

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

May 16, 1991

GEORGE SUCHTA,)	
Complainant)	
)	
v.)	8 U.S.C. 1324b Proceeding
)	Case No. 90200290
U.S. POSTAL SERVICE,)	
Respondent)	
_____)	

DECISION

Appearances: George Suchta, pro se;
Suzanne Milton, Esquire, United States Postal
Service, Washington, DC, for Respondent.

Before: Administrative Law Judge McGuire

Background

This proceeding involves a complaint by George Suchta (Complainant) against his former employer, United States Postal Service (USPS or Respondent), in which Complainant has alleged that Respondent terminated his employment based upon his national origin and citizenship status, in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.

On May 21, 1990 Complainant filed a charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) of the Department of Justice, alleging that Respondent had engaged in an unfair immigration-related employment practice. Specifically, Complainant charged that Respondent had terminated his employment on November 17, 1988 solely because of his national origin and/or citizenship status.

On September 19, 1990, following its investigation of Complainant's charge, OSC forwarded a letter to Complainant notifying him that based upon its investigation it would not file a complaint on his behalf. In that correspondence, also, OSC advised Complainant of his right to file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) no later than December 17, 1990.

On September 24, 1990, Complainant filed a complaint with OCAHO, in which he reasserted the allegations of national origin and citizenship status discrimination and requested that the matter be assigned to an administrative law judge for hearing.

On November 23, 1990, Respondent timely filed its answer, together with attachments, consisting of copies of its relevant correspondence with OSC and excerpts from the USPS Personnel Operations Handbook. In addition to denying Complainant's allegations generally in its responsive pleading, Respondent asserted three affirmative defenses.

On March 6, 1991, following written-notice to the parties, the matter was heard before the undersigned in New York, New York. A fully fluent Polish interpreter was present throughout the proceeding.

Summary of Evidence

Complainant's hearing evidence consisted of his testimony. That of the Respondent was comprised of the testimony of three USPS employees, Delores Witkowski, a personnel specialist assigned to USPS' Long Island, New York division, Ziggy Wilinski, the postmaster at the USPS facility in Riverhead, New York and Complainant's supervisor, and that of Richard Torres, the USPS Affirmative Action Program Coordinator in the Long Island, New York division. In addition, 19 documents were marked and entered into evidence as Respondent's Exhibits 1 through 7, and 9 through 20.

Complainant, a permanent resident of Polish ancestry, is a sincere and affable gentleman of 57 years. He was born in Warsaw, Poland on January 1, 1934, having lived there, as well as in Szczecin, Poland, and in Ryazan, White Russia.

He began a 10-year elementary school curriculum in 1941 at age 7 and testified that he served as a member of the Polish Resistance Movement against the Germans in the Second World War between 1942 to 1945, when then between 8 and 11 years of age. In 1960 he

started college in White Russia, where he took courses in railroad engineering.

From 1960 until 1976, he operated locomotives on Polish railroads. During 1976 he initially came to the United States on a tourist visa. Following a 3-month stay, during which he made the acquaintance of a lady residing in Riverhead, Long Island, he returned to Poland and began corresponding with her. He returned to the United States permanently in 1980, leaving his job as a horse farm worker in Szczecin, Poland, and began an uninterrupted period of residence in Riverhead. He testified that he was subsequently granted amnesty and on August 26, 1990 became a permanent resident alien.

His work history in the United States includes jobs as a landscape worker, horse farm employee, punch press operator, factory assembler, and maintenance/custodial employee. While working in the latter occupation at Southampton College between 1984 and 1987, he was advised by a coworker that membership in an American Legion post would possibly qualify him for federal jobs normally set aside for U.S. military veterans.

He subsequently saw a notice or advertisement which had been placed in a Polish daily newspaper by a Polish American organization located in Chicago offering assistance in securing memberships in American Legion posts. He responded and was eventually accepted as a member of a post in Albany, New York and subsequently transferred that membership to an American Legion post in Riverhead, Long Island, where he is still an active dues paying member.

In the course of picking up his mail at a postal box in the Riverhead, Long Island post office, which is located one-half mile from his residence, he noticed a postal job announcement advertising the position of Cleaner, Custodian and Custodial Laborer in that post office. He testified that the ad described the job as being 40 hours weekly, at \$6.50 per hour, and that the term of employment would not exceed 90 days, but that the term could be extended for a similar term, or a total of 180 calendar days.

