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

May 13, 1999

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| UNITED STATES OF AMERICA, Complainant, | ) |
| v. | ) 8 U.S.C. § 1324b Proceeding<br>) OCAHO Case No. 98B00051 |
| AGRIPAC, INC., Respondent. | ) |

**ORDER GRANTING LEAVE TO AMEND COMPLAINT**

I. *PROCEDURAL HISTORY*

This is a pattern and practice action in which the Office of Special Counsel (OSC) alleges that Agripac, Inc. engaged in certain acts of discrimination in the hiring of employees in violation of the Immigration and Nationality Act as amended 8 U.S.C. § 1324b (INA or Act). A revised scheduling order was entered on March 16, 1999, setting out time frames which called for the filing of witness and exhibit lists and stipulations in May 1999, completion of discovery before June 1, 1999, and a hearing to be held during the final week in July 1999.

Presently pending is the motion of OSC to amend the complaint to add the names of Eligio Evaristo Santiago Lopez and Antonio Raymundo Sanchez, two additional individuals allegedly affected by Agripac's hiring practices, and to describe the specifics of certain alleged conduct by Agripac. Agripac opposed the motion, which has been fully briefed and is ripe for adjudication. On April 5, 1999, the parties requested that I delay ruling upon this motion because they were optimistic that settlement was imminent. Accordingly, I delayed issuing any order addressing the motion. More than a month has now elapsed since their request was made, and, while the parties have continued periodically to report good progress on settlement, no resolution has been reached. Because

further delay is likely to postpone compliance with the scheduling order and jeopardize the July hearing date in the absence of a settlement, the motion will be ruled upon so that the parties are put on notice of all issues to be heard.

Agripac's opposition to the amendment of OSC's complaint is based on four grounds. First, Agripac asserts that OCAHO is without jurisdiction as to the allegations regarding Santiago Lopez because OSC failed to adhere to the statutory timetable for processing his charge. Agripac argues that these allegations are time-barred; thus amendment would be futile. Second, Agripac contends that neither Santiago Lopez nor Raymundo Sanchez is similarly situated to Agustin Lua Talavera, the individual whose charge was the basis for filing the initial action. Third, Agripac claims that only individuals discriminated against in the 180 days prior to the filing of the Talavera charge may participate in this case, thus there is no authority for Santiago Lopez or Raymundo Sanchez to "piggyback" on Talavera's complaint when their claims accrued after the complaint was filed. Finally, Agripac argues that new and unrelated employment practices are alleged which would prejudice its defense of Talavera's complaint because new discovery would be required.

## II. *APPLICABLE LAW*

OCAHO rules[1] provide for amendments and supplemental pleadings to complaints or other pleadings if and whenever a determination of a controversy on the merits will be facilitated thereby. 28 C.F.R. § 68.9(e). This rule permits amendment "at any time prior to the issuance of the . . . final order" upon such conditions as are necessary to avoid prejudice to the public interest or the parties. It also expressly provides for the allowance of supplemental pleadings "setting forth transactions, occurrences, or events that have occurred . . . since the date of the pleadings and which are relevant to any of the issues involved." The OCAHO rule is analogous to and modeled upon Rule 15 of the Federal Rules of Civil Procedure, and accordingly it is appropriate to look for guidance to the caselaw developed by the federal district courts in determining whether to permit requested amendments under that rule. OCAHO jurisprudence has long followed the guidance pro-

[1] Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. 7066 (1999) (to be codified at 28 C.F.R. Part 68) (hereinafter cited as 28 C.F.R. § 68).

vided by the federal rules, as is directed by 28 C.F.R. § 68.1. *See, e.g., United States v. Mr. Z Enters.*, 1 OCAHO 162, at 1129 (1990).[2]

Rules 15(a) and (c) do not prescribe any specific time limit within which a motion for leave to amend or supplement a pleading may be filed. Thus motions to amend have been considered after the close of discovery, after the entry of dismissal or summary judgment, when the case has already been set for hearing, during trial, and even on remand after appeal. 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1488 (2d ed. 1990). The rule also provides that leave to amend shall be freely granted when justice so requires. *See generally, id.* §§ 1486–87.

The Supreme Court has also directed that a liberal approach should be taken in ruling on a motion to amend:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

*Foman v. Davis*, 371 U.S. 178, 182 (1962).

Undue delay, bad faith, and dilatory motive are not alleged here. Neither has there been any previous request for amendment. Thus the principal factors to be considered are whether the proposed amendment would be futile and whether respondent will be prejudiced if the amendment is allowed.

