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

September 12, 1996

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

FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *Yefim Luvish, Esq.,* for Complainant
Barry M. Sax, Esq., for Respondent Department of Defense
John A. Shetterly, Esq., for Respondent EG&G

I. *Procedural History*

By a charge dated September 23, 1992, Leonid Naginsky (Complainant or Naginsky) alleged that EG&G Dynatrend, Inc. (EG&G) discriminated against him based on his citizenship status and national origin, practices prohibited by section 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. §1324b(a)(1)(B). Pursuant to §1324b(b)(1), Naginsky filed his charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Naginsky alleged that on approximately March 1, 1984, he began employment with EG&G as an Information Analyst. In March 1987, EG&G requested that he apply for a Department of Defense (DOD)

security clearance despite the fact that such a clearance was unnecessary in order to perform the tasks to which he was then assigned. DOD denied Naginsky a security clearance on the basis that he did not satisfy the requirements of the "5/10 rule." The "5/10 rule" established by DOD regulation (since rescinded) provided that an immigrant from one of certain designated countries was required either to have been a citizen of the United States for at least five years or a resident for ten years as a condition precedent to obtaining a security clearance. *See* former 32 C.F.R. §154.16 (1987); *Huynh v. Carlucci*, 679 F. Supp. 61 (D.D.C. 1988) *Huynh v. Cheney*, 87–3436 TFH (D.D.C. Dec. 24, 1991).[1]

Naginsky alleged that following denial of his security clearance, EG&G discriminated against him by refusing to allow him to perform meaningful work in line with his qualifications and skills, providing him only limited access to needed equipment, and giving him poor performance reviews. Naginsky contended that EG&G's discriminatory actions culminated in his involuntary termination on March 15, 1991.

By a determination letter dated March 25, 1993, OSC informed Naginsky that it elected not to file a complaint on his behalf before an administrative law judge (ALJ) for two reasons: First, there was "no reasonable cause to believe that . . . [he was] injured by application of the 5/10 year rule. . . ." Secondly, his charge was not timely filed with OSC. OSC, however, informed Naginsky that he could pursue a private cause of action directly with an ALJ. 8 U.S.C. §1324b(2).

On April 22, 1993, Naginsky filed his Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO), naming EG&G and the Department of Defense (DOD) as Respondents. Complainant reasserted his claim that EG&G discriminated against him during the four years of his continued employment after failing to obtain clearance from DOD, and ultimately fired him because of his citizenship status and national origin.

On May 3, 1993, OCAHO issued its Notice of Hearing (NOH), which transmitted copies of Naginsky's Complaint to DOD and EG&G.

[1] *Carlucci* is the district court decision which held that the 5/10 rule was unconstitutional; *Huynh v. Cheney* approved the subsequent settlement agreement to which DOD assented, requiring public notification of the *Huynh* decision.

On June 25, 1993, DOD timely filed an Answer, a Brief in Support of its Answer and a Motion for Summary Decision. The Answer included three affirmative defenses: (1) Complainant failed to state a cause of action, (2) failed to show any damage caused by the 5/10 rule, and (3) the Complaint was not timely filed within 180 days of the alleged discriminatory conduct, i.e., his termination from employment.

After obtaining an extension of time, EG&G timely filed an Answer on June 29, 1993 and a concurrent Motion for Summary Decision and brief in support. EG&G asserted as affirmative defenses that OCAHO lacks jurisdiction; that Complainant failed to state a claim, failed to establish that he was damaged by application of the 5/10 rule, and that the charge was out of time.

On August 10, 1993, Complainant filed responsive pleadings including a Motion for Summary Decision. Both EG&G and DOD filed pleadings in opposition to Complainant's Motion, prompting Naginsky to file another pleading on March 24, 1994.

The presiding ALJ issued an Order denying Complainant's Motion on August 22, 1994.[2] Following retirement of the ALJ, I was assigned the case on August 23, 1994.

By Order dated January 12, 1995, I tentatively concluded, *inter alia,* that: Complainant's charge alleging discriminatory employment practices under 8 U.S.C. §1324b was not timely filed, but that the *Huynh* case and settlement apply; under OCAHO precedent and the *Huynh* settlement, DOD is subject to the agreement to waive §1324b limitations, entitling Complainant to benefit from waiver of §1324b limitations as to DOD, and that there is a genuine issue as to whether application of the 5/10 year rule to Complainant and the resulting denial of a security clearance was the proximate cause of his ultimate termination by EG&G. 5 OCAHO 726 (1995).

A confrontational evidentiary hearing was set for July 18–19, 1995, rescheduled due to illness of Complainant's then-attorney, until September 6–7, 1995. On August 29, 1995, Complainant's attorney filed a Motion to Withdraw, and for a continuance. On August

[2] At all times relevant, Naginsky was employed either by Dynatrend, Inc, or after merger with its successor, EG&G Dynatrend, Inc. For convenience, the employer is identified solely as EG&G.

30, 1995, Complainant filed a *pro se* motion for a continuance, requesting at least sixty days to seek new counsel and prepare for an evidentiary hearing. By Order dated August 31, 1995, I granted both the Motion to Withdraw and Complainant's motion, postponing the evidentiary phase of the hearing pending an opportunity to obtain substitute counsel.

As subsequently rescheduled, at the adversarial evidentiary hearing held in Boston, Massachusetts on January 30–31, 1996, Complainant was represented by his current counsel. DOD filed a post-hearing brief on May 7, 1996, EG&G on May 24, 1996. Complainant filed his on May 23, 1996. DOD filed a reply brief on June 4, 1996; EG&G filed on June 12, 1996. Because certain exhibits admitted into evidence were omitted from the official stenographer's certified transmittal of the hearing record, and the stipulation between Complainant and EG&G is inconsistent with the evidence as to when the security application was applied for,[3] by Notice and Order issued August 13, 1996, I proposed a procedure for resolving both matters, subject to objection to be filed by August 21, 1996. DOD and EG&G each filed a response dated August 21, 1996, in effect concurring in the proposed procedure for the omitted exhibits, and addressing also the date of the security clearance application. No objection being filed, copies of the exhibits as identified below,[4] were transmitted to the official files by Order issued August 30, 1996.

[3] The discussion, *infra* at page 6, n. 7, resolves any uncertainty as to the date of application.

[4] The exhibits enumerated in this footnote were received by me at hearing on January 30, 1996, as counterpart duplicates of those handed to the official stenographer as listed at page 7 of (Continued) the transcript but omitted from the stenographer's transmittal to OCAHO of the transcript and all other exhibits marked for identification at hearing. The exhibits so enumerated are DOD Exhibits 1 through 7 and EG&G 30. *See* Notice and Order dated August 13, 1996; Order dated August 30, 1996. In both orders all exhibits but DOD Exh. 1 were listed as having been admitted into evidence, a notation consistent with the omission at page 7 of the transcript of a page reference to admission into evidence of DOD Exhibit 1. The judge's bench notes, however, reflect admission into evidence, consistent with the dialogue at page 161 of the transcript where DOD counsel asks "that Exhibit No. A10, Complainant's Exhibit be admitted into evidence at this point," and the judge's response, "Alright," coupled with the request to " the court reporter to mark what had been shown as [Complainant's] Exhibit A10 to be marked as DOD Exhibit 1 for identification." The subject of extensive cross-examination of Complainant, Tr. 160–169, the exhibit is understood to be in evidence, overtaking my contrary indications in the issuances of August 13 and 30, 1996.

On August 21, 1996, Complainant filed a motion to receive as a post-hearing exhibit, as more fully discussed in the Order of August 30, 1996, a Deputy Secretary of Defense letter of October 27, 1986, addressed to a third party unrelated to this case, in response, according to its terms, to a request for "waiver of the proposed revision to the Department of Defense policy governing eligibility of naturalized citizens for a security clearance." Over objection by both Respondents, the August 30, 1996 Order admitted into evidence the October 27, 1986 letter tendered by Complainant, and also confirmed receipt in evidence as a post-hearing exhibit of the February 28, 1996 filing, contemplated at hearing, of computer print-outs of security clearance applications of EG&G analysts identified on a list supplied by EG&G.

II. *Background*

This is not the first OCAHO case to adjudicate §1324b claims which implicate the former 5/10 rule. The first was substantially resolved by agreed disposition following extensive pretrial practice and bench rulings, as described in the decision and order in *Roginsky v. Depart ment of Defense*, 3 OCAHO 426 (1992). *Roginsky* established that DOD is amenable to administrative law judge (ALJ) jurisdiction in such §1324b cases, without regard to the otherwise applicable 180 day limitations period of §1324b(d) (3). As the result, it is today unexceptionable that an ALJ has jurisdiction where the claim of discrimination arises on the part of a naturalized U.S. citizen to whom employment was allegedly denied or terminated because of insufficient duration of that citizenship status or residence, and the fact that his national origin was one from a country identified as "adverse." Preliminary determinations in *Roginsky,* aptly characterize the present case:

> (1) the alleged discrimination essentially was based on and implicated Complainant's citizenship status and not his Russian national origin;
>
> (2) to the extent national origin may have been implicated, an ALJ Is not deprived of 8 U.S.C. §1324b jurisdiction over citizenship discrimination allegations, *United States v. Marcel Watch Corporation*, 1 OCAHO 143, 999—1001 (1990)[5] *see also Romo v. Todd Corporation,* 1 OCAHO 25, 123 (1988); *aff'd U.S. v. Todd Corp,* 900 F.2d 164 (9th Cir. 1990).