He filed an application for the job, was hired and began his duties at the Riverhead post office on May 17, 1988. For the first three weeks he worked 40 hours each week and then learned that he would be working fewer hours thereafter. At about that time, also, he was told that another casual custodial employee was starting and that that person would be working 40 hours weekly. That person, whose first

name was Lee, began work on May 28, 1988 and worked until quitting on July 4, 1988. After Lee left, he began working additional hours.

He also testified that another person, whom he knew only as Danny, was hired as a casual custodian on a 90-day term at the same time Lee had been hired. He learned that Danny had been working at that post office as a letter carrier and he stated that Danny was also a U.S. military veteran. On November 17, 1988, at the end of his second 90-day term, he testified that he was fired and that Danny continued working in the position to which he feels he should have been appointed.

Complainant acknowledges that he has no U.S. military service and for that reason he is aware that he cannot qualify for any positions within the USPS that are reserved for U.S. military veterans. He testified that he further understands that as a permanent resident alien he can apply and take competitive examinations for any other USPS positions which are open to non-veterans. He is particularly anxious to work at the USPS facility at Riverhead as a custodian laborer at \$6.50 per hour since it is only one-half mile from his home. Because he cannot operate a motor vehicle owing to color blindness, that job is especially attractive since it is within a three-minute cycling distance. The USPS duties also impose significantly fewer physical demands on his lower back than did his previous occupations, as well as his present job of maintenance custodian, for which he is paid \$7.00 per hour.

Delores Witkowski, a USPS personnel assistant, testified that during the period of Complainant's temporary employment at the Riverhead post office, she served as the acting examination network coordinator. Her duties included issuing examinations for competitive registers for filling positions within the Long Island Division of USPS.

She stated that all positions within the Long Island Division of USPS are advertised by posting job announcements in every postal facility within the division. Complainant filed his job application for the Custodial Laborer position in question after seeing the job announcement which had been posted in the Riverhead post office. The lower portion of that announcement contained this wording: "These positions are restricted by law to individuals entitled to veteran preference. Applications received from individuals not entitled to veterans preference will be returned." (Respondent's Exh. 5 at 1).

Complainant filed an application card, PS Form 2479-AB (Respondent's Exh. 4) in filing for the Custodial Laborer position and did not claim a veteran preference. For that reason, and also because that career permanent position was restricted by law to persons entitled to U.S. military preference, Ms. Witkowski returned Complainant's job application to him by mail on November 30, 1988, and advised him to apply for other postal positions for which he was qualified as a non-veteran (Respondent's Exh. 15).

Complainant then directed correspondence to William Cummings, Regional Postmaster General, USPS, requesting the latter's assistance in being allowed to take the competitive examination for that position (Respondent's Exhs. 16, 17).

That correspondence was forwarded to Ms. Witkowski and on February 15, 1989 she again sent correspondence to Complainant advising him that he could apply for the custodian examination only upon a showing that he was entitled to U.S. military preference (Respondent's Exh. 18).

Ms. Witkowski testified that Article 7 of the National Union Contract under which USPS operates provides for two employee classifications: (1) Regular Work Force, which consists of full-time and part-time workers, and (2) The Supplemental Work Force, comprised of casual employees whose number in any period, other than December, may not exceed 5% of the workers covered by that agreement, who may not be employed in lieu of full or part-time employees, and who are limited to two (2) ninety (90) day terms of casual employment in a calendar year plus a period not exceeding twenty-one (21) days during the Christmas period (Respondent's Exh. 19 at 2).

She further explained that the position for which Complainant applied, that of Custodial Laborer, was a career, or permanent, position as opposed to a casual, or term/temporary position, and was one of several restricted to persons entitled to a U.S. military preference, in accordance with the provisions of Section 262.11, USPS Personnel Operations Handbook EL-311, April 1990 (Respondent's Exh. 6). Since Complainant had no U.S. military service his application for that position could not be accepted and had been returned to him for that reason.

Ms. Witkowski also stated that the USPS regulations provide that since the position of Custodial Laborer was a career position, vacancies within that position could be filled by: (a) Promotion; (b) Reassign-

ment; (c) Change to lower level; (d) Transfer from another federal agency; (e) Reinstatement, and (f) Selection of a person within reach on the register of eligibles for that position (Respondent's Exhs. 6, 7, 8).

Her testimony also made available the information that while applicants who were not members of the USPS or federal work forces, or who had previous service therein, were required to be eligible veterans in order to apply for the position of Custodial Laborer, current career members of those work forces, or those seeking reinstatement, were not similarly restricted (Respondent's Exh. 6). She also advised that since mid-1988 two persons, Lee Backus and Daniel Bennett, had been hired to the full-time, career position of Custodial Laborer at the Riverhead post office. Backus was entitled to veteran's preference, passed the written examination and was appointed to the position. Bennett was not entitled to veteran's preference but he had been a part-time flex letter carrier, a career position, in the Riverhead post office and resigned that position on August 31, 1988 (Respondent's Exh. 9) and was appointed to the full-time Custodial Laborer position.