## III. *WHETHER PREJUDICE HAS BEEN SHOWN*

Prejudice to the opposing party has been characterized as the most important factor for consideration. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330–31 (1971) (trial court "required" to consider potential prejudice). *United States v. Sunshine Building Maintenance, Inc.*, 6 OCAHO 913, at 1071–72

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, and Volumes 3 through 7, *Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Law of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

(1997). Agripac's claim of prejudice is premised upon the assertion that adding two more alleged victims will be unduly burdensome and require discovery. Yet this has been a pattern and practice action since its inception, so that it cannot come as a surprise to Agripac that additional persons have now been identified.

Agripac also alleges that the scope of this pattern and practice action should be limited solely to individuals who were discriminated against within 180 days prior to the filing of the Talavera charge, citing *Walker v. United Air Lines, Inc.*, 4 OCAHO 686 (1994). Agripac correctly states the rule respecting the inclusion of persons who could have, but did not file timely changes of their own during that time period.[3] Here, however, the record reflects that both Santiago Lopez and Raymundo Sanchez *did* file timely charges of their own. It is simply incorrect that they are seeking to "piggyback" on Talavera's charge; they filed their own charges and exhausted their own administrative remedies. As Agripac acknowledges, OSC could have filed separate lawsuits on behalf of each of these individuals. While it criticizes the decision not to do so, it appears to me that even Agripac is benefited from consolidation of these related claims into one action rather than three.

Agripac also asserts that Raymundo Sanchez and Santiago Lopez are not similarly situated to Talavera because the facts respecting its failure to hire them differ from the facts in Talavera's case. The appropriate question, however, is not whether there are factual differences between the refusals to hire them and Talavera, but whether their claims are like and reasonably related to the allegations in Talavera's original charge. *Ong v. Cleland*, 642 F.2d 316, 318 (9th Cir. 1981). The facts are not required to be identical; it is sufficient if the new facts can reasonably be expected to grow out of the charge. *Serpe v. Four Phase Sys., Inc.*, 718 F.2d 935, 937 (9th Cir. 1983). Examination of the new allegations demonstrate that these individuals too, allege that Agripac refused them employment, requested specific documents and rejected the documents they proffered.

While there may be some added discovery to be done and even the risk of a possible delay in the hearing date, I can find no

[3] The reason is clear: a discriminatory act which is not made the basis for a timely charge is without legal consequence. It is merely an "unfortunate event in history which has no present legal consequences." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557 (1977).

injustice, particularly here where both the parties requested that I delay ruling on the instant motion. That additional discovery may have to be conducted does not carry the same potential for prejudice, moreover, where the information about the added claims would ordinarily be available in the opposing party's own records or files. *LaSalvia v. United Dairymen*, 804 F.2d 1113, 1119 (9th Cir. 1986), *cert. denied*, 482 U.S. 928 (1987). Because the gravamen of the allegation sought to be added here involves issues of the opposing party's own knowledge or intentions, the added discovery cannot, without more, be found to be unduly burdensome. Only Agripac knows precisely why it declined to hire the named persons or if it requested the documents they say it did.

The burden of showing undue prejudice rests with the party claiming it and that burden has not been met. Agripac makes a generalized claim of substantial prejudice but has failed even to identify any specific discovery it claims is needed. Rather, it complains that OSC declined its invitation to continue discovery at its Oregon plant. How OSC's decision to terminate its own discovery is prejudicial to Agripac is unelaborated.

## IV. *WHETHER THE AMENDMENT AS TO SANTIAGO LOPEZ WOULD BE FUTILE*

The test for futility is whether the proposed amendment is legally sufficient to survive a motion to dismiss, *Los Angeles Sheet Metal Workers' Joint Apprenticeship Training Comm. v. Walter*, 139 F.3d 906 (table), 1998 WL 51720, at **2 (9th Cir. 1998) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)), that is, whether any facts can be proved in support of the allegations which would entitle the pleader to relief. Agripac asserts that OSC's proposed amendment to add allegations relating to Santiago Lopez is barred by limitations because the Special Counsel failed to comply strictly with the statutory timetables laid out in 8 U.S.C. § 1324b in processing the charge he filed. The proposed amendment should be found to be futile only if it is certain as a matter of law that the allegations as to Santiago Lopez are time barred. In order to answer that question, it is necessary to review the legal context, both substantive and procedural, in which the question arises.