[5] Citations to OCAHO precedents reprinted in Volume 1 (Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Law of the United States, as published by the Government Printing Office (1995)) reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, *seriatim,* of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

(3) while §1324b national origin discrimination generally is actionable only against employers of more than three but fewer than fifteen individuals, ALJ national origin jurisdiction may arise also as to employers of more than fourteen, by virtue of the national security exception to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e–2(g). *See* 8 U.S.C. §1324b(a)(2)(B). *See also Pioterek v. Anderson Cleaning Systems, Inc*., 3 OCAHO 590, at 2 (1993) and cases collected in *Roginsky* at 5, n. 3.

The 5/10 rule, previously codified at 32 C.F.R. §154.16 (1978), prohibited the granting of security clearances to United States naturalized citizens who are natives of designated countries, including the former Soviet Union. The prohibition applied only to those citizens naturalized for less than five years or who had not resided in the United States for ten years. DOD's regulation was held unconstitutional. *Huynh v. Carlucci*, 679 F. Supp. 61 (D.D.C. 1988) and *Huynh v. Cheney,* 87–3436 TFH (D.D.C. Dec. 24, 1991).

By the agreement approved in *Huynh v. Cheney*, the rule having been abrogated, DOD agreed to waive §1324b limitations, allowing claimants to litigate §1324b claims even if filed outside the limitations period. In the instant case, DOD concedes that Complainant was denied a security clearance because the rule was applied. Because Naginsky filed his OSC charge within 180 days of learning that the 5/10 rule was the reason for the denial, he qualifies as a complainant under *Huynh* as to whom DOD waives §1324b limitations.

Because in the present case limitations had run against EG&G but not DOD, any liability would be solely that of DOD. EG&G has remained in the case as an accommodation, reflecting the reality that its files and its personnel, and not DOD's, are the most informative. In light of rejection of summary decision, and filing of a stipulation between Complainant and EG&G (attch. B to the transcript), as confirmed in the Fifth Prehearing Conference Report and Order at 1 (1995), the *Naginsky* parties have agreed that the only issues in this case are: (1) whether the conceded application of the 5/10 rule to Complainant was the proximate cause of his termination, and if so, (2) the recovery, if any, to which Complainant is entitled as a result.

III. *Discussion*

A. *Stipulated Facts*

Complainant was born in 1941, in Leningrad, U.S.S.R., of Russian parents. He has a masters degree in city and regional planning

from Leningrad University. In 1979, he emigrated to the United States, became an employee of EG&G in March 1984, and a U.S. citizen in 1985.

Naginsky, who was hired by EG&G as a systems analyst,[6] worked exclusively on Department of Transportation (DOT) projects.

Naginsky's starting pay was $9.35 per hour, increased on 12/31/84 by 7% to $10.00; 7/1/85 by 5% to $10.50, and 6/30/86 by 2% to $10.80.According to the stipulation, in March 1987, EG&G Security Officer, Joseph Coughlin (Coughlin), requested that Naginsky complete an application for security clearance even though a security clearance was not a requirement for Naginsky's job.[7] As part of the security clearance application process, Coughlin also requested that Naginsky provide him with documentation to verify his immigration status. The 5/10 rule became effective in January 1987, requiring as a condition precedent for a security clearance that an applicant from one or another of designated countries, including the Soviet Union, must have been a citizen of the United States for five years or a resident for ten years. When Naginsky applied for a security clearance, he had neither been a citizen of the United States for five years nor a resident of the United States for ten years. On or about March 13, 1987, DOD denied Naginsky's security clearance on the basis of the 5/10 rule.

Following denial, Naginsky received the following hourly pay raises: 6/29/87, by 2.3% to $11.02; 10/19/87 by 10.4% to $12.20; 1/1/90 by 6% to $12.93, and 12/31/90 by 3% to $13.32.

On March 15, 1991, EG&G terminated the employment, on the stated basis that Naginsky's services were no longer needed due to lack of work.

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[6] It appears clear from the record, however, that Naginsky was hired as an information analyst, later promoted to senior information analyst, and never served as a systems analyst.

[7] The stipulation is in error as to the date of application. Coughlin's testimony and exhibit DOD–4, as well as concessions by Complainant's counsel, confirm that the application was filed with DOD on November 26, 1986. *See also* Notice and Order dated August 13, 1996 and Order dated August 30, 1996 (including filings of the parties referred to in the latter issuance).

B. *Positions of the Parties*

(1) Complainant's Claims

Claiming his proof establishes that implementation of the 5/10 year rule was the proximate cause of his employment problems from 1987 to 1991 and ultimate termination, Complainant relies on Massachusetts statutory and judicial discrimination principles, without reference to federal law.

Essentially focusing on his EG&G experiences after denial of the security clearance, Naginsky relies on letters and memoranda, primarily complimentary, by U. S. Department of Transportation (DOT) personnel, praising his performance while working with them. (Exhs. A6, A9, B4, C9, E8). In the face of positive DOT comments, he was ignored from 1987–1991 by supervisors who failed to assign him to Government projects for which he was hired, even removing him from all U.S. government projects, including the United States Air Force Logistics Information Management Support System Potential for Computer Graphics Integration (LIMSS) Project, on which he had worked since March, 1984. Because of the security clearance denial, he was not given work assignments, and received biased work evaluations.

Naginsky insists that because of the denial, he became "non-market able" and acquired a "badge of disloyalty." Cmplt. Br. at 2–3. His testimony is that after removal from LIMSS, he was assigned only graphic design projects, and did not again perform his job as an information analyst, even though EG&G continued to hire others, even with less experience.

Naginsky contends his salary level was lowest among similarly situated information analysts, proffering a comparative analysis which calculated the EG&G average salary rate for those employees with security clearance and those without, claiming that the average hourly rate for those without security clearances was lower.

Complainant claims it is significant that EG&G informed him at the time that his termination was due to lack of funds, but that throughout the hearing process EG&G has emphasized his inferior performance. Naginsky argues that this switch in rationale makes clear that both are pretexts for the real reason, i.e., the "badge of disloyalty."

James E. Allen (Allen) at all relevant times was the employer's Project Manager at the DOT Transportation Systems Center (TSC) (also known as the Volpe Center) in Cambridge, Massachusetts, the individual to whom Naginsky's supervisors reported. Complainant stresses Allen's acknowledgment that had a security clearance been granted, it would have expanded Naginsky's opportunities. Complainant also finds it significant that when he complained to Allen about his supervisor's bias behavior, Allen authorized a significant pay increase. Complainant interprets Allen's testimony that there may have been a "personality conflict" (Tr. 319–320) with his supervisor Marc Cutler (Cutler) as a concession that Naginsky suffered "supervisory bias." Complainant finds comfort also in the notion that Naginsky's case was not a typical case of "0001 being charged because the general level of task demand or task support was declining."[8] Tr. 329; Cmplt. Brief at 11.

Responding to the suggestion that client managers did not indicate a desire to have him on their projects, Complainant finds comfort in Coughlin's concession that it is not typical for government managers to identify an individual whose services they want or do not want on the basis of prior experience with that individual. Tr. 439–440; Cmplt. Brief at 12.

Complainant points out that Michael Diaz (Diaz) testified that when he was Naginsky's supervisor, Naginsky was the only analyst for whom Diaz could not find work. Tr. 481; Cmplt. Post-Hr'g. Br. at 12. Diaz testified that when he looked for work for those performing analytical jobs, he did not mention any names but he would keep his "ears open" and "ask questions and try and find opportunities." Tr. 481.

(2) Respondents' Claims

Respondents[9] contend that Complainant has failed to prove the core issue, i.e., whether implementation of the 5/10 rule was the

[8] The term "0001 account" as well as "capability maintenance" refers to overhead time. When Complainant was terminated, so were two others who shared with him relatively high allocations of salary to the "0001 account," reflecting hours not chargeable to particular client projects. Allen specified the reason Naginsky remained at 75% of overhead compared to an average of 6 % for other employees, i.e., lack of customer response to EG&G proffers of Naginsky's services. Tr. 329–330, 331–332. *See infra* at pages 22, 27.

[9] Because EG&G joined in DOD's post-hearing brief, where appropriate, the term Respondents includes both EG&G and DOD.

proximate cause of his employment problems from 1987 to 1991, and his termination in March 1991.