She pointed out that there were dramatic differences in the status which Bennett and Complainant occupied as applicants for that position. Complainant was not entitled to U.S. military preference and was a casual-temporary employee who was not entitled to take competitive, in-service examinations for career positions until he attained a career status by first obtaining a USPS or federal position which was not restricted to applicants entitled to U.S. military preference.

Bennett, on the other hand, was not entitled to U.S. military preference, either, but he did enjoy career status by virtue of his prior USPS employment and was therefore permitted to compete for the position of Custodial Laborer. She also testified that the records disclose that the postmaster of the Riverhead post office was eager to have Bennett, who was regarded as a good employee.

Ms. Witkowski stated that she was unaware of Complainant's national origin or citizenship status until very recently, when she reviewed the records in preparing to testify in this proceeding.

Ziggy Wilinski, the postmaster of the Riverhead, Long Island post office, testified that he is authorized to have three custodial employees. Two are full-time career custodial laborers and the remaining position

is filled by a part-time casual custodial laborer whose work week is limited to 10 hours, with some exceptions, and whose employment term is limited to 180 days in any calendar year, plus 21 days during the Christmas period, with no exceptions.

The two full-time career custodial laborer positions are presently held by Benjamin Yocano and Charles Olshefsky, both of whom are entitled to U.S. military preference.

In May 1988 he was authorized to have two full-time career and one part-time casual custodial laborer positions. He stated that Complainant held the latter position between May 11, 1988 and November 17, 1988.

He also testified that he spoke to Complainant in the lobby of the Riverhead post before Complainant began his casual custodial duties. They spoke in English and in Polish and discussed the 10-hour per week work limitation. Complainant was told on that occasion, as well as on many others, that he would not work in excess of 10 hours weekly except on those days on which the two full-time career custodial laborers would be on sick leave or annual leave.

According to Wilinski, Complainant's job performance was excellent and his services were terminated on November 17, 1988 only because Complainant's total 180-day work period had ended on that date. He knew that Complainant was Polish but was unaware of his citizenship status.

He recalled that during the summer of 1988 the two full-time career custodial laborer positions were held by Benjamin Yocano, who was hired before Complainant started in May 1988, and Lee Backus, who was a career USPS employee prior to having received his full-time career custodial laborer position prior to May 1988. When Complainant began work in May 1988 as a part-time casual custodial laborer, the three-person custodial crew was in place.

Wilinski stated that Backus had been fired during the summer of 1988, reducing the custodial crew to two persons, Yocano and the Complainant. The second full-time career laborer position was filled in October 1988 by Daniel V. Bennett, who resigned from his career part-time flex carrier position (Respondent's Exh. 9) in order to join the custodial crew.

Richard Torres, Respondent's concluding witness, is a first generation American of Puerto Rican ancestry, who serves as the Affirmative Action Program Coordinator for the Long Island Division of USPS. His

duties include administering USPS' Severely Handicapped Program, which allows severely handicapped applicants to compete for USPS positions without having to take the competitive examinations required of other applicants.

He stated that the provisions which provide for the noncompetitive career hiring of persons with severe disabilities are those found at Section 261.54 USPS Personnel Operations Handbook EL-311, April 1990 (Respondent's Exh. 20).

He was familiar with Complainant, but had not met him before the March 6, 1991 hearing. In May 1988 or in May 1989 Torres was contacted on Complainant's behalf by Joanne Cullinane, a counselor assigned to the Riverhead, Long Island office of the New York Office of Vocational Rehabilitation. Ms. Cullinane inquired whether Complainant was eligible for a noncompetitive USPS position on the basis of his physical disabilities.

As a result of Ms. Cullinane's inquiry, Complainant's status was reviewed and a determination made that he was not sufficiently disabled under the criteria of the Severely Handicapped Program. He discussed the USPS findings with Ms. Cullinane and she agreed with those findings. He further testified that Complainant had not been certified as having been disabled by the New York Office of Vocational Rehabilitation, either.

Torres testified that he was unaware of Complainant's national origin, his citizenship, or his entitlement to U.S. military preference.

Issue

The primary issue raised under this factual scenario is that of determining whether, as Complainant has alleged, Respondent violated the pertinent provisions of IRCA by having engaged in an unfair immigration related employment practice by discriminating against Complainant in terminating his employment because of his national origin and/or citizenship status.

Discussion Findings and Conclusions

Before proceeding, it must be determined whether Complainant timely filed his charge with OSC. Under the applicable provisions of IRCA, 8 U.S.C. § 1324b(d)(3), complaints based upon unfair immigra-

tion-related employment practices must be filed within 180 days of the date of the alleged proscribed practice.

This evidentiary record discloses that Complainant contends that Respondent discriminated against him in the course of terminating his position of part-time casual custodial laborer on November 17, 1988. Accordingly, his charge was required to have been filed with OSC within 180 days of that date, or on or prior to Monday, May 16, 1989.

The record discloses, however, that Complainant filed his charge with OSC on May 21, 1990, or one year and five days, or 370 days later. Accordingly, Complainant is precluded from maintaining this action under the pertinent provisions of IRCA.

Even in the event that Complainant had timely filed his charge with OSC as well as the administrative law judge, he would not have prevailed because he has failed to provide any evidence that Respondent had engaged in a discriminatory act unlawful under IRCA.

Claims based upon national origin discrimination may be entertained by this office only in the event that the employer involved employs between four and 14 employees. 8 U.S.C. § 1324b(a)(2)(B); Ryba v. Tempel Steel Co., OCAHO Case No. 90200206 (1/23/91) at 9; Fordjour v. General Dynamics, OCAHO Case No. 90200146 (1/11/91) at 3; Williams v. Lucas Associates, Inc., OCAHO Case No. 89200552 (10/22/90) (Decision and Order Granting in Part Respondent's Motion to Dismiss, and Order to Show Cause) at 3. Since it is uncontested that USPS employs in excess of 14 employees, that ground is unavailable to Complainant in this forum.

Instead, Complainant must bring his national origin discrimination action against Respondent before the Equal Employment Opportunity Commission, under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. (1982) (Title VII), rather than having filed a charge of that type before OSC, under the provisions of IRCA.

Accordingly, even in the event the Complainant had not been time-barred from maintaining this action, his only claim against USPS would be one based upon citizenship status discrimination.

In assessing the efficacy of Complainant's charge on that basis, we find that the pertinent provisions of IRCA prohibit "a person or other entity to discriminate against any individual, . . . with respect to the hiring . . . or the discharging of the individual from employment -- (B) in the case of protected individual, . . . because of such individual's citizenship status." 8 U.S.C. § 1324b(a)(1)(B), amended by Section 533,

Immigration Act of 1990 (IA90), Pub. L. No. 101-649, 104 Stat. 4978. Complainant, as a permanent resident alien of the United States, is a "protected individual" and, therefore, has standing to maintain an action based upon his citizenship status. 8 U.S.C. § 1324b(a)(3)(B), amended by Section 533, IA90.

When viewing Complainant's allegations as a charge of citizenship status discrimination, rather than one based upon national origin, I find that Complainant has failed to meet his evidentiary burden of proving that he was discriminated against on that ground. The evidentiary burden imposed upon Complainant is that of demonstrating by a preponderance of the evidence that Respondent has engaged in an unfair immigration-related employment practice. 8 U.S.C. § 1324b(g)(3); 28 C.F.R. § 68.50(c)(1)(iv). Should Complainant fail to meet that burden, the administrative law judge must dismiss the complaint. Id.

This evidentiary record discloses that Complainant has offered no testimonial or documentary evidence that he was terminated from his custodial position because of his citizenship status as a permanent resident alien. Rather, the records clearly disclose that Complainant simply could not be employed as a casual custodial laborer for a period in excess of 180 days in any calendar year. Nor could he apply for the full-time custodial laborer then being advertised because he was not a U.S. veteran, nor was he a present or former career government employee, nor was he an individual with a certified disability sufficiently severe to have qualified under USPS' Severely Handicapped Program.

Respondent has provided adequate and credible evidence that Complainant's period of casual employment had been terminated solely because Complainant completed his second 90-day employment period, the maximum term for temporary custodial employees. In addition, Respondent's personnel handbook clearly provides that the position for which Complainant applied is one which is restricted to individuals with veteran preference, unless the applicant qualifies for the in-service examination for such position.*

* It should be noted that the regulation at issue does not fall within the exception set forth for at 8 U.S.C. § 1324b(a)(2)(C), which provides that the prohibition against citizenship status discrimination does not apply to "discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract. . . ." 8 U.S.C.

(continued...)

Accordingly, I find and conclude that Complainant is not a United States veteran and, therefore, is not eligible for veteran's preference. Nor does Complainant occupy the status of being a present or former career government employee who is entitled to take the in-service examination. Finally, as Torres testified, Complainant simply has not demonstrated that his alleged physical disability is sufficiently severe to enable him to be certified to be eligible for an exemption from the veteran preference requirements. These reasons alone provide sufficient bases upon which to conclude that Complainant simply does not qualify, nor has he ever qualified for the position he seeks, that of full-time Custodial Laborer.

One can readily understand the measure of Complainant's disappointment in not having been hired as a full-time custodial employee in USPS' Riverhead, Long Island post office, given the proximity of that postal facility to Complainant's place of residence and for the further reason that those job duties, according to Complainant's testimony, are significantly less demanding than those of his current custodial position, which pays \$7.00 hourly, as opposed to the USPS rate of \$6.50 per hour. But as a non-veteran, and as an applicant who clearly failed to qualify under any of the six criteria set forth in Section 261.31 of the USPS Personnel Operations Handbook (Respondent's Exh. 7), it was simply not possible for him to have been considered for the full-time career position of Custodian Laborer. Indeed, had USPS allowed him to file an application for that position, it would have violated its regulations in the process of doing so.

Complainant's testimony discloses that he firmly believes that two of his custodial coworkers, Lee Backus and Daniel Bennett, were also hired as casual custodial employees and that both had been granted an employment status which he was denied because of his citizenship status. Even a cursory review of the hearing testimony, as well as

* (...continued)

§1324b(a)(2)(C). In other words, the prohibition against citizenship status discrimination does not apply in cases where a particular citizenship status is legally required. That exception was held to apply in two prior OCAHO cases involving the U.S. Postal Service. Tovar v. U.S. Postal Service, OCAHO Case No. 90200006 (Nov. 19, 1990); Sosa v. U.S. Postal Service, OCAHO Case No. 89200001 (Dec. 15, 1989). Those cases dealt with a USPS regulation which bars hiring based on an individual's citizenship status, namely, the status of a temporary resident alien, as opposed to a permanent resident alien, hence, that regulation is not involved under these facts. Instead, the regulation at issue restricts custodial worker positions to "preference eligibles under the Veterans' Preference Act of 1944" rather than individuals of any particular citizenship status.

Respondent's documentary evidence, causes those allegations to be viewed as having a decidedly hollow ring.

The record discloses that Lee Backus and Daniel Bennett were not hired as casual custodian employees, as Complainant contends. Instead, both were hired as full-time custodial laborers because each had occupied a glaringly dissimilar applicant status for the position of Custodial Laborer than did Complainant. It is just that simple. Backus was entitled to U.S. military preference, was a career USPS employee at the time he filed his application and, finally, was hired only after he passed a competitive examination for that position. In the case of Bennett, he was not entitled to U.S. military preference but at the time that he filed his application he also enjoyed career USPS status by reason of the fact that he was then working at the Riverhead, Long Island post office as a part-time flex letter carrier.

As noted, the gravamen of Complainant's charge consists of his claim that USPS has engaged in an unfair immigration-related employment practice, that of having discharged him on November 18, 1988 solely because of his citizenship status. But the testimony of the three USPS employees who made the hiring decisions under these facts, in accordance with governing USPS regulations, Ms. Witkowski and Messrs. Wilinski and Torres, reveals that none of them were even aware of Complainant's precise citizenship status until each only learned of his permanent resident alien status in the course of their respective preparation to participate in this proceeding as witnesses on behalf of USPS. That fact obviously militates against a finding that Complainant's citizenship status could reasonably have played any part under these facts.

In conclusion, Complainant is time-barred from maintaining an action under the anti-discrimination provisions of IRCA because he failed to file his charge with the OSC within the requisite 180-day period. And even in the event that Complainant had timely filed a charge of that nature, he has failed to carry his evidentiary burden, that of establishing a prima facie case of discrimination by a preponderance of the evidence in support of his contention that Respondent discriminated against him based on his citizenship status.

In view of the foregoing, Complainant's request for administrative relief must be denied and an appropriate order of dismissal entered.

Order

Complainant's September 24, 1990 complaint regarding alleged unfair immigration-related employment practices, based upon national origin and/or citizenship status discrimination, allegedly in violation of the provisions of 8 U.S.C. § 1324b, is hereby ordered to be dismissed.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This decision and order upon issuance and service upon the parties shall, in accordance with the provisions of 8 U.S.C. § 1324b(g)(1), become final unless, as set forth in the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such order seeks a timely review of that order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such order.