UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

LEONID NAGINSKY, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 93B00087
DEPARTMENT OF DEFENSE and EG&G DYNATREND, INC., Respondents.	)	

ORDER
(January 12, 1995)

Upon receiving responses from the parties to my Order of Inquiry dated November 23, 1994,[1] I tentatively conclude the following:

(1) Complainant's charge alleging discriminatory employment practices under 8 U.S.C. § 1324b was not timely filed. Complainant alleges he was discharged on March 15, 1991. He did not, however, file a charge with the Office of Special Counsel (OSC) until on or about October 1, 1992.[2] Section 1324b provides that: "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." 8 U.S.C. § 1324b(d)(3). There has been no showing of any basis on which to equitably toll § 1324b's 180-day statute of limitations. Accordingly, Complainant's charge, filed over one year after his discharge, is untimely.

(2) Complainant argues that he is entitled to a waiver of § 1324b limitations under Huynh v. Carlucci and the resulting settlement agreement in which the Department

[1] For the procedural history of this case, see Naginsky v. Department of Defense and EG&G, 4 OCAHO 710 (1994).

[2] A charge filed with OSC is deemed filed on the day it is mailed to OSC. See 28 C.F.R. § 44.300(b) (1994). Whatever difficulty there may be in determining the precise date of filing, it is certain that OSC received Naginsky's complaint on October 1, 1992.

of Defense (DOD) agreed to waive § 1324b limitations.[3] Under OCAHO precedent[4] and the Huynh settlement,[5] however, only DOD is subject to the agreement to waive § 1324b's limitation period. The OSC charge as it relates to EG&G appears therefore to have been untimely filed.

(3) As for DOD, the Huynh case and settlement do apply, allowing Complainant to benefit from a waiver of § 1324b's statute of limitations. Nevertheless, there remains the issue of when Complainant became aware of his right to file a charge based on the 5/10 rule because, although tolled by Huynh, the statute of limitations began to run upon Naginsky receiving notice of his rights under Huynh.[6] DOD states that it is not able to determine when Naginsky became aware and does not principally defend on the basis of lack of timeliness. In contrast, EG&G concludes that Naginsky first received notice of Huynh on or around May 8, 1992. Assuming that this date is correct and that DOD offers insufficient evidence to refute it, Complainant's charge was timely filed against DOD.

(4) Complainant alleges that he was discriminated against in violation of § 1324b because DOD applied the 5/10 rule to him. Specifically, Naginsky asserts that, once

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[3] See Huynh v. Carlucci, 679 F. Supp. 61 (D.D.C. 1988) and Huynh v. Cheney, 87-3436 TFH (D.D.C. Dec. 24, 1991). The former case invalidated DOD's regulation known as the "5/10 rule," under which naturalized citizens from a designated list of countries deemed to be hostile to the United States were required (1) to have been a U.S. citizen for five (5) years, or (2) to have resided in the U.S. for the past ten (10) years in order to obtain security clearances required of employees involved in certain DOD contracts. See former 32 C.F.R. § 154.16(c)(1). In the latter case, Huynh v. Cheney, DOD agreed to waive § 1324b's limitations requirement, thereby allowing victims of the 5/10 rule to litigate their discrimination claims even if filed more than 180 days following the discriminatory practice. In Naginsky, DOD concedes that Complainant was a victim of the 5/10 rule and for this reason was not granted the security clearance required for particular tasks at EG&G in 1987. Brief in Support of DOD's Answer at 2

[4] See e.g., Trivedi v. Northrop Corp. and Department of Defense, 4 OCAHO 600 (1994), appeal filed, No. 94-70098 (9th Cir. Mar. 8, 1994) (holding that only DOD is bound by the Huynh decision; other entities, including private contractors like Respondent, are not bound) and Bozoghlanian v. Lockheed Advanced Development Co., 4 OCAHO 711, at 4 (1994) (stating that "[t]he Huynh settlement waives limitations only with regard to charges against DOD, and not other employers").

[5] The Huynh settlement agreement specifically states that "[a]s to any IRCA claim filed within 180 days of the claimant receiving notice that the regulations may have been applied to them, or within twelve months after the last date of publication of the notice, whichever is sooner, the DOD waives any defense based upon timeliness of filing of a claim of discrimination based upon application of the regulation" (i.e., the 5/10 rule). Huynh v. Cheney, 87-3436 TFH, at 6 (D.D.C. Dec. 24, 1991) (emphasis added).

[6] See Bozoghlanian v. Lockheed, 4 OCAHO 711, at 9 (stating that "IRCA's statute of limitations, although tolled by Huynh, began to run again as soon as . . . [Complainant] knew or 'should have become aware of facts which would support a charge of citizenship status discrimination under IRCA. . . .'").

he was denied a security clearance by DOD, a series of events took place, each of which represented a demotion which ultimately culminated in his involuntary termination. Complainant states: "What EG&G did not anticipate was that the Complainant, despite being denied access to equipment necessary to his job, despite being personally demeaned through alleged "performance" reviews, despite being assigned tasks well below his skill level, the Complainant simply would not resign." Furthermore, he alleges: "Clearly, the Complainant's case would be much simpler if EG&G simply terminated him immediately upon the denial of his security clearance. Of course, that is exactly why he was not immediately terminated. It would have been too obvious." Complainant's Response to the Nov. 23, 1994 Order of Inquiry at 2-3. Complainant therefore asserts that after his denial of a security clearance, the pattern of discrimination led to his discharge in violation of § 1324b.

(5) In response, DOD asserts that Complainant was retained by EG&G despite his inability to obtain a security clearance and was "'not demoted, and even got raises.'" Furthermore, "Complainant was terminated in March 1991 because of a lack of work resulting from reductions in government contracts; that other employees were laid off at the same time for the same reasons; and that some of those other individuals had security clearances and some did not." Respondent states that Complainant "received some poor evaluations **even before** the denial of [a] security clearance" and that Complainant cannot establish "any causal relationship between [his] . . . problems and alleged discrimination on the one hand and the 5/10 year rule on the other hand." Brief in Support of the DOD's Answer at 3.

(6) From the pleadings, it appears that there is a genuine issue as to whether application of the 5/10 rule to Complainant and his resulting denial of a security clearance was the proximate cause of his treatment and ultimate termination by EG&G.

As a consequence of the preceding discussion and before issuing dispositive decisions or orders, it is appropriate to schedule a telephonic prehearing conference. I anticipate that a conference can be scheduled for the first or second week in February in order to ventilate the above mentioned issues and to determine the necessity of conducting an evidentiary hearing. My office will telephone counsel for the parties within the next week in order to schedule such a conference.

SO ORDERED.

Dated and entered this 12th day of January, 1995.

MARVIN H. MORSE
Administrative Law Judge