Respondents contend that Complainant's problems began shortly after he was hired in 1984, with a seven year series of average-to-unsatisfactory evaluations. It is obvious, therefore, that the security clearance denial was irrelevant: "Complainant was always a problem employee who refused to accept responsibility for his own substandard work effort and EG&G's responses to his substandard performance." DOD Brief at 4. DOD emphasizes that far from establishing a nexus between the 5/10 year rule and his termination, the proof is that EG&G "leaned over backward to help him and continued to employ him long after he might readily have been terminated for cause." DOD Brief at 8.

DOD aptly summarizes its spin on the evidence:

> Consider the individual and collective testimony of Allen, Coughlin, Diaz, and Harrison. Covering the entire period of Mr. Naginsky's tenure at EG&G, from 1984 to 1991, all of his work evaluations contained similarly uncomplimentary comments and average to unsatisfactory ratings. . . . All testified that while Complainant was clearly highly intelligent and did some excellent work, as reflected in individual and group commendations, primarily from DOT officials (Complainant's Exhibits A8, A9, F2, G2, I3, J1, etc.), his overall performance during the same periods covered by his listed exhibits was uneven and never approached a high level (See DOD Exhibits 1,2,3,4,5,6, and 7).

DOD Brief at 12.

DOD also argues that Complainant's testimony and exhibits raise questions about Naginsky's credibility, specifically, his attempt to persuade the court that he received high and very high evaluations.[10] Naginsky's testimony about an early so-called high evaluation contrasts with that of Donna Katrych (Katrych). Katrych, as Manager [later, Director] of Human Resources, was the custodian of EG&G's personnel records, who testified that the first page of Exhibit DOD–8, an ostensible performance evaluation for the first months of Naginsky's employment, was not a copy of anything in Complainant's personnel file. Katrych testified that the form was not recognizable as one utilized by the employer, that evaluations are normally maintained in a personnel file. Allen also could not account for the bona fides of the document (which although bearing a DOD exhibit number came from Complainant at hearing).

[10] See discussion, *infra,* at footnote 11.

C. *Discussion*

(1) The Employment Context

Both Coughlin and Allen described how government projects were obtained, and employees assigned. Coughlin stated,

> The general contract level of effort was defined in the . . . RFP and then through negotiations subsequently when the contract was awarded. The flushing out of the actual activities were handled through . . . task work orders. In other words if we had twenty labor years of analytic work, that would be flushed out through a series of task work orders negotiated between the EG&G supervisors and individual task managers on the government's staff. There was no guarantee at any time that there would be actual specific work to flush that out. So it was . . . a task order type contract. We only could respond to requests made. As a matter of fact is [sic] was kind of a prohibition against marketing our services. Although obviously in the course of every day activities there had to be some give and take on that.

Tr. 300–301.

At one point, during Naginsky's tenure, "the budgets and all were such that" government task requests expanded, so that if an EG&G employee had an idea which would expand the scope of a contract task, it was to EG&G's financial benefit. Tr. 301–302.

However, according to Allen, by early 1989**,** there was a retrenchment in government spending, and as funding declined and it became more difficult to acquire direct charge work, customer task managers,

> became much more particular concerning who was assigned to their tasks. Principally as a result of the prior history, the word had kind of gotten around among the government staff that there were certain people that you didn't necessarily (sic), even though it's a non-personal services contract, in practice people look at other people in terms of what they think they can reasonably expect. As we moved through that period from say 1990 into 1991, . . . the opportunity for the supervisors to acquire an interest of the various task managers who might otherwise have been amenable to provide direct task work [decreased]. And in general that accounted for an awful lot of the non-availability of the work for, in terms of Mr. Naginsky's opportunities.

Tr. 328–329.

To similar effect, Coughlin explained that,

> the Transportation Systems Center [TSC] is unlike just about any other bureaucracy in the federal government. It is a consulting house within the federal government looking for work. It is not a budget item. So the entire culture of the place is that you look for tasks. If it does not bring in work from the outside

> it does not exist. It does not have a statutorial (sic) mission that enables it to have funding every year. As such, the culture of the federal employees and that of the contract employees is to go out and find tasks, to bring them back into the building to provide value added, both technical and administrative and to continue looking for essentially, looking for problems that the center and its staff can become solutions to.

Tr. 379–380.

As Coughlin put it, DOT had to obtain projects and funding where it could throughout the government, such as LIMSS, the Air Force funded project. LIMSS was illustrative of projects under DOT tasking of other agency resources, primarily non-DOD, and principally but not exclusively transportation oriented.

(2) Employment Chronology

(a) *1984–1985*

In the chronology of his employment, the first reference to performance is by James Harrison, a team leader who, having worked with Naginsky, testified that in 1984 he quickly became "problematic," his production "absolutely close to zero." Tr. 500–502.

In point of time, the first documented performance review is a memorandum dated November 7, 1985 from Marc Cutler, as Supervisor, Analytic Services Group, to Naginsky entitled "Job Performance." Exh. DOD–1. Referring to "numerous occasions" on which "you have been informed of deficiencies in your job performance by both myself and by your immediate supervisor,[11] Cutler

[11] Complainant relies on a "Personnel Review Form #1, with the typed date "1 January 1985" struck through and "31 December 1984" penned in, with an evaluation grid above the typed entry "Superviser [sic]: Tom Lindsley." Exh. DOD–8. The grid generally is similar but not identical in appearance to exhibit DOD–2, a format according to Allen used by Raytheon, EG&G's predecessor. There are evaluation blocks ranging from excellent—above average—average—fair—poor, under five criteria: quantity/average; quality/above average/ knowledge of job/above average; dependability/average; adaptability/above average. Exh. DOD–8. Although Complainant insists he obtained this evaluation in the ordinary course and it is what it appears to be, EG&G cannot locate it in its files and Allen discounts its credibility because it omits any signature blocks. Tr. 338. By reason of the lack of (1) a custodial chain and disavowal of its legitimacy by EG&G, (2) discrepancies in comparison to Exhibit DOD–2, including particularly lack of jurats and dates and provision for comments as in that exhibit, (3) mispelling of "supervisor," and (4), the fact that the putative evaluations are relatively immodest, considered in context of Naginsky's disappointment with Lindsley's failure to support significant pay increases and his claim that Lindsley was biased against him, I have sufficient doubt as to the bona fides of this document as to give it no credit. In any event, however, it could hardly overcome the weight of critical comment on his performance, before as well as after the security clearance denial.

cautioned that "no substantial progress in correcting these deficiencies have been observed to date." Exh. DOD–1. Cutler listed "Specific areas of deficiency communicated verbally" as completing assignments on time "and in proper format;" assuring "a complete understanding of the assigned work before proceeding;" "Acceptance, in a responsive and professional manner, of technical guidelines concerning project requirements, as provided by the task manager," and "conformance with established work-rules," including "being present at your work station and working at 9:30 A.M., the start of the Center's 'core' work hours." He warned that "unless immediate and sustained correction occurs, further disciplinary actions will be taken, including possible termination of employment." *Id.*

(b) *1985–1986*

Eight months later, the Personnel Review Form for Leonid Naginsky, Information Specialist, bearing a 7/1/86 review date, signed by Cutler as supervisor on 6/16/86, and by Naginsky, without a date, contains a grid for evaluating the employee on a scale which ranges from excellent—above average—average—fair—poor against five skills and abilities, i.e., quantity, quality, job knowledge, dependability and adaptability. Cutler rated Naginsky fair for the first category, average for the remaining four. An attached typed narrative, explaining in detail that Naginsky's work "on the ASA stress testing project" was unacceptable, finds that since assignment "to the LIMSS project, Leonid's performance has improved considerably, he has developed an excellent rapport with his sponsor and completed assignments on-time and in an acceptable fashion. He appears to be developing a role for himself in a relatively unstructured situation." But, noting that the project work load and technical demands were "fairly light," he preferred "to see how Leonid performs under the pressure of deadlines, a heavy workload, and increased technical demands, and to see this recent improvement sustained over a longer period of time . . . [and] . . . an improvement in Leonid's attendance record" as the precondition to a change in his overall evaluation. Exh. DOD–2. The accompanying salary change sheet shows a 2.9% increase effective June 30, 1986.

On Dynatrend's [EG&G's] memorandum letterhead, dated October 29, 1986, from J.E. Allen to Naginsky, entitled "Group Achievement Award—Aviation Safety Analysis Support Team," Allen, as EG&G Project Manager, recites "our sincerest and most appreciated commendation for your highly able and dedicated efforts," expressing the employer's thanks "for your personal performance and contribu-

tions to the group recognition cited in the attached memorandum from TSC's Incentive Awards Administrator." Exh. B4.

The referenced memorandum from the Incentive Awards Administrator, Florence H. Koniares, dated October 28, 1986, advises James Allen that at TSC's seventeenth annual awards ceremony of outstanding support, nine individuals, including Naginsky, will be recognized "for the outstanding support [they] have given to our Aviation Safety Analysis Team." Exh. B4. Again this year by memo, J. E. Allen to "Dynatrend Employees at TSC," also dated October 29, 1986, EG&G the (nine) individuals named in the Koniares memo receive "congratulations, appreciation and thanks for the outstanding performance and professional contributions leading to this award." Exh. B4, p.1.

