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

June 23, 1994

WARTAN BOZOGHLANIAN, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 94B00072
MAGNAVOX ADVANCED PRODUCTS AND SYSTEMS CO., Respondent.	)	

ORDER TO SHOW CAUSE WHY MOTION TO DISMISS SHOULD NOT BE GRANTED

On September 15, 1993, Wartan Bozoghlanian (complainant) commenced this action by filing a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). In that charge, he alleged that on Thursday, October 22, 1987, Magnavox Advanced Products & Systems Company (Magnavox or respondent) discriminated against him because of his citizenship status, in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b.

In particular, complainant alleged that on that date, he attended an on-campus recruitment interview at California State University, Los Angeles and at the conclusion of that interview, Ron Gottesman (Gottesman), respondent's representative, asked complainant when he had become a naturalized United States citizen. Complainant replied that he became a naturalized citizen in late 1985, prompting

Gottesman to respond that the position for which complainant was applying required a security clearance, and that in order to be eligible for that clearance, an individual was required to have been a citizen for a period of five (5) to 10 years. Complainant concluded that that statement by Gottesman resulted in his having been denied employment with Magnavox solely because of his citizenship status.

On March 10, 1994, after having reviewed complainant's charge, OSC informed him by letter that it had determined that there was no reason to believe that citizenship status discrimination had occurred as a result of the so-called "5/10 year rule," at issue in Huynh v. Cheney, 87-3436 TFH (D.D.C.). In addition, OSC advised complainant that he had failed to file his citizenship status discrimination charge in a timely manner.

For those reasons, OSC advised complainant that it would not file a complaint with this Office on his behalf and informed him that he was entitled to file a private action directly with an administrative law judge assigned to this office.

On April 8, 1994, complainant did so by having filed the Complaint at issue, alleging therein that on October 22, 1987, respondent refused to hire him for a position for which he was qualified and for which respondent was looking for workers and did so based solely upon his citizenship status, as well as his Lebanese national origin.

As he had in his initial charge, complainant alleged that on October 22, 1987, during an interview at Cal State University, Los Angeles, respondent's company representative told him that in order to obtain employment with respondent, it would be necessary to obtain a security clearance, which would require that complainant must then have been a United States citizen for at least five (5) years.

On May 17, 1994, respondent filed its Answer, in which it denied that it had discriminated against complainant because of his national origin and citizenship status. Respondent also asserted four (4) affirmative defenses in its responsive pleading.

As its first affirmative defense, respondent asserted that complainant fails to state sufficient facts to constitute a cause of action against respondent.

In its second affirmative defense, respondent, while denying that complainant has been damaged in any way, asserted that if it is deter-

mined that complainant has sustained damages, he has failed to mitigate those damages.

For its third affirmative defense, respondent has averred that the Complaint, and each purported claim for relief contained therein, is barred by the applicable statute of limitations, in particular, 28 C.F.R. section 68.4(a), which provides that an individual must file a charge with OSC within 180 days of the date of the alleged immigration-related employment practice.

Respondent's fourth affirmative defense asserts that the Complaint, and each purported claim contained therein, is barred in whole or in part by complainant's failure to have exhausted internal and administrative remedies.

On May 17, 1994, respondent also filed a Motion to Dismiss, asserting therein that based solely on the facts alleged in the Complaint, this proceeding is barred by the applicable statute of limitations.

In particular, respondent notes that complainant asserted in paragraph 13(b) of the Complaint that he interviewed for a job with respondent on October 22, 1987, but that complainant asserted in paragraph 18 of the Complaint that he did not file a charge with OSC until April 15, 1993, or some five and one-half (5 1/2) years after respondent's alleged wrongful failure to hire complainant, and thus clearly beyond the 180-day deadline for filing charges under IRCA, 8 U.S.C. § 1324b.

Complainant had 15 days from the date of service of respondent's motion, or until May 31, 1994, to have responded thereto. 28 C.F.R. §§ 68.8(c)(2), 68.11(b). Because no response has been received from complainant, only respondent's motion is under consideration.

The filing of a timely charge with OSC is a prerequisite for filing a private action with this Office. See 8 U.S.C. § 1324b(d)(1) and (2). Under IRCA and the pertinent regulations, a charge must be filed with OSC within 180 days after the occurrence of the alleged unlawful act on which the charge is based. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300(b); 28 C.F.R. § 68.4(a). See Lundy v. OOCL (USA) Inc., 1 OCAHO 215, at 8 (8/8/90).

As noted previously, complainant alleged in his charge and in the resulting Complaint that the unfair immigration-related employment practice complained of namely, respondent's alleged wrongful failure

to hire complainant because of his citizenship status and national origin, had occurred on October 22, 1987. The record in this case clearly discloses that OSC did not accept complainant's charge as complete until September 15, 1993, or almost six (6) years later, and thus well in excess of the 180-day statute of limitations provided for in IRCA. Even accepting complainant's assertion in the Complaint that he filed his charge with OSC on April 15, 1993, as opposed to September 15, 1993, that charge would still have been filed some 1823 days after the 180-day filing deadline of April 19, 1988.

Complainant's failure to comply with this 180-day filing deadline is not per se dispositive, because the deadline is subject to equitable modification on a case-by-case basis. United States v. Mesa Airlines, 1 OCAHO 74, at 26 (7/24/89). The filing period is generally extended for periods during which: (1) the employer held out hope of employment or the applicant was not informed that he was not being considered; (2) the charging party timely filed his charge in the wrong forum; or (3) the employer lulled the applicant into inaction during the filing period by misconduct or otherwise. United States v. Weld County School Dist., 2 OCAHO 326, at 17 (5/14/91). The charging party bears the burden of demonstrating that equitable modification is appropriate. Becker v. Greenwood Police Dep't, OCAHO Case No. 92B00228 (Order Granting Respondent's Motion for Dismissal) (4/19/93).

In addition, complainant has alleged facts implicating the "5/10 year rule," and the explicit waiver of timeliness as an affirmative defense to causes of action under IRCA, 8 U.S.C. § 1324b resulting therefrom under the Settlement Stipulation in Huynh v. Cheney, 87-3436 (D.D.C. March 14, 1991), which would, if applicable, possibly preserve complainant's claim in this forum.

For the following reasons, however, complainant has failed to demonstrate that either equitable relief or the application of the waiver of timeliness to claims resulting from application of the "5/10 year rule" is appropriate.

This record is devoid of any facts which indicate the presence of any of the circumstances which would lead to equitable modification of the filing deadline since complainant has not asserted that he filed his charge in a timely manner in the wrong forum, or that respondent held out hope of employment, or that he was not informed that he was not being hired for the position for which he applied for the intervening five (5) years, or that respondent lulled complainant into inaction throughout that period by way of misconduct or otherwise.

Nor is there anything in the record to indicate that the "5/10 year rule" was applied adversely to complainant, or that the waiver of the affirmative defense of timeliness to charges brought under IRCA, 8 U.S.C. § 1324b, resulting from application of that rule under the Settlement Stipulation in Huynh, should be applied in this situation.

In order to determine whether the "5/10 year rule" was adversely applied to complainant, a brief examination of the rule and its history would be helpful.

On January 2, 1987, the Department of Defense (DoD) implemented its Personnel Security Program (Security Program). Huynh v. Carlucci, 679 F. Supp. 61, 62 (D.D.C. 1988). Among other things, the Security Program created policies and procedures governing personnel "security clearance" for classified defense-related information. Id.

By its terms, the Security Program applies to "DoD civilian personnel, members of the Armed Forces, excluding the Coast Guard in peacetime, contractor personnel and other personnel who are affiliated with" DoD. 32 C.F.R. § 154.2(b). Under the Security Program, security clearance would be granted to a United States citizen who satisfied a "personal security standard" requiring that:

> based on all available information, the person's loyalty, reliability, and trustworthiness are such that entrusting the person with classified information or assigning that person to sensitive duties is clearly consistent with the interests of national security.

32 C.F.R. § 154.6(b)(1987).

The "5/10 year rule", however, denied certain naturalized United States citizens security clearance even if they satisfied the aforementioned "personal security standard." Huynh, 679 F. Supp. at 63. In particular, the "5/10 year rule", formerly codified at 32 C.F.R. § 154.16(c)(1987), provided:

> (1) Naturalized U.S. citizens, whose country of origin has been determined to have interests adverse to the United States..., or who have resided in such countries for a significant period of their life, shall be eligible for a security clearance... only if they have:
>
> (i) Been a U.S. citizen for five years or longer, or
>
> (ii) If a citizen for less than five years, must have resided in the U.S. for the past 10 years....

See generally Roginsky v. Department of Defense, 3 OCAHO 426 (5/5/92).

The regulation was successfully challenged by two employees of DoD who were naturalized citizens and immigrants from Vietnam, one of the "designated" countries. See Huynh v. Carlucci, 679 F. Supp. 61, 62 (D.D.C. 1988). In a decision dated March 14, 1991, the regulation was declared unconstitutional.

On December 31, 1991, DoD and the plaintiffs in Huynh entered into a settlement stipulation, under which DoD agreed to post notices publicizing the decision and to permit individuals adversely affected by the regulation to file charges under IRCA, 8 U.S.C. § 1324b, with OSC. In that stipulation, DoD also agreed to waive the defense of untimely filing as to those claims. Huynh v. Cheney, No. 87-3436, Settlement Stipulation at 5-6 (D.D.C. Dec. 31, 1991).

The application of the waiver of timeliness as an affirmative defense does not appear to be appropriate in this case for two reasons.

First, complainant was not adversely affected by application of the "5/10 year rule." In his Complaint, complainant indicated that he obtained his permanent resident status in July 1977. On October 27, 1987, the date upon which complainant was allegedly wrongfully refused employment by respondent, complainant had then been a resident of the United States for more than 10 years, and therefore eligible for a security clearance under the pertinent regulation. See 32 C.F.R. § 154.16(c)(1)(ii)(1987).

Accordingly, complainant could not have been adversely affected by the "5/10 year rule", since it did not apply, and therefore application of the waiver of the timeliness defense is not in order. See Gimein v. Department of Defense, 3 OCAHO 503, at 7 (3/30/93).

Moreover, even in the event that complainant had been adversely affected by the "5/10 year rule", it is not clear that the waiver of timeliness in the Huynh Settlement Stipulation, entered into by DoD and its employees, applies to respondent, whose status is that of an independent contractor. See Tiplea v. Reynolds Elec. & Eng'g Co., 3 OCAHO 548 (8/4/93).

Accordingly, complainant is ordered to show cause, within 15 days of his acknowledged receipt of this order, why his Complaint should not be dismissed as having been untimely filed. In the event that he fails

to do so, his Complaint will be ordered to be dismissed with prejudice to refiling.

JOSEPH E. MCGUIRE
Administrative Law Judge