### A. *Agency Procedures*

The INA provides a procedural framework for OSC's administrative processing of charges after filing. Section 1324b(b)(1) directs

the Special Counsel to serve notice of the charge upon the named respondent within 10 days of its filing, while § 1324b(d)(1) directs that, within the first 120 days after the charge is filed, the Special Counsel should conduct an investigation and determine, first, whether there is reasonable cause to believe that the charge is true, and second, whether or not to bring a complaint before an administrative law judge. Section 1324b(d)(2) provides that if the Special Counsel has not filed such a complaint before an administrative law judge within the first 120 days, the person who made the charge should be so notified and the aggrieved person then may file a private action within the 90 days following his or her receipt of the notice. The section also makes clear that the Special Counsel's failure to file a complaint within the initial 120 days does not impair his right to investigate or bring a complaint during the 90 days following the receipt of notice by the person filing the charge. (The right to file a complaint during the initial 120 days is, in other words, exclusive to the Special Counsel, while the right of the charging party to file a complaint during the 90 days period following receipt of the notice is not exclusive to that individual.) Section 1324b(d)(1) also provides that the Special Counsel may conduct investigations on his own initiative, even in the absence of a charge, and may file a complaint based on his own investigation.

It is undisputed in this case that the 120-day letter was provided to Santiago Lopez; it is alleged, however, that because the motion to amend the complaint to add the allegations raised in his charge was filed more than 210 days after the charge, his allegations should be barred. No showing is made on the record as to when Santiago Lopez actually received OSC's notification letter, thus it is unclear when his 90-day filing period actually began to run. As Agripac points out, Santiago Lopez' charge was filed July 9, 1998 and 210 days thereafter is February 4, 1999. The motion was filed February 24, 1999.

The Act is entirely silent as to any specific consequences which attach to the Special Counsel's failure to comply strictly with the procedural framework described. In fact, the Act does not set out in terms any particular time within which the Special Counsel must file a complaint before an administrative law judge. The only express time limitation set out in the statute for filing complaints is that in § 1324b(d)(3), which provides that "No complaint shall 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."[4] The question posed here is thus whether, in the face of Congressional silence, a limitations period is to be implied as a penalty for OSC's missing a procedural deadline.

Although OCAHO pattern and practice cases are frequently analogized to cases brought by the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et seq., *see, e.g., Walker v. United Air Lines, Inc.*, 4 OCAHO 686, at 827 (1994), such an analogy must be approached with caution in this context and may be inapposite for two reasons. First, although the procedural prescriptions for the processing of charges under the two statutes share many similarities, their respective statutory designs differ in significant ways. Second, the respective roles of the two agencies in enforcement proceedings are different as well.

1. *Charge Processing Procedures*

The 1972 amendments to Title VII set forth a multistep enforcement procedure for EEOC, culminating in the power to sue in federal court, but only after a complex series of sequential steps in four distinct stages: 1) filing and notice of the charge, 2) investigation, 3) conference and conciliation, and 4) enforcement.[5] OSC's procedural framework, in contrast, is both simpler and shorter. The major differences between the two processes are the Special Counsel's own-initiative authority and the EEOC's conciliation requirement.

The authority of EEOC to investigate is triggered only by the filing of a charge, either by or on behalf of an aggrieved individual or by one of its own Commissioners, 42 U.S.C. § 2000e–5(b) and § 2000e–6(e), while the Special Counsel, in addition to receiving charges, may commence an investigation entirely on his own initiative. 8 U.S.C. § 1324b(d)(1). The Special Counsel is expressly authorized to file a complaint based on its own-initiative investigation, even in the absence of a charge. 8 U.S.C. § 1324b(d)(1).

[4] There is also a specific time bar for back pay relief set out at § 1324b(g)(2)(C) which directs that "[B]ack pay liability shall not accrue from a date more than two years prior to the date of the filing of a charge with the Special Counsel."

[5] An alternate and longer schedule applies where state or local agencies participate in the procedure. 42 U.S.C. § 2000e–5(c)–(e). The alternate schedule is not implicated here and references to it are omitted.

Like § 1324b, Title VII requires that notice of a charge shall be given to the named respondent within 10 days. Both agencies are directed to investigate and make probable cause determinations within 120 days. However, the Special Counsel is given the same 120 day period not only to make its determination but also to make the decision whether or not to file a complaint and to notify the person making the charge of the determination, after which that person may file a complaint within 90 days of his or her receipt of the notice. 8 U.S.C. § 1324b(d)(2). Title VII provides that the Commission shall make its reasonable cause determination "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." 42 U.S.C. § 2000e–5(b).

However, before it can make the decision whether to file a complaint, the next step for EEOC is to attempt informal resolution by means of conciliation and persuasion. Only if its conciliation efforts are unsuccessful is the Commission authorized to file a civil action. 42 U.S.C. § 2000e–5(f). OSC has no statutorily mandated role analogous to that of the Commission at the third stage. The final step in EEOC charge processing either when it dismisses the charge, or if it has not filed an action or entered a conciliation agreement within 180 days after the charge is filed, is to so notify the person aggrieved and within 90 days after the giving of such notice, a civil action may be brought by that person. § 2000e–5(f)(1). OSC's equivalent of the Commission's fourth step is thus combined with its second.

Courts have on the highest authority long rejected the proposition that the 180-day period in § 2000e–5(f)(1) imposes any limitation whatever upon EEOC's authority to sue. In *Occidental Life Ins. Co. v. E.E.O.C.*, 432 U.S. 355, 361 (1977), Justice Stewart, speaking for the Court, approached the question by first construing the statutory language on its face, observing that "the literal language of § 706(f)(1) simply cannot support a determination that it imposes a 180-day time limitation on EEOC enforcement suits." He went on to say that "[o]nly if the legislative history of § 706(f)(1) provided firm evidence that the subsection cannot mean what it so clearly seems to say would there be any justification for construing it in any other way." *Id.* Surveying the extensive legislative history of the amendments in the 92nd Congress, he concluded that no such evidence was to be found because the legislative history clearly demonstrated that:

> [T]he provision was intended to mean exactly what it seems to say: An aggrieved person unwilling to await the conclusion of extended EEOC proceedings may institute a private lawsuit 180 days after a charge has been filed. The subsection imposes no limitation upon the power of the EEOC to file suit in a federal court.

*Id.* at 366.

There is no obvious reason why the similar language in § 1324b should have the opposite meaning or why the fact that EEOC has an intervening conciliation process would have any effect on the meaning of that language.

2. *Enforcement Procedures*

The second major difference between actions by OSC and by EEOC is the respective roles of the agencies in pattern and practice enforcement actions. A pattern and practice action by the Special Counsel, unlike a pattern and practice action by EEOC (and unlike a private individual action under either statute), is not simply an action for the back pay and injunctive remedies provided for in § 2000e–6 and § 1324b(g)(2)(B). It is also an action to impose a civil money penalty as prescribed by § 1324b(g)(2)(B)(iv), a provision which has no analogue in Title VII.[6] Because an action by the Special Counsel is one to impose a civil fine or penalty, it is not clear why the appropriate limitations period, at least as to that relief, is not the one applicable generally to agency proceedings to impose civil money penalties as provided in 28 U.S.C. § 2462, which states that:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Because the result sought here by Agripac would clearly override the broad principle of *E.I. DuPont de Nemours & Co. v. Davis*,

[6] Two justices dissented in part in *Occidental Life*, but only as to the portion of the decision which held that the most analogous state statutes of limitations did not apply to EEOC actions either. The dissent argued that state limitations provisions should apply in such a suit because the government was not acting in a sovereign capacity when it sought only relief which the charging party could have obtained in a private action. 432 U.S. at 374–75 (Rehnquist, J., dissenting with Burger, C.J., joining).

264 U.S. 456, 462 (1924), that actions brought by the United States to enforce a public right are not subject to limitations periods without their explicit imposition by Congress, there must be something more than congressional silence to support the implication of a bar by limitations to a pattern and practice action by OSC, at least insofar as it is an action for civil money penalties. Moreover, no authority is cited by Agripac for the assumption that the same limitations period would apply regardless of the nature of the relief sought, and it is not clear why this would necessarily be so. In *United States v. Marsden Apartments, Inc.*, 175 F.R.D. 257 (E.D. Mich. 1997), for example, the court found that the government's pattern and practice claims under the Fair Housing Act were governed in part by the three year limitations period in 28 U.S.C. § 2415(b) to the extent that money damages were sought, in part by § 2462 to the extent that civil money penalties were sought, and by no limitations period at all to the extent injunctive and declarative relief were sought. 175 F.R.D. at 263.

B. *Agripac's Citation of Authority*

Agripac cites to just two OCAHO cases in support of its argument that OCAHO's jurisdiction is extinguished if OSC has not filed a complaint prior to the expiration of 210 days from the filing of the charge:[7] *United States v. Workrite Unif. Co., Inc.*, 5 OCAHO 736, at 111–15 (1995) and *United States v. Hyatt Regency Lake Tahoe*, 6 OCAHO 861, at 397–99 (1996). It points, however neither to a statutory nor a regulatory provision which says that the Special Counsel loses the power to act after the expiration of 120 days (or 210 days), or to anything in the legislative history or other federal administrative caselaw which would support the result it seeks.

While neither of the cases cited is precisely on all fours with this case, both generally support the view that the procedural framework set out in the statute for charge processing by the Special Counsel must be strictly complied with. OCAHO case law generally has not, however, taken an entirely consistent approach to the statutory time periods.

In *United States v. Frank's Meat Co.*, 3 OCAHO 513, at 1097–1104 (1993), it was held that OSC's failure to comply literally

[7] Agripac also cites to a third OCAHO case, *Walker v. United Air Lines, Inc.*, 4 OCAHO 686 (1994), but only with respect to its contention that the continuing violation theory has no application to this case.

with the 10 day notice provision of § 1324b(b)(1) was insufficient ground to dismiss a complaint because the notice provision was neither a statute of limitations nor a jurisdictional requirement. Relying on *Brock v. Pierce County*, 476 U.S. 253 (1986), on cases in which EEOC had not fully complied with the procedural requirements of Title VII, and on *In re Investigation of Florida Rural Legal Servs. v. Immolakee Agricultural Workers*, 3 OCAHO 437 (1992) (declining to quash OSC's subpoena because of respondent's objection to lack of specificity in the 10 day notice), *Frank's* held that where the respondent was not prejudiced by OSC's delay, dismissal was inappropriate. *Cf. Walker v. United Air Lines, Inc.*, 4 OCAHO 686, at 838–39 (1994) (although OSC had a duty to provide notification to the respondent that the charge had been amended to include a group of additional individuals, omission of the notice did not prejudice respondent or bar suit).

In *Workrite*, however, where OSC's complaint was timely filed within 90 days after the charging party received the determination letter but the Special Counsel had not sent the determination letter to the charging party within the 120-day statutory period, the period was characterized as being akin to a statute of limitations and was strictly construed to bar a pattern and practice action by the Special Counsel without any inquiry as to whether respondent had suffered prejudice. Although the discussion in that case specifically approached the question in terms of an analogy to a statute of limitations, the final findings of fact and conclusions of law nevertheless included a conclusion that jurisdiction was lacking. 5 OCAHO 686, at 115. On reconsideration, 5 OCAHO 755, at 268–72, it was reiterated that the 120-day period was akin to a statute of limitations, and was applicable to a pattern and practice action brought by OSC, at least where the action was based on an individual charge.

In *United States v. IBP, Inc.*, 7 OCAHO 949, at 462–65 (1997), in contrast, the failure literally to meet the 120 day requirement for issuing the determination letter was not treated as a bar. Finding it "inconceivable" that the three-day delay involved in that case had prejudiced the respondent, 7 OCAHO 949, at 465, the administrative law judge declined to dismiss the complaint, relying on *Pierce County* and stating that an overly technical application of the statute might otherwise defeat its mandated purposes.

In *United States v. Hyatt Regency Lake Tahoe*, 6 OCAHO 861, at 397–99 (1996), although resolution of the question was not nec-

essary to the decision, dictum nevertheless suggested that a complaint filed by OSC might be barred where the agency had issued a timely notification letter within its initial 120-day investigatory period but the letter failed to actually make a determination of whether there was reasonable cause to believe the charge was true. (The letter in that case recited instead that the OSC had not yet reached its determination as to whether the charge was meritorious or whether to file a complaint.)

C. *Other Authority*

Absent some specific indication in the statute that any departure from literal compliance with the procedural framework is intended to result in an enforcement bar, I decline to so hold. The procedural framework set out for OSC should not be elevated to an end in itself. It is rather simply a template for the agency to achieve efficient charge processing. First, from a common sense perspective it appears inherently improbable that Congress intended an employer to become immune from the laws prohibiting employment discrimination simply because of a procedural misstep by OSC. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1981) (failure of Illinois Fair Employment Practices Commission to convene fact finding conference within 120 days as prescribed by statute does not extinguish jurisdiction, any other result would offend the due process rights of the charging party). Second, review of federal case law setting forth judicial and agency construction of other, similar statutory provisions persuades me that the weight of authority supports, if not compels, the opposite result.

The judicial approach to a wide variety of federal statutes with similar statutory provisions setting agency timetables demonstrates that courts and other agencies have not taken the draconian approach advocated here. *See generally*, Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: a cost-benefit appraisal*, 39 Admin. L. Rev. 171 (1987). With respect to enforcement actions brought by the Special Counsel, the decision of the Supreme Court in *Pierce County* is particularly instructive. At issue in that case was an analogous statutory timetable in the former Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 816(b) (1976 ed. Supp. V),[8] which required the Sec-

[8] Effective October 13, 1982, CETA was replaced by the Job Training Partnership Act (JTPA), 29 U.S.C. § 1501 et seq. (1982 ed. and Supp II), which in turn was replaced by the Workforce Investment Act of 1998, Pub. L. No. 105–200, signed on August 7, 1998.

retary of Labor, like the Special Counsel, to investigate, determine the truth of allegations alleging misuse of funds by a grant recipient and issue a final determination "not later than 120 days after receiving the complaint." In reversing the Ninth Circuit's holding that an action by the Secretary was barred after the expiration of the 120-day period without a timely determination, a unanimous Court held that because the legislation nowhere specified any consequence to the failure to comply with that time limit, a court should not impute to Congress an intent that the agency lose the power to act. It observed:

> We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

476 U.S. at 260.

The "less drastic remedy" identified was an action to compel agency action unlawfully withheld pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 701–706, which entitles any person adversely affected or aggrieved to bring such an action. 5 U.S.C. § 706(1). In the Court's view, the 120-day investigation provision "was clearly intended to spur the Secretary to action, not to limit the scope of his authority," and thus the Court observed that it would be "very odd" if Congress meant to cut off the Secretary's authority to correct abuses just 120 days after learning of them. *Id*. at 265.

The Court in *Pierce County* also implicitly approved a line of cases construing similar statutory time limits in other statutes, citing *National Cable Television Ass'n, Inc. v. Copyright Royalty Tribunal*, 724 F.2d 176, 189, n.23 (D.C. App. 1983) (requirement in 17 U.S.C. § 804(e), *repealed by* Copyright Royalty Tribunal Reform Act of 1993, 103–198 § 2(d)(6), that tribunal "shall" render decision within one year does not make later decision void); *Marshall v. N.L. Indus., Inc.*, 618 F.2d 1220, 1224–25 (7th Cir. 1980) (failure to meet requirement in 29 U.S.C. § 660(c)(3) that Secretary of Labor "shall" make determination on employee's complaint within 90 days does not bar subsequent enforcement action); *Marshall v. Local Union 1374, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 558 F.2d 1354 (9th Cir. 1977) (requirement of 29 U.S.C. § 482(b) that Secretary of Labor "shall" bring suit within 60 days of receiving complaint does not bar later suit). 476 U.S. at 259

n.6. The Court also quoted approvingly from a lower court opinion by Judge Friendly in a case raising the identical issue before it, noting that "the proposition that Congress intended the Secretary to lose the authority to recover misspent funds 120 days after learning of the misuse 'is not, to say the least, of the sort that commands instant assent.'" *Id.* at 258 (quoting *St. Regis Mohawk Tribe, New York v. Brock*, 769 F.2d 37, 41 (2d Cir.1985) (footnote omitted), *cert. denied*, 476 U.S. 1140 (1986)). Although *St. Regis* squarely held that the absence of any specification of consequence in the statutory text is itself dispositive of congressional intent *not* to create a jurisdictional requirement, 769 F.2d at 41, the *Pierce* Court nevertheless went on to examine CETA's legislative history and to state its own unwillingness to require that an evident congressional purpose to achieve speedy resolution of complaints take place at the expense of the very persons for whose benefit the statute was enacted.

Where a specific time period is prescribed as an impetus to agency action, it would be at minimum inconsistent with such a purpose and at most perverse to construe it as a prohibition. While the legislative history of § 1324b is uninformative as to the specific intent of its 120-day period, the history of other nondiscrimination statutes having a similar procedural framework suggests that the intent of such schemes was at least in part to preclude individual suits from being filed pending an initial opportunity for the agency to attempt resolution. For example, Congress amended the State and Local Fiscal Assistance Act ("Revenue Sharing Act"), 31 U.S.C. § 6716 et seq., in 1976 to include timetables for the Office of Revenue Sharing to handle discrimination complaints and to authorize private citizen suits. As was thereafter recognized in *Brown v. City of Salem*, No. CIV.A. 85–3309–S, 1986 WL 11750, at *3 (D. Mass. April 10, 1986):

> [T]he timetables were intended not to limit the time period in which civil action could be brought but instead to expedite agency disposition of complaints and set a date after which a complainant need not wait in order to bring his action.

*Cf. King v. Dep't of Health and Human Servs.*, 71 M.S.P.R. 22, 29–30 (MSPB 1996) (construing Joint Explanatory Statement of the House and Senate which accompanied the Whistleblower Protection Act of 1989, 135 Cong. Rec. S2783–84, H749 (daily ed. Mar. 21, 1989), and the history of the 1988 version, S. Rep. No 100–413, at 61 (1988) to support an inference that the legislative intent of the statutory scheme was to require that an aggrieved individual give the agency an exclusive period in which to seek

corrective action before the aggrieved person is permitted to file individual action). Similarly, in *Occidental Life*, 432 U.S., at 366 it was recognized that the multistep enforcement procedure of Title VII was intended to enable an aggrieved person to institute a private lawsuit only after giving the Commission an exclusive period to resolve the case.

The Court in *Pierce County* also relied upon its own frequent articulation of the "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." 476 U.S. at 259 (citing *United States v. Nashville, C. & St. L. Ry. Co.*, 118 U.S. 120, 125 (1886)).[9] That long recognized principle has subsequently been reiterated in *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) ("There is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent"; therefore failure to comply with mandatory prompt hearing provision of Bail Reform Act, 18 U.S.C. § 3142, does not defeat governmental authority to seek detention.), and *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63–64 (1993) (*Pierce County* holds that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction"; thus failure to comply with the internal statutory timing directives of 19 U.S.C. § 1602–04 does not require dismissal of civil forfeiture action). *See also General Motors Corp. v. United States*, 496 U.S. 530, 542 (1990) (EPA enforcement action under Clean Air Act, 42 U.S.C. § 7410(a)(2) (1982 ed.) not barred by agency delay; "[i]n the absence of a specific provision suggesting that Congress intended to create an enforcement bar, we decline to infer one.").

*Pierce County* and its progeny have been followed in the Ninth and other circuits in a variety of different contexts involving directory time limits in statutes or regulations. *William G. Tadlock*

[9] For substantially the same reasons, neither laches nor estoppel ordinarily runs against government agencies. *See, e.g., Stanley v. Schwalby*, 147 U.S. 508, 515 (1893), quoting *United States v. Hoar*, 26 F. Cas. 329, 330 (D. Mass 1821) (No. 15,373) (Story, J.) ("'The true reason, indeed, why the law has determined that . . . no delay should bar [the sovereign's] right . . . is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officers.'").

*Constr. v. United States Dept of Defense*, 91 F.3d 1335, 1341 (9th Cir. 1996) (failure of Defense Logistics Agency to meet any of statutory deadlines of 90 days for investigation, 30 days thereafter for report and 90 days thereafter for order does not bar subsequent agency action), *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1400 (9th Cir. 1995) (Endangered Species Act does not proscribe listing species after expiration of statutory time limits), *McCarthney v. Busey*, 954 F.2d 1147, 1152 (6th Cir. 1992) (failure of National Transportation Safety Board to dispose of appeal within 60 days as required by 49 U.S.C.App. § 1429(a) does not require dismissal), *Saratoga Savings and Loan Ass'n v. Federal Home Loan Bank Bd.*, 879 F.2d 689, 694 (9th Cir. 1989) (failure of Board to render decision within 90-day deadline does not curtail its ability to issue cease and desist order), *Hendrickson v. FDIC*, 113 F.3d 98, 100–02 (7th Cir. 1997) (FDIC does not lose jurisdiction for failure to adhere to 90-day statutory and regulatory deadlines for decision contained in 12 U.S.C. § 1818(h)(1) and 12 C.F.R. § 308.40(c)(2)), *Oy v. United States*, 61 F.3d 866, 871–73 (Fed. Cir. 1995) (where Department of Commerce failed to timely comply with its own regulatory notice requirement, that failure does not impair its authority to administer antidumping laws), *Gottlieb v. Pena*, 41 F.3d 730, 732–37 (D.C. Cir. 1994) (Secretary of Transportation not barred from acting after expiration of statutory 10-month period in 10 U.S.C. § 1552(a)(1) (Supp. V 1993) for final action on application to correct Coast Guard records; provision is directory only), *United States ex rel. Siller v. Becton Dickinson & Company*, 21 F.3d 1339, 1342–46 (4th Cir.) (qui tam provision of False Claims Act, 31 U.S.C. § 3729 et seq., requiring government to elect whether to intervene within 60 days of receiving complaint, is not jurisdictional in character), *cert. denied*, 513 U.S. 928 (1994), *Kinion v. United States*, 8 F.3d 639, 643–44 (8th Cir. 1993) (FmHA given 60 days under 7 U.S.C. § 2001(c)(4) to make debt restructuring and loan servicing decision; failure to meet deadline does not divest agency of power to act), *Kelly v. Secretary*, 3 F.3d 951, 956 (6th Cir. 1993) (HUD's failure to comply with statutory investigation period does not disable agency from pursuing complaint of discrimination in violation of Fair Housing Act), *accord United States v. Salvation Army*, No. 96 Civ. 2415, 1997 WL 37951, at *1–2 (S.D.N.Y. Jan. 30, 1997), *United States v. Scott*, 788 F. Supp. 1555, 1557–59 (D. Kan. 1992), *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 113–15 (3d Cir. 1997) (Clean Air Act, 42 U.S.C. § 7407(d)(3)(D), imposes duty for EPA to act on state's redesignation request within 18 months; agency nevertheless not precluded from acting after expiration of the deadline), *City of*

*Camden v. USDOL*, 831 F.2d 449, 451 (3d Cir. 1987) (allowing agency to recover funds 6 years after expiration of 120-day period), *Brown*, 1986 WL 11750, at *3.

As the court pointed out in *Gottlieb*, Congress is fully able to specify the consequence of failure to abide by a statutory deadline when it chooses to do so. 41 F.3d at 734. *Cf. In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997) ("Congress knows the difference between encouraging and mandating specific conduct, and knows how to impose binding obligations on courts when it wishes to do so."). [10] Congress expressly and unambiguously created only one limitations bar in § 1324b; it is found at § 1324b(d)(3): "No complaint may be filed respecting any unfair immigration-related practices occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." This bar is applicable both to suits based on a charge and to suits based on the Special Counsel's own-initiative investigations. No such prohibition was stated with respect to procedural missteps. [11]

This is the legal backdrop against which Agripac seeks to establish that OSC's failure to adhere to the statutory time period deprives OCAHO of jurisdiction over the allegations as to Santiago Lopez. For the reasons stated in the cases cited, I conclude that, absent some showing of prejudice to the respondent, failure to comply literally with the timetables for charge processing does not limit the Special Counsel's authority to file a pattern and practice complaint or an amendment or supplement thereto. Ac-

[10] Among the various statutes the *Gottlieb* court pointed to as other examples of Congress' demonstrated ability to specify the consequences of failure to comply with a deadline are 25 U.S.C. § 2710(e) (1998) (if Chairman of the National Indian Gaming Commission fails to act on a request for approval of a tribal gaming ordinance within 90 days of its submission, the ordinance "shall be considered to have been approved"), 25 U.S.C. § 2710(d)(8)(C) (1988) (if Secretary fails to disapprove state-tribal compact within 45 days, "the compact shall be considered to have been approved"; 15 U.S.C. § 3416(a)(2)(1988) (failure to act timely treated as denial of application); 16 U.S.C. § 544e(b)(3)(A) and (C) (1988) (failure to act timely treated as approval of submitted ordinance); 22 U.S.C. § 4113(f)(3) (1988) (same, regarding agreement); 42 U.S.C. 1396n(h) (1988) (same, regarding request). 431 F.3d at 734 n.5.

[11] *See Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991):

> Congress' silence in this regard can be likened to the dog that did not bark. *See* A. Doyle, *Silver Blaze* in *The Complete Sherlock Holmes* 335 (1927) and *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (parallel citation omitted) (1980) (Rehnquist, J dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night").

cordingly it cannot be said to a certainty that relief for Santiago Lopez is precluded, and the proposed amendment as to him has not been shown to be futile.

V. *CONCLUSION*

The motion of OSC for leave to amend its complaint is granted.

**SO ORDERED.**

Dated and entered this 13th day of May, 1999.

Ellen K. Thomas
Administrative Law Judge