(c) *1986–1987*

Among an abundance of individual commendatory communications introduced by Complainant, the earliest, dated June 15, 1987, on Memorandum letterhead, DOT Research and Special Program Administration, is from L. Vance (Vance), LIMSS Transportation Project Manager to James Allen, Dynatrend Project Manager, concerning Naginsky's "Support of the LIMSS Transportation Project." Citing a year of support by Naginsky to the transportation component of the LIMSS program for which Vance said he has been "his primary 'customer,'" he characterized Naginsky's performance as timely and useful, "responsive to our short term needs, quickly defining an appropriate product and delivering it when needed." Vance concluded that "We on the LIMSS project consider Leonid an asset. He is flexible and provides new insights and ideas from his unique perspective," and looks forward to his continued role. Exh. J1.

An undated, unsigned Memorandum of the DOT Research and Special Programs Administration, from J. Bellantoni to File, entitled "Information: Summary of Contributions to SARSAT by Leonid Naginsky," reciting that Naginsky was assigned from June 1984 through May 1985 to the Satellite Aided Search and Rescue Project [SARSAT], summarized his participation: his "performance on his assigned tasks has been marked by thoroughness, a sense of responsibility and a very personable manner." Exh. A6.

On plain paper, addressed to James Allen, dated 7/15/87, B.S. Goldstein was pleased to write a note at Naginsky's request concern-

ing Naginsky's work on the Coast Guard sponsored "internationally cooperative" SARSAT project. Stating that Naginsky "analyzed the messages, extracted appropriate data, performed required statistical analysis and computations and constructed histograms," Goldstein characterized him as "cooperative, conscientious in his work and accurate in carrying out all analyses and computations," concluding that "Generally, I was very pleased with the support he has given me on this project." *Exh.* A9.

For the year ended June 30, 1987, Cutler evaluated Naginsky's year on a performance review form which called for assigning ratings from exceptional (5.0), very high (4.0), high (3.0), satisfactory (2.0), fair (1.0), to unsatisfactory (0.0), across nine specific factors. He rated Naginsky for JOB KNOWLEDGE, 0.0; PLAN AND ORGANIZE WORK, 0.0; QUALITY OF WORK, 1.0; DEPENDABILITY 1.0; INITIATIVE, 1.0; JUDGMENT AND DECISION MAKING, 1.0; COOPERATION, 0.0; ORAL COMMUNICATION, 1.0, and WRITTEN COMMUNICATION, 0.0. The overall evaluation was unsatisfactory, 0.0, defined on the employer's preprinted "general Guidelines" as: "Performance fails to meet minimum requirements of job; requires corrective/disciplinary action and follow-up action." Exh. DOD–3. The accompanying narrative notes that Naginsky was assigned to LIMSS for much of the year and had "good personal rapport with the customer" but "made little technical contribution to the project," and has a reputation at the Center even though well liked "as an unproductive worker with minimal technical skills" and "no data processing skills and, given his English-language limitations, it is not possible to use him on menial editorial-type work." Cutler continued:

> In any event, Leonid rebels against assignments which he considers to be beneath his intellectual level. Despite my constant suggestions over the past two and a half years, Leonid has undertaken no actions to remedy these deficiencies.

Exh. DOD–3.

Suggesting that "it is questionable how much longer [Naginsky] will be kept on the project even though Dynatrend's overall support to the project has grown dramatically in recent months," and if Naginsky is "dropped from the LIMSS project, I believe it will be difficult to find another assignment for him," Cutler "strongly" recommended that he seek alternative employment. He recommended against a salary increase. *Id.*

By memorandum dated August 4, 1987 to Jim Allen, referring to a conversation of July 10, Naginsky disagreed in conclusory fashion with "Mr. Cutler's charts" and evaluation, asserting, without details, that his supervisor's evaluations "were not supported by analysis on a level normally expected from a supervisor," but containing remarkably poetic, albeit astringent, commentary. He suggested "two questions," in particular:

> a.) Wheter [sic] my capabilities have degenerated in spite of Mr. Cutler's best efforts, or
>
> b.) whether I have risen with his help from the depths of premature senility to the level ordinary incompetence. In the latter case, Mr. Cutler should have made use of negative numbers to evaluate the performance of previous years (from -5.0 to 0.0).

He added, rejecting "this kind of evaluation as wilful and malicious discreditation, which violates the elementary norms of human and professional ethics," that,

> If Mr. Cutler's assessment is to be accepted at face value, then his generous decision to continue my salary at its present level not simply solves no problems but only increases the risk of damage of the sort which a person of such limited skills and minimal communication ability (0.1 on Mr. Cutler's scale) can cause. My continued presence might lead me to infect the environment with my ignorance.

Exh. C7, p.1.

Significantly, on the same date, by a memorandum, Naginsky to Allen, "Reevaluation of job performance," responding to Allen's request "that I express my opinions in writing," Naginsky wrote that "I strongly believe that, *since I joined Dynatrend in 1984, my job performance has_never been properly evaluated* and because of that fact my present salary has been kept at an injustifiably low level." (Emphasis supplied). He cited as "the most important facts," "1. Previous evaluations," and "2. Recent professional accomplishments." As to the first, he wrote that his first EG&G supervisor Bob Earle said he had no problem with the $25,000 salary which Naginsky said he would be satisfied with, but Earle "retired two months later without giving me the promised salary increase," presumably complaining that he was not brought up to that annual level. Next,

> Tom Lindlsey during his year of tenure as supervisor of Dynatrend analysts never once asked me what I was doing on my project. Later he confessed he thought I was a translator. Nevertheless he evaluated my performance as merely average and wrote in my file that he could find only negative element in

> my work—my strong Russian accent. When I pointed out that this phase could be intepreted [sic] as discriminatory and contrary to company equal opportunity policies he deleted it. Nevertheless his assessment was not altered.

Exh. C7, pp. 2,3.

Again, as in 1986, Naginsky was one among the LIMSS team named to receive a TSC Group Achievement Award, as listed by Florence H. Koniares writing on November 13, 1987 to James Allen, advising that "your organization will be recognized at TSC's Eighteenth Annual Awards Ceremony." On November 17, 1987, by memo to Naginsky, "Group Award for Outstanding Support," Allen extended his "congratulations for this very commendable achievement," which "reflects great credit on yourself and our LIMSS support group." He expressed the "sincerest appreciation for your continuing efforts and accomplishments." Exh. C 9, pp. 1,2. Allen testified that "nobody on the Dynatrend [EG&G] team that I recall was excluded" from the TSC award, which to "tell you the honest truth" did not carry much weight for an individual awardee. Tr. 346, 347.

(d) *1987–1988*

The next year, 1987–88, Complainant, by then a senior information analyst, was evaluated on the same format as the 1986–87 exercise, by a different reviewer, MacDonald. The review yielded a uniform rating of 1.0 across the board. Exh. DOD–5. The evaluation, across the board was in the 1.0, fair category.[12] The accompanying narrative relates mixed reviews on Naginsky's performance on the LIMSS transportation component to the effect that the Dynatrend task leader voiced concern over timeliness, resorting to "outlining specific tasks in writing," obtaining timely results "at a great cost in time." The TSC sponsor "sometimes voiced satisfaction" but warned that after July 1, 1988, Naginsky's time would only be needed 15 to 10 hours a week on LIMSS, and full funding for Naginsky's graphic support to the transportation component "is uncertain at present." Unlike his predecessor, MacDonald recommended a salary increase, based on the stated expectation that Naginsky would fully cooperate and defer "to the direction and judgment of the Dynatrend assigned

[12] Page one of the performance evaluation format in evidence shows entries at 2.0 as well as 1.0, while page 2 shows only 1.0. Page 4, as confirmed by testimony, is understood to explain that the higher rating was an error, and reflects rejection of a salary increase, in contrast to Complainant's speculation that Allen and MacDonald disagreed and he was downgraded because of the security clearance denial.

task leader." On further review, his recommendation was disapproved, as noted by the reviewing endorsement. *Id.*

(e) *1988–1989*

To Michael Diaz, the experience as Naginsky's supervisor was frustrating, namely because Naginsky was "resistant to authority," Tr. 454, as for example, he failed to comply with the rules governing the proper procedure for time cards, instead doing "creative things" so he could carry over-time from one week to the next, a practice which was neither authorized nor permitted. Tr. 455–456.

On March 17, 1989, Naginsky, by memo to Diaz, copy to Coughlin, took exception to Diaz for having that day in the cafeteria "publicly and loudly reprimanded me for having coffee in 'a wrong time.'" Naginsky expressed his resentment for "this unprofessional display of public execution in front of my colleagues and bystanders. An empty office can always [sic] found in a case of crime." He added that "this mentioned punishment was particularly undeserving and unfair." He wrote that Diaz as his supervisor was aware that he had been overloaded in recent weeks with two LIMSS projects requiring him to improvise his own schedule, with inconveniences not under his control, lacking adequate computer hardware "(documentation folks, as you know, even made personal keys in order to keep their precious machines away from the hands of undesirable poor relatives)," resulting in his sharing a TSC computer on a floating schedule. "In order to keep up with the schedule I was personally asked by the LIMSS Manager to work after regular hours and weekends whenever I can." Naginsky was convinced his TSC clients "are completely satisfied" and he enjoys "very good personal relations" with his immediate sponsors. "And last, but not least, I believe that the work I perform brings added revenues to the company." Nevertheless, in his career at EG&G he has "suffered tremendously from the similar type of organizational deficiencies or even tempers of short-lived immediate supervisors (I have had three new bosses just during the last year)." He concludes that he wants to keep the record straight "in the hope that upcoming EG&G management does not practice such unnecessary abuses and imply [sic] more appreciative way to handle their employees loyalty and experience." Exh. E1.

By memorandum to Naginsky dated March 28, 1989, Diaz wrote to confirm that "you have failed to comply with my numer-

ous requests for meaningful weekly status reports," explaining that they must

> contain specific information about the nature of your tasks and a quantitative estimate of the work performed. [They] must contain action words such as 'provided,' 'documented', and 'prepared.' Statements such as 'Architecture of interrelated informational hierarchies' is not a complete sentence and does not convey any meaning.

Exh. EG&G 14.

Writing that Naginsky has not accepted his offer "to provide you with examples of what I consider excellent reports submitted by your peers," Diaz admonished him to take steps "to correct this situation by Friday, 31 March 1989," adding that if he needed assistance he should let Diaz know immediately. Naginsky signed an acknowledgment of receipt. *Id.*

By memorandum to Allen dated the next day, March 29, 1989, Diaz reported that he counseled Naginsky on failure to provide acceptable weekly status reports, having emphasized to Naginsky the need for such reports to account for "expenditure of funds and as a record of accom plishments to be used as reference during the annual review process." Exh. EG&G 13. According to Diaz, Naginsky "does not understand or respect the supervisor/subordinate relationship. . . . He stated that he failed to see the need for status reports when his TSC sponsors are satisfied with his work." Telling Naginsky he must stop working overtime without the supervisor's permission, and pointing out that Naginsky "insinuated that my requirement for him to sign a letter acknowledging receipt of a letter of counseling would start a paper war between us," "I said that if it came to the point that I had to spend an inordinate amount of time keeping him on track that I would approach you and recommend his discharge." *Id.*

A few days later, by memorandum to Allen dated April 5, 1989, highlighting his problems with Naginsky, Diaz discussed the March 17 altercation in the cafeteria when, according to Diaz, Naginsky should and could have been at work on a computer which had been made specifically available to him. Diaz complained that "the situation with Naginsky is becoming quite unbearable," that while "he has been uncooperative and unresponsive to my requests for professional behavior . . . now he has become insubordinate as well." Attempting to "get Mr. Naginsky to justify the number of hours he

is documenting as overtime," Diaz inquired "of [Naginsky's] TSC sponsors in order to understand the nature of his assignments." Diaz continued :

> I admit that if he was attempting to complete the three tasks he is currently assigned he would require overtime to do so. My investigation reveals, however, that two of the tasks have been put on hold with instructions to concentrate on the remaining task.

Exh. EG&G 12.

He added that despite instructions as to how to budget his time so as to share a computer, Naginsky continues to come to work at times the computer is unavailable and he is unable to perform, but he still documents overtime:

> When I challenged him about his overtime he had Jennifer Slack write a letter to you stating that the overtime was necessary. . . . He is not managing his time correctly and is taking advantage of the lack of TSC supervision to work extra hours.

Id.

Diaz wrote that he called Naginsky aside in the cafeteria to ask why he was there and not using the computer which was available because the TSC person he shared it with was out sick; he reported that Naginsky responded that he had a headache, needed coffee, always got his work done, and remained in the cafeteria despite being told "he should be at work." Acknowledging that Naginsky's TSC sponsors may have been "content with his work," Diaz believed it his duty "to see that my subordinates' time is spent wisely" and not "charge unnecessary overtime hours even if the TSC sponsor doesn't appear to realize what is happening." Concluding that Naginsky "has been given ample opportunities to correct his behavior by myself and his previous supervisors," Diaz requested "that consideration be given to terminating" Naginsky's employment. *Id.*

An unattributed EG&G memo dated May 16, 1989, which Diaz testified he wrote, Tr. 457, concluded that by comparing Naginsky's time cards and the sign in/sign out book, it appears he was working excess hours on Fridays and logging them on subsequent Mondays with the result that Fridays were under-reported while for Mondays, hours were recorded in excess of those actually worked. Naginsky assured the writer "that from now on he would follow the correct procedures." Exh. EG&G 11.

Nevertheless, another unattributed memorandum dated June 5, 1989, but obviously also from Diaz, Tr. 461, complained that three weeks after the writer discovered irregularities in Naginsky's time cards, the latter continued to record hours not worked but to work more hours than reported, and made no effort at corrections despite requests to do so:

> He is quite stubborn about using his method and repeatedly ignores my instructions. For the third week in a row I had to tell Leonid not to turn in his time card unless he knows how many hours he intends to work. He continues to attempt to report time in such a way that it appears he has only worked 40 hours in a given week. . . . This concerns me because it may reflect the level of attention he pays to the details of his graphics tasks.

Exh. EG&G 10.

In the midst of the 1989 evaluation and review process, by memorandum dated July 17, 1989, to Diaz, copy to Coughlin, Naginsky asked that "this document (see attachment)" be shown to "potential sponsors." Exh. E8, p. 1. The attachment, a memorandum of the same date, July 17, to EG&G on blank paper, by Jennifer Slack, "Operations Research Analyst LIMSS Program, DTS–64," reports glowingly on Naginsky's support with "graphics expertise." Commending his quality and speed, she continues:

> His knowledge of the Mac system and his orientation to the aesthetic and design aspects of graphics are indispensable [sic] in the LIMSS work. Mr. Naginsky is inventive and cognizant of the latest applicable technologies. A major work prepared by Mr. Naginsky for USAF General McDonald is renowned within the Air Force Logistics community, and is contained in a major planning document of the LIMSS sponsor. The LIMSS Program will continue to use Mr. Naginsky's expertise in the future.

Exh. E8, p.2.

A few days earlier, on July 6, 1989, by memo to Diaz, copy to Coughlin, Naginsky wrote that his "full-time status on the LIMSS project is temporarily limited to approximately 10 hours a month," and advised that he was in "a process of contacting potential sponsors and would appreciate any assistance from you in this matter." Exh. E6. Some weeks previously, on March 31, 1989, Slack wrote to Allen that "[i]n light of the high priority placed upon the delivery of special charts designed for General McDonald, HQ USAF/LE, support from Leonid Naginsky is essential and will include overtime." Exh. E3.

The 1988–89 annual review, dated 7/3/89, was completed on the same format as those of the two prior years. This time, with comments set out as to each, Diaz assigned the rating "fair," 1.0, to six rating factors: JOB KNOWLEDGE "interest is high; however, job knowledge is shallow;" PLAN AND ORGANIZE WORK "Not prompt in completing tasks. Does not plan—reacts instead;" QUALITY OF WORK "Lacks patience, does not check for accuracy. Treats his work as 'art' rather than technical documents;" JUDGMENT AND DECISION MAKING "Is capable of identifying mistakes & problems, but cannot identify solutions without help;" ORAL COMMUNICATION "Has difficulty finding correct terms and expressions;" and WRITTEN COMMUNICATION "Admits problems." He assigned the unsatisfactory rating, 0.0 to three: DEPENDABILITY "Socializes to excess. Much time unaccounted for. May take an hour or longer to locate him;" INITIATIVE "Exhibits no initiative. Actually loses work opportunities by not adjusting to job demands," and COOPERATION "Has serious problem accepting Dynatrend supervision. Rebellious to authority. Has his own agenda." Exh. DOD–6.

The accompanying narrative critique is devastating:

> Leonid . . . was released from the Transportation component of the [LIMSS] project because the task manager was not satisfied with the quality and quantity of his work. I managed to secure him a task with the Connectivity component of LIMSS; however, his performance there has been rated as barely satisfactory. This is mainly because Leonid's technical knowledge of computer graphics may be described as shallow and he requires close supervision and tight control. On the other hand, Leonid is a "Senior Information Analyst" not a Graphics technician and should be doing information analysis work.
>
> During this reporting period I have had several confrontations with him because of his resistance to my authority. He has resisted my requirement for him to write meaningful status reports. When pressed to comply he stated that his English is not good enough for him to write clearly. I have discovered several discrepancies in his timecards caused by his unique method of accounting for overtime. When I explained to him that his timecard must accurately reflect his hours worked, he appeared confused and continued to document his hours incorrectly. This has caused me to hold his timecard each week and check the hours recorded on Friday before I turn in his time card. Three out of the last four weeks were incorrect and required correction before they were submitted. Attached are memorandums documenting my unpleasant experiences with Leonid.
>
> Leonid also has caused some embarrassing situations with TSC by pitting TSC personnel against me whenever he feels "threatened" by supervision. One situation he caused almost ended in a confrontation with Mike Dinning, the LIMSS program manager. Due to his marginal job performance, lack of initiative and insubordinate attitude I recommend his immediate discharge from the company.

Exh. DOD–6.

The recommendation was against a salary increase. An accompanying page entitled "Correction Actions Required" calls on the incumbent to fulfill assigned tasks completely, and to comply with supervisor(s) directions, including conformance with "core-hour" flex-time requirements, to cease "pitting" TSC personnel against the employer's staff, and to sustain a more business-like approach to work and conduct. On July 19, 1989, Naginsky subscribed to the correctives: "I have reviewed the above and understand what actions I must take before my next review." *Id.*

By memo to Naginsky dated the previous day, entitled "Sixty-day Probationary Notice," Allen summarized Naginsky's 1986 and 1987 performance evaluations "conducted and prepared by your then supervisor, Mr. M. Cutler." Exh. DOD–7. Allen noted that in August 1987, Cutler having resigned from EG&G,

> you presented your case to me that you considered you had been treated unfairly relative to your true accomplishments vs. your reviews, strongly implying that a highly personal bias on the part of Mr. Cutler (and his predecessor, Mr. Lindsley) was, in fact, the origin of these "unfair" and "unobjective" evaluations, with their attendant minimal merit salary increases.
>
> Based on my review at that time of all the evidence available (such as your inclusion in the Aviation Analysis Team Group Award, etc.) . . . it was not possible for me, based on this review to clearly determine the extent to which complete objectivity and your former supervisor's personal subjectivity played a part in these 1986 and 1987 evaluations. Accordingly, I recommended and received approval for an adjustment/raise effective in October 1987 to establish a new salary baselin—consistent with average-to-above average raises during these prior two periods—for subsequent performance reviews.

Id.

Allen specified that in discussions between them in October 1987, he highlighted that with new supervisors who he was confident had no cause to treat Naginsky in a "'biased' or unfair manner;" he would have "a salary adjusted to reflect an overall 6.9% (above-average) increase per year (employment annual anniversary dates) since initial employment," and "a fresh opportunity to demonstrate your ability to meet professional staff requirements." *Id.* Allen testified that after review of Cutler's 1987 critical evaluation of Naginsky, and the latter's claim of supervisory bias, Lindsley and Cutler having left E G & G, he was unsure whether there were personality conflicts. Giving Naginsky the benefit of the doubt, he recommended a 10.4% raise, a

"significant jump in his salary to bring him up pretty much to where he would have been if he'd been getting six to seven percent in raises during that period." Tr. 320. Allen said he did so because based on "facts acquired subsequent to his July 1 minimal increase it became clear to me that the prior supervisor evaluations were not strictly consistent with actual competence and performance for reasons still not entirely clear." Tr. 350–352.

Allen continued,

> Discouragingly, your July 1988 performance evaluation did not reflect that you had made the most of this "fresh opportunity". Lack of timeliness and cooperation with your supervisor in developing assigned products surfaced once again; which, together with attendant difficulties, resulted in an overall performance rating of 1.0 (Fair) vs. a maximum 5.0, clearly not satisfactory. Despite this, and once again because your recent (at that time) efforts in LIMSS graphics generation looked promising, a modest raise was recommended in the expectation that such promise would indeed by [sic] sustained. This recommendation, as you know, was rejected by higher company management because your performance rating was below 2.0 (Satisfactory).
>
> During this past year, because of staff members moving on to other employment, you have been reporting to another set of supervisors: Mr. M. Diaz as Chief of LIMSS analysis and Mr. J. Coughlin, his superior as Associate Project Manager for Analysis, who have performed your July 1989 performance evaluation.
>
> This July 1989 evaluation clearly demonstrates that your performance and conduct, contrary to our expectations *reflected by our actions* in prior periods, has not only shown improvement, but has regressed. All of the problems cited by Mr. Cutler in the July 1986 and 1987 evaluations still exist, compounded by an additional problem in proper time recording.
>
> Given this continuing series of unacceptable problems with your performance and conduct over the past four (4) years, under the supervision of several supervisors, and on different task assignments, I am hereby giving you notice that effective Wednesday, 19 July 1989, you are placed on 60-days probationary employment.

Id.

Complainant was advised that he was to report to Coughlin, and that he would be evaluated after the 60 days "relative to your compliance with the Corrective Actions Required. . . . " The record is silent as to the outcome of the 60 day evaluation. *Id.*

To counter the claim that contract work was diminishing in 1989, Naginsky offered into evidence a list of analysts hired by EG&G between 1986 and 1989. Exh. B3. Asked why new analysts were hired

between 1987 and 1991, when Naginsky was running out of work, Allen said that although EG&G was expanding, both LIMSS and another project, Computer Aided Logistics System (CALS), peaked and began to drop off. The value of TSC tasks ranged from the thousand dollar level to several millions; some, like LIMSS and CALS were mega-size, meaning that more than two or three people were utilized; CALS never had more than eleven, including subcontractors. In 1987, E G & G employed between twenty-five to thirty analysts; in 1991 there were approximately forty. (Tr. 361–362).[13] Katrych was of the opinion that while Naginsky was still on board, none of the new hires were assigned to his group.

Coughlin had Naginsky work for him directly so that he could personally find him work. The customers would come to the EG&G project managers to request individuals for particular tasks but they did not respond when Coughlin recommended Naginsky: ". . . they had other people in mind that they wanted to work with." Tr. 441. Although customer personnel technically were not supposed to designate a particular person, often it was made clear that they wanted the services of a specific employee. Tr. 439–440.

Coughlin explained the difference between a good employee and "just someone who is on staff and being fed" is that good employees "can find their own work and develop their own tasks for themselves and others . . . all of us know . . . that to charge 0001 was . . . not something that you wanted to do because you were not being productive. And you knew that the company could just not keep you on overhead for an extended period of time." Tr. 407. The nature of the operation was such that 0001 figured into general administrative costs recoverable from customers, but it was not in the business interest of the employer "to keep people there." Tr. 408.

(f) *1990–1991*

Complainant's performance appraisal for the period 1/90 to 1/91, was signed by Coughlin, endorsed by Allen as department head, and endorsed by Katrych for the Human Resources Department on

[13] In January 1996, there were 50 to 60 employees in the analytical group, up from 35 to 40 when Naginsky was terminated. Asked to explain the increase in the number of analysts at Volpe Center from 1991 to 1996, Coughlin said he could not make a comparison between the current contract and the previous contract "because they are very different animals." Tr. 426.

January 4, 1991.[14] Naginsky's duties as a Senior Information Analyst were defined as: "Perform[ing] research and graphical analysis in support of LIMSS and USMC information engineering programs. Specifically, this position is responsible for graphically depicting the functional decomposition of logistics organizations with Apple software and hardware." Exh. F1. Reflecting the last prior salary increase, authorizing a new increase effective with the new year, the entry for the "last overall rating " is " N/A. " With evaluations posted for 8 categories, the maximum points available to a non-supervisory employee such as Naginsky was 255; of that potential, he scored 193 points. The rating official entered an evaluation for each of a number of described skills and abilities within each of the eight categories, grading the incumbent as to each from "unsatisfactory" through "needs improvement" to "competent" to "above average" to "outstanding." Exh. F1.

For KNOWLEDGE OF WORK, Naginsky received one "above average," two "competent" and one "needs improvement," ratings for a score of 36 of a possible 48, and the comment, "past experience with USMC programs that improvement requires closer coordination with project leader to clearly understand task goals." He scored 35 of 45 for QUALITY OF WORK, with one "above average," two "competents"; for QUANTITY OF WORK, he scored 31 of 45, obtaining one "competent," "two needs improvement," and the comment: "Greater adherence to milestones would result in increase value to the overall team and add to client confidence." The category DEPENDABILITY, earned him 34 of 45, with four competents," one "needs improvement," and the comment: "Need to internalize team milestone schedule so require less dependence on project leader's daily demands." For ADAPTABILITY, he earned 16 of 24; all four ratings were "competent." On INTERPERSONAL RELATIONS, he garnered 17 of 24, two ratings in the "competent," category, one "needs improvement," and the comment: "Written work in the future should be submitted to editorial to improve overall syntax and idiom usage." For SAFETY, he gained the maximum, 24 of 24, with three "outstandings." *Id.*

[14] The 1990–91 evaluation format, for the period January 1990 to January 1991 (Exh. F–1) differed from that used uniformly for 1986–87 (Exh. DOD–3), 1987–88 (Exh. DOD–5) and 1988–89 (Exh. DOD–6); that for 1985–86 is on the grid signed by Cutler (Exh. DOD–2). The record is silent as to the period from July 1989 to January 1990.

Having received 193/255 points, the rating sheet automatically assigned Naginsky to the "competent" category, defined as "meets all job requirements." The next higher category, 201–237, would have been "above average" i.e., "meets all job requirements and in many cases exceeds them." The next lower category, 151 to 175, would have been "needs improvement" i.e., "inconsistently meets job requirements." Coughlin's narrative accompanying the overall rating is that "Mr. Naginsky is to be congratulated for attempting to identify additional work on his own. However, his future success and contribution to the TISS program is wholly dependent on near-term identification of full-time funding." *Id.*

Within 10 weeks, i.e., on March 15, 1991, Complainant was terminated by EG&G. A letter from Allen to Naginsky on that date, effective immediately, enclosed four weeks' pay in recognition of the employer's policy of four weeks notice. Allen wrote:

> In conjunction with our on-going efforts to reduce non-direct costs on our on-site contract and to fulfill our evolving contractual requirements more effectively, it has become necessary to make certain contract staffing adjustments. An analysis of future staffing needs does not indicate a requirement for personnel with your specific background and experience on our current programs, nor other similar programs projected for the future.

Exh. EG&G 5.

Allen explained that other EG&G employees had .0001 (overhead) rates of about 6 percent, but Naginsky's was around 75 percent. (Tr. 331,332). Denying any discriminatory intent in having Naginsky apply for a security clearance, Allen said the decision to terminate Naginsky was based on the "indirect cost problem," that two others were laid off at the same time, having nothing to do with security clearances. *Id.*

IV. *Concluding Analysis*

I reject Complainant's proposal that I apply the Massachusetts legal standard. With all due respect to the State in which this dispute arose, this is a federal venue governed by 8 U.S.C. §1324b, which provides in pertinent part, that

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 274A(h)(3)) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-
>
> (A) because of such individual's national origin, or

> (B) in the case of a protected individual (as defined in paragraph (3)),[15] because of such individual's citizenship status.

8 U.S.C. §1324b(a)(1)(A)(B).

Complainant has the burden of proof to establish by a **preponderance** of the evidence that he was discriminated against on the basis of citizenship status or national origin. 8 U.S.C. §1324b(g)(2)(A); *United States v. Mesa Airlines,* 1 OCAHO 74, 500 (1989). That burden is satisfied in a case of employment termination by showing that the employee was a member of a class entitled to protection, and was discharged without valid cause. *Nguyen v. ADT Engineering, Inc.*, 3 OCAHO 469 at 11 (1993). Although the burden of proof never shifts, once the complainant makes a prima facie showing, the burden of going forward shifts to the employer "'to articulate some legitimate, nondiscriminatory reason for the employee's . . . [termination].'" *Mesa Airlines*, 1 OCAHO 74, 500 (citing *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Once the employer's case is made, the burden shifts a third and final time to the complainant to show that the employer's reasons for termination are a "pretext or gloss designed to conceal an underlying discriminatory motivation." *Mesa Airlines* at 500.

Complainant met the first prong of the prescribed analysis. DOD admitted that application of the 5/10 year rule was the reason for the security clearance denial. Accordingly since there is no dispute that he filed his charge timely as to DOD, I find that as a citizen of the United States Complainant was a member of a protected class, entitled to a cause of action against DOD despite the otherwise applicable 180 day limitation period to file §1324b discrimination claims. *Huynh v. Carlucci*, 679 F. Supp. 61, and *Huynh v. Cheney*, 87–3436 TFH. Having found that Complainant fits within a protected class, and proffered evidence to support his theory of discrimination, the burden of going forward shifted to Respondents to rebut the prima facie claim of discrimination.

Complainant argues that he was discharged without valid cause, that because of the 5/10 rule he did not work as an information analyst after July of 1987, was taken off the project he had been working on since March 1984, and obtained only graphic design projects.

[15] The categories of individuals protected against citizenship status discrimination identified at subparagraph (3) include citizens of the United States. §1324b(a)(3)(A).

Relying on references by non-EG&G personnel and the one putative EG&G evaluation (which as explained at footnote 11, *supra*, I do not credit), Complainant contends he performed at an acceptable level. He would have it that the DOT letters, the opinions of those with whom he worked directly reflect his true worth.

EG&G argues that the complex plot alleged by Complainant lacks common sense: Complainant continued in EG&G's employ for four years after denial of his security clearance in 1987. EG&G asserts that as it has no pecuniary interest in the outcome, there is simply no reason to have retained Naginsky for four years in order to avoid liability which did not exist. Respondents stress that because the 5/10 rule did not go into effect until January 1987, and because Naginsky's application was submitted in November 1986, a conspiracy to get rid of Mr. Naginsky by a malicious application of the 5/10 rule is not credible.

They are correct. Complainant's case is unconvincing. As the array of supervisor comments and performance evaluations make unambiguously clear, whatever uncertainty there may have been with respect to the *raison d'etre* of the early performance appraisals, Naginsky never altered course. There is no evidentiary basis on which to suspect that through the years of his continued troubled performance the failed security clearance application was ever at issue. Certainly it was never raised by him when critiquing his evaluations. Considering DOT documentation as well as all the testimony, I find that the work he was doing ran out of funds as to him, and did not require a security clearance. In context, that EG&G continued to hire information analysts who may have been in demand by customers provides no support to Complainant. There is a total absence of any nexus between the denial of the clearance and his misfortunes. His effort at showing salary discrepancies is not only explained by the annual performance evaluations, but is immaterial.

Respondents established through testimony and written evidence that EG&G had legitimate reasons for its actions and ultimate termination of Complainant's employment. Complainant performed at a marginal, barely satisfactory level and was considered a problematic employee both pre-and post-security clearance denial. Evidence in almost any litigation is rarely all for one and none for the other. For example, Allen's concession in 1987 reflected doubt as of that time of his confidence in the objectivity of Naginsky's early supervisors in response to the employee's protestations to that effect, con-

cession overtaken by his own response to Naginsky in subsequent years. Uncertainties as to perceptions of his performance pale, however, in the face of the pervasive critical caste to evaluations of his performance from 1984 to 1991; taken as a whole there is no reason to pick and choose among them. Indeed, far from assisting his case, Allen's 1989 action affording Naginsky the benefit of the doubt as to earlier evaluations evinces a managerial effort to provide him a second chance, which he muffed. In contrast to his claim of high level performance, Naginsky's overall level was at best uneven and never approached the heights he claims. Buttressing the testimony of his supervisors and counter to his claims of quality performance, the extracts from EG&G's personnel files depict a performance well below average, despite which EG&G continued to give him raises both before and after denial of the security clearance. In fact, his average raise before the denial can be calculated as 4.667%, and after that, at 5.425%.

The last portion of the discrimination paradigm adopted in *Mesa Airlines,* obliged Naginsky to show that EG&G's alleged reasons for termination were pretextual. Complainant argues that "lack of funds" or "substandard work" are obviously pretextual because EG&G first claimed the one and then switched to the second. To the contrary, I agree with DOD that "his poor reputation among contractors led to a lack of work for him to do." DOD Reply Br. at 5. From the start this was a troubled employment. No matter how much the employee may have ingratiated himself with customer representatives or how attractive he may have been to one or another EG&G colleague, he failed to persuade me that EG&G's reasons for termination, whether "lack of funds" or a "substandard performance" are a "pretext or gloss," designed to cover another more pernicious reason, i.e., citizenship or national origin discrimination. *Mesa Airlines*, 1 OCAHO 74, 500. He has utterly failed to prove the claim that as the "result of the denial of security clearance Mr Naginsky was not given work assignments by the EG&G personnel and, *because of that,* he had been receiving biased work evaluations." (Emphasis in original). Cmplt. Br. at 3.

I find no basis on which to conclude that Coughlin's request that Naginsky apply for a security clearance had a nefarious purpose. I conclude instead that it was an effort to position Naginsky and EG&G for potential customer support which did not materialize. That DOD's anticipated 5/10 rule was the subject of an advisory opinion in the form of the Deputy Secretary's October 27, 1986, let-

ter is immaterial. I draw no inferences from that letter because this record fails to disclose that any person at EG&G was aware of the pendency of the 5/10 rule at the time of the November 26, 1986 application or at any time prior to the Naginsky application. Indeed, the evidence is that they were unaware. Since the prospects for projects which required a security clearance never materialized, the security clearance denial did not affect the type of work or projects that Naginsky could work on; he was not denied work because he did not have a security clearance. As well summarized in DOD's Reply Brief:

> The entire thrust of EG&G witnesses' testimony and Respondents' written evidence absolutely establishes that Complainant was *always viewed as a problem employee and that he was always informed in writing and orally by his supervisors and teamleaders as to the nature, variety, and seriousness of his shortcomings as an employee.*

DOD Reply Brief at 4. (Emphasis in original).

I have considered the occasional supportive statements of EG&G colleagues and plaudits by TSC personnel, which Complainant concedes he solicited in order to combat EG&G supervisors' evaluations; as well, I have in mind Coughlin's observation that he had never seen a negative comment by a government person. Notwithstanding the somewhat laudatory comments, recognizing that he appears in a more positive light with sponsor personnel than with EG&G supervisory personnel, the weight of supervisory critiques is compelling. Having observed Complainant for two days at hearing, and having considered the evidence of record, I conclude he is an intellectually competent individual who is, however, so querulous, nonconformist and confrontational as to overwhelm his capabilities, rendering him sufficiently nonmarketable in the dynamics of EG&G's customer arrangements as to have made him expendable long before his termination from employment. Whatever psychological or other stress he may have experienced as the result of the failed security clearance application, I perceive no glimmer, much less a preponderance, of evidence that his departure from EG&G proximately resulted from that failure.

I am satisfied that Naginsky's supervisors repeatedly viewed his performance as below standard. It is reasonable to conclude, and nothing before me persuades otherwise, that when Respondent EG&G had to cut down its staff in1991, it terminated from its employ the less productive and/or "problematic" employees, including Complainant. Together with two other employees whose "capability

maintenance" levels were also high, Naginsky was terminated when EG&G decided it was necessary to reduce staff. Summarizing the testimony of Naginsky's supervisors and co-workers, he was "a talented under-performer not in much demand with the customer." EG&G Brief at 4. "It had nothing to do with whether or not he had a security clearance." *Id.*

It was far from common knowledge that Naginsky had failed to obtain the clearance; contract performance required no clearance. The insignificant role of the clearance is reflected in the project manager's lack of interest; he took so little notice that he never asked and never learned until preparation for hearing the reason for the denial.[16] There is no suggestion, no reference, no whimper in all Complainant's confrontations with management, that the denial of his security clearance was any part of the source of his problems at EG&G, or figured in his performance evaluations.

Coughlin's credibility as a supervisor and as a witness is strengthened by his professed friendship with Naginsky and his role as the security officer who requested he apply for the clearance: "I was a friend with Leonid and I thought this might open up more of a venue." Tr. 45. Coughlin requested that Complainant apply for a security clearance "in anticipation or hope of getting DOD work that didn't materialize," Tr. 392. Had Naginsky obtained the clearance, it most likely would have been administratively terminated within a year along with those of others who applied during the same time period. He was confident that for the work that Naginsky was doing, he did not need a security clearance, and that the customers would not have known that clearance was denied; no sponsor ever asked Coughlin whether or not Naginsky had a clearance.

Coughlin tried to find work for Naginsky but was unable to find any Government program interested in employing his services. In 1991, when Coughlin completed Naginsky's performance evaluation,

[16] Coughlin testified that as a routine matter, the Defense Investigate Service periodically terminates security clearances for nonuse, as it did for Robert Chew and Diaz who applied when Naginsky did. Confronted on cross examination by resumes of each, Coughlin was unable to vouch for their recitation of clearances in effect at later dates. Insisting, however, as did Allen also, that the motivation for the Naginsky security clearance application was to enhance Naginsky's marketability, at a time when only 8–10% of analysts had clearances, in fact no projects materialized on which Naginsky could have served called for clearances.

he informed Complainant that he needed to find full time work to stay at EG&G.

Complainant falls short in proof that the 5/10 rule caused his termination from EG&G. I find that EG&G proved legitimate, non-discriminatory reasons. *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973). Complainant failed to prove that his termination, four years after the denial of his security clearance, was for discriminatory purposes and not for the reasons advanced by Respondents. I do not find it remarkable that the latter stress performance in its litigating posture; considering the nature of its client contract arrangements, the one rationale subsumes the other. If the employer was unable to assign the employee to remunerative employment he was of little use. On this record it would be speculation to conclude that he was refused assignments because of his inability years before to obtain the security clearance, however mistaken may have been the requirement to seek one. There is no proof of evil intent in imposing that requirement. There is no proof Complainant was singled out in order to put him at risk. There is no proof that any evil befell him within the scope of §1324b as the result of the aborted clearance process. While intent as such is not a necessary element to liability for §1324b liability, inauguration of the 5/10 rule **after** his application underscores his failure to prove an EG&G conspiracy or pernicious purpose.

When Naginsky was required in November 1986 to apply for a security clearance the 5/10 rule was not yet in effect and, notwithstanding there may have been reference to a proposed 5/10 rule in October 1986 in DOD correspondence to one or another stranger to this proceeding, I have no basis from which to infer that EG&G had prior knowledge that such a rule was on the horizon. The record lacks any predicate on which to conclude that EG&G personnel conspired to place Complainant in a position where four years later they could rationalize a discriminatory termination. It is simply not credible on this record that for seven years, supervisors critical of the employee's performance and attitude were privy to an effort to remove him because he had flunked the security clearance. Neither is there any reason to ascribe to putative omissions in discovery responses by EG&G a sufficient basis for drawing inferences to fill Complainant's evidentiary gap. He makes no such claim.

To the extent of Naginsky's difficulties short of discharge, I note, *passim,* that the only action properly before me is that of an em-

ployee's termination from employment, not the conditions of employment as to which OCAHO jurisprudence confirms there is a lack of §1324b jurisdiction. *See Westdendorf v. Brown & Root, Inc*., 3 OCAHO 477 at 11 (1993); *Ipina v. Michigan Dept. of Labor,* 2 OCAHO 386 (1991); *Huang v. Queens Motel,* 2 OCAHO 364 (1991). Unless I were able to find a chain of circumstances leading inexorably to discharge, as if for example his lack of assignments, i.e., his retention on the 0001 account, was the proximate result of the clearance denial, I can provide no relief. Except for his unsubstantiated claim that he wore a "badge of dishonor," I cannot credit the denial as having any significance. Nothing in the account of his evaluations and responses to them implicates the 5/10 rule or the security clearance exercise, unnecessary as it may have been. Since it is unrebutted that Naginsky would doubtless have lost the clearance in a couple of years due to non-utilization, I ascribe no significance to the 5/10 rule episode except of course to empathize that it may have had psychological consequences for the employee. Such impact does not, however, rise to the level of actionable conduct under §1324b. Whatever may have caused distortions, if any, in his salary vis a vis his colleagues, §1324b jurisdiction does not extend beyond unlawful refusal to hire and unlawful termination from employment.

While there may be a set of facts where an employee who suffers salary discrimination establishes that such effect is so integral to actionable discrimination culminating in discharge as to be proof of the latter, this is not that case. Whatever glimpse he may suppose of a sustainable cause of action is obscured by evidence of his marginal performance in context with the way EG&G billed out its personnel to government client projects. Retaining a marginal employee on the payroll for as long as four, or as appears, seven years, does not establish a cause of action against management. Far from implicating a conspiracy so that, as he claims, the employer might avoid liability for exposing him to the 5/10 rule, this record reveals a long suffering management.

There are several OCAHO cases involving claims by marginal employees. *See Chu v. Fujitsu Network Transmission System, Inc.,* 5 OCAHO 778 at 4–11 (1995); *Yefremov v. NYC Department of Transporta tion,* 3 OCAHO at 34–36 (1993); *Nguyen v. ADT Engineering*, *Inc.*, 3 OCAHO 489 at 15 (1993). While I resolve this case in favor of Respondents on the evidentiary record before me, it is instructive that Naginsky's difficulties with management were similar to the labor/management problems addressed in those cases.

Both *Nguyen* and *Yefremov* observed that an employer has broad discretion in defining expectations of an employee's performance. Naginsky's inability to provide meaningful work schedules is reminiscent of the employee's response to supervisors' demands discussed in *Chu.* Absent an illegality, an employee must acquiesce in those expectations, rather than perceiving them as discriminatory. *Nguyen* at 12; *Yefremov* at 27. Both cases endorse the principle, which I adopt also for the present case that,

> The business of business, and the sole concern of business is profit. And the law does not judge the wisdom of a company's business decision, unless a forbidden motive is present.

Oxman v. WLS TV, 60 Empl. Prac. Dec. ¶41,946, at 73,532(N.D. Ill.1993).

Lacking an evidentiary basis by which to suspect that Complainant's performance evaluations were other than routinely objective or that client personnel were avoiding him **because** of his security clearance denial, I find and conclude that EG&G did not act in contravention of his rights under §1324b despite his having unnecessarily undergone a DOD security clearance process which through no fault of his could not at that time have succeeded.

V. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, testimony, evidence, briefs and arguments submitted by the parties. All motions and requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already stated, I find and conclude the following:

1. That Complainant has failed to prove by a preponderance of the evidence that Respondents or either of them discriminated against him on the basis of citizenship status or national origin in violation of 8 U.S.C. §1324b;

2. That Respondents have not engaged in the unfair immigration-related employment practices alleged in the Complaint;

3. The Complaint is dismissed.

Pursuant to 8 U.S.C. §1324b(g)(1), this Final Decision and Order is the final adjudicative order in this proceeding and shall be final unless appealed not later than 60 days in a United States court of appeals in accordance with 8 U.S.C. §1324b(i)(1).

SO ORDERED:

Dated and entered this 12th day of September, 1996.

MARVIN H. MORSE
Administrative Law Judge