by the law of the place where it was performed. Kane v. Johnson, 13 F.2d 432 (D. Mass. 1926). While none of the Complainants were formally married according to United States' law, the Complainants were married consistent with their customs and tradition, in a placage union. Their "placage" unions would be recognized by the Haitian government and the Catholic church. Since the marriages were valid in Haiti they are valid in the United States. These unions were consensual, involved mutual obligations and in at least two instances (Complainants Blanc and Azor), included the birth and rearing of children. The Complainants' unions meet the traditional definition of a family -- a nucleus of two adults living together and cooperating in the care and rearing of their children. Finally, it is noteworthy that in 1983 Hepburn Orchards was indifferent to the Complainants' marital status. The Respondent denied them family housing not because they were unmarried but because the Respondent's policy was to deny family housing.

C. THE PREVAILING PRACTICE WITHIN THE AREA OF INTENDED EMPLOYMENT.

1. The Area of Intended Employment

The Regulations define the area of intended employment as:

[T]he area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Standard Metropolitan Statistical Area (SMSA), any place within the SMSA is deemed to be within normal commuting distance of the place of intended employment.

20 C.F.R. § 655.200(b).

The SMSA in which Hancock, Maryland is included comprises Hagerstown, Maryland and surrounding Washington County (according to the U.S. Bureau of the Census). However, the SMSA is only a minimum requirement of normal commuting distance. Under the Regulations, the test for the area of intended employment relies upon commuting distance not the SMSA. The Regulations require that the normal commuting distance for the place of intended employment at least includes any place within the SMSA. The normal commuting distance for the place of

intended employment may go beyond the SMSA, however, and still be within the area of intended employment under 20 C.F.R. § 655.200(b). SMSA's can include, and, in the case of large urban areas, frequently do include, portions of several states.

The Regional Administrator's conclusion that the area of intended employment is limited by state boundaries is in error. The Regional Administrator's reliance on ET Handbook No. 385, I-102 to I-105 is misplaced. See decision of the Regional Administrator, Federal File Tab 7. The agricultural reporting areas set out in the Handbook are limited by definition to geographic divisions within a state. The definition of the "area of intended employment" set forth in 20 C.F.R. § 655.200(b) relies on commuting distances and is not limited by state boundaries.

In addition, the Regional Administrator's conclusion that 20 C.F.R. § 655.202(b)(1) must be interpreted in response to the language provided in the job order is unsound. To hold that family housing shall be provided if the grower announces in his job order that he provides it is to engage in circular reasoning. Holding that the area of intended employment is limited to that of the very grower for whose conduct complaint is being made strips the Regulations of any force. Such an unchallenged reliance on the grower's job order and a myopic view of the Regulations cannot have been the intention of the Department of Labor. The Regional Administrator's reasoning is especially unsound in this case where the Respondent's orchard is partially in Pennsylvania. The Regional Administrator's decision would limit the area of intended employment to an area that does not even include the Respondent's whole orchard.

Turning to the instant case, the testimony of fruit laborers supports a finding that 45 miles from Hepburn Orchards is a reasonable commuting distance. Testimony was received of farm workers commuting up to 60 miles each way. Additionally, it is approximately 45 miles from one end of Washington County to the other (taking official notice of the Rand McNally Cosmopolitan World Atlas). Since the SMSA in which Hancock, Maryland is located includes all of Washington County, Maryland, following the Regulations it is reasonable to conclude that commuting distances from Hancock, Maryland are at least equal to the distances between points in Washington County. Under this definition, commuting distance would be at least 45 miles. Commuting distance is defined as including, at least, all points within the SMSA. Since the SMSA includes all of Washington County, commuting distance is at least equal to the distance from one end of Washington County to the other.

The "area of intended employment" includes all counties located within a radius of 45 miles from Hepburn Orchard's location in Hancock, Maryland. These counties are as follows: Franklin and Adams Counties, Pennsylvania; Washington County, Maryland; Jefferson and Berkeley Counties, West Virginia; Hampshire County, Frederick County and Clarke County, Virginia.

2. The Prevailing Practice

If it is the "prevailing practice within the area of intended employment" the employer must provide family housing. 20 C.F.R. § 655.202(b)(1). "Prevailing" is defined as having superior force or influence; being most frequent or common. Webster's New Collegiate

Dictionary (1979). 20 C.F.R. § 655.202(b)(1) requires the employer to provide family housing if the majority of growers in the area of intended employment provide it, i.e., if the most frequent practice is to provide family housing. Based on the evidence, including testimony from the Director of Migrant Education in Winchester, Virginia (TR at 171); Suzanne Benchhoff of the Shippensburg University Migrant Child Development Program (TR at 722); an employee of Telemon which is a non-profit placement service for migrant laborers in west Virginia (TR at 238); the acting director of the Migrant Health Program, the Pennsylvania Department of Health (TR at 252 and Complainants' Exhibit 9); and an employment service officer with the Pennsylvania Department of Labor, Office of Employment Security (TR at 263 and Complainants' Exhibit 10), the prevailing practice within the eight county area of intended employment is to offer family housing. The majority of such employers offer family housing.

3. Suitability

Respondent has maintained that he did not have housing appropriate for family members, a position affirmed by the Director, Maryland Department of Employment and Training. The space requirements for housing are provided for in 20 C.F.R. § 654.407. Section 654.407 requires 50 square feet per occupant for sleeping purposes, partitioned sleeping areas for the husband and wife, and separate sleeping accommodations for each family. The testimony of the Division Chief of Community Services for the Maryland Department of Health and Dental Hygiene (TR at 288) buttresses the conclusion that camps #1 and 13 could accommodate families and fit the requirements of § 654.407.

The Respondent has argued that the issue in this matter is not whether the housing was suitable for families but whether it was provided. That is not quite correct. The issue is whether family housing should have been provided. Since the provision of family housing was the prevailing practice in the area of intended employment, family housing should have been provided.

D. SANCTIONS

The Respondent argues that the lone sanction available in this proceeding is that provided by 20 C.F.R. § 655.210(a). This position is without merit. Under 20 C.F.R. § 655.210(a), the Regional Administrator may investigate possible violations of temporary labor certifications by agricultural employers. However, this proceeding does not involve an action initiated by the Regional Administrator to deny temporary labor certification for failing to live up to the terms of past labor certifications. The remedies available to the Regional Administrator under 20 C.F.R. § 655.210(a) are wholly separate from the remedies available under the Job Service Complaint System.

20 C.F.R. § 655.210 merely curtails the application of other remedies in those situations where the Regional Administrator chooses to deny temporary labor certification in the upcoming year. MacArthur v. Beauchesne, 82-TAE-1 (December 12, 1982). Here, however, the Regional Administrator has not decided to deny temporary labor certification. He may choose to do so in the future and, if he does, he would be limited by the available remedy found in 20 C.F.R. §

655.210. In this matter, however, the complaint is a Job Service Complaint under 20 C.F.R. Part 658. Part 658 “allows for the imposition of various substantive sanctions.” MacArthur, 82-TAE-1.

The authority of the Department of Labor Administrative Law Judge under the Job Service Regulations derives from C 658.425. Section 658.425(a)(4) states that the Administrative Law Judge may render such rulings as are appropriate to the issues in question. The section clearly contemplates the granting of remedial sanctions. “The Administrative Law Judge . . . possesses the authority to impose any necessary sanctions.” A broad grant of authority is necessary because “an integral and vital component of any such complaint system, whether or not directly expressed, is the ability to provide redress for any actions which are adjudged to constitute a wrong under that system.” MacArthur, 82-TAE-1 (December 13, 1982).

1. Discontinuation of Services

20 C.F.R. § 658.500 governs discontinuation of services to employers by the Job Service System. The state agency shall initiate procedures for discontinuation of services to an employer when the employer has been found to violate the job service regulations. 20 C.F.R. § 658.501(a)(4). Here, the Respondent has violated the Job Service Regulations by failing to provide family housing as required by 20 C.F.R. § 655.202(b). In order to conform with the prevailing practice within the area of intended employment, family housing should have been provided.

Additionally, the Respondent violated the assurances made in its 1983 job clearance order by failing to offer family housing to the Complainants’ non-working family members. The Respondent promised in the clearance order (under which the Complainants were hired) that it would provide U.S. workers with the benefits of 20 C.F.R. § 655.202, including the family housing benefits of 20 C.F.R. § 655.202(b)(1). Although the Respondent was required to provide family housing, it did not provide it.

Finally, in its clearance orders the Respondent misrepresented the nature of its available housing as “barracks” when the evidence shows there were numerous smaller rooms suitable for family occupancy, and the Respondent in fact used such rooms to house working husband and wife families. Characterizing available housing which is suitable for family housing as solely “barracks” style housing is a material misrepresentation. A material misrepresentation in the employer’s job order triggers the discontinuation of services provisions of § 658.501. 20 C.F.R. § 653.501(a).

Since Hepburn Orchards, Inc. has violated 20 C.F.R. § 655.202(b)(1) and has violated the assurances made in its job order, the state agency (in this case the Maryland Department of Employment and Training) shall initiate procedures for the discontinuation of services to the Respondent, in accordance with 20 C.F.R. §§ 658.501(a)(3) and (4).

2. Restitution

Restitution is also appropriate under 20 C.F.R. § 658.425(a)(4). In order to have employment services reinstated, Hepburn Orchards, Inc. must meet the requirements of 20 C.F.R. S 658.504. For purposes of reinstatement of services, appropriate restitution shall be as listed below. These figures include reimbursement for rental expenses incurred by Complainants in housing their families, plus the commuting costs of visiting their families once a week by commercial bus (\$13.60, round trip):

<u>Complainant</u>	<u>Months Worked</u>	<u>Rent</u>	<u>Commuting Expenses</u>	<u>Total</u>
Leroy Azor	4	\$ 400.00	\$ 217.60	\$ 617.60
Evaleri Blaise	4	400.00	217.60	617.60
Pauleus Blanc	2	600.00	108.80	708.80
Joirilus Pierre	4	400.00	217.60	617.60
Sidoles Presi	2	600.00	108.60	708.80

ORDER

1. The State of Maryland shall terminate all Job Service services to Hepburn Orchards, Inc., in accordance with 20 C.F.R. § 658.501(a)(3) and (4) until reinstatement of services is deemed appropriate pursuant to § 658.504.

2. Hepburn Orchards, Inc. shall pay to:

Leroy Azor	--	\$ 617.60
Evaleri Blaise	-	617.60
Pauleus Blanc	-	708.80
Joirilus Pierre	-	617.60
Sidoles Presi	-	708.80

ROBERT J. SHEA
Administrative Law Judge