

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

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

ORDER OF INQUIRY  
(November 23, 1994)

I. Procedural History and Facts

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). Naginsky filed his charge in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Naginsky alleged that on approximately March 1, 1984 he began employment with Respondent EG&G where he worked as an Information Analyst. In March of 1987, he was asked by EG&G to apply for a security clearance from the Department of Defense (DOD) despite the fact that such a clearance was unnecessary in order to perform the tasks to which he was then assigned. DOD denied Naginsky's security clearance on the basis that he did not fulfill the requirements of the "5/10 rule." Under this rule, which has been repealed, resident aliens from certain designated countries were required to either have been a citizen for five years or a resident for ten years in order to receive a security clearance. See former 32 C.F.R. §

154.16 (1987); Huynh v. Carlucci, 679 F. Supp. 61 (D.D.C. 1988) and Huynh v. Cheney, 87-3436 TFH (D.D.C. Dec. 24, 1991).<sup>1</sup>

Following the negative response to Naginsky's security clearance application, he alleges that EG&G discriminated against him by refusing to allow him to perform meaningful work in line with his qualifications and skill, giving him only limited access to needed equipment and giving him poor performance reviews. Further Naginsky contends 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 in the Office of the Chief Administrative Hearing Officer (OCAHO).

On April 22, 1993, Naginsky filed the complaint at issue. Complainant reasserted his claim that EG&G had discriminated against him during the four years he continued to work there 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 to Respondent a copy of Naginsky's complaint. The NOH was received by DOD on May 21, 1993 and by EG&G on May 10, 1993.

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 as affirmative defenses: (1) Complainant failed to state a cause of action, (2) Complainant 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.

EG&G timely filed an answer on June 29, 1993 after having been granted an extension of time. On the same day, EG&G filed a brief in support of its answer and a motion for summary decision. EG&G

---

<sup>1</sup> The Huynh cases are essentially the same case: Huynh v. Carlucci is the district court decision which held that the 5/10 rule was unconstitutional whereas Huynh v. Cheney is the subsequent settlement agreement to which DOD assented, requiring public notification of the Huynh decision.

#### 4 OCAHO 710

asserts as affirmative defenses that OCAHO lacks jurisdiction over this case and that Complainant failed to state a claim. EG&G also alleges that Complainant failed to establish that he was damaged by application of the 5/10 rule. Finally, EG&G argues that the complaint was not timely filed because the charge was not filed with OSC within 180 days of the discriminatory action (i.e., within 180 days of his termination).

On July 28, 1993, Complainant filed a pleading requesting time in order to engage foreign counsel from Russia, Complainant's country of origin. This motion was denied by order dated July 29, 1993. Complainant filed an answer to the Respondent's answer and a motion for summary decision on August 10, 1993. On March 14, 1994, DOD filed an opposition to Complainant's Motion for Summary Decision prompting Naginsky to counter-file with another answer on March 24, 1994.

On June 6, 1994, the ALJ issued an order setting a deadline for discovery and informing Complainant that his request for compensation for emotional distress, humiliation, and punitive damages exceeded the forum's jurisdiction which is limited to awards of backpay and reinstatement.

An order denying Complainant's Motion for Summary Decision was issued on August 22, 1994. Following retirement of the ALJ who previously presided, I was assigned to this case on August 23, 1994.

## II. *Discussion*

### A. Statute of Limitations

Under 8 U.S.C. § 1324b(d)(3), "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." DOD denied his security clearance in 1987 and he was terminated from his job by EG&G on March 15, 1991. Naginski filed his charge with OSC on September 23, 1992, more than five years after DOD allegedly discriminated against him and more than a year after EG&G allegedly took discriminatory action against him. Complainant has not advanced any apparent rationale for the delay in filing his OSC charge.

### B. Possible Waiver Under *Huynh v. Carlucci*

By the agreement which settled *Huynh v. Carlucci*, 679 F. Supp. 61 (D.D.C. 1988), "DOD agreed to waive the statute of limitations

requirement in IRCA thereby allowing victims of the 5/10 rule to litigate their discrimination claims well after the allotted 180 days has run." Bozoghlanian v. Unisys Corp., OCAHO Case No. 94B00067 at 4 (Nov. 18, 1994) (citing to Huynh v. Cheney, 87-3436 TFH (D.D.C. Dec. 24, 1991) (settlement agreement)). DOD's motion for summary decision acknowledges that it applied the 5/10 rule to Complainant in deciding not to grant him a security clearance. The issue therefore is whether under Huynh Complainant is entitled to a waiver of the 180 day statute of limitations.

It is questionable whether Complainant can rely on Huynh to obtain a waiver of limitations against EG&G. OCAHO precedent has held that no such waiver exists for DOD contractors. See, Trivedi v. Northrop Corp. and Department of Defense, 4 OCAHO 600 (1994), appeal filed, No. 94-70098 (9th Cir. Mar. 8, 1994); See also, Bozoghlanian v. Unisys Corp., OCAHO Case No. 94B00067 (Nov. 18, 1994).

However, with regard to DOD, the settlement agreement in Huynh v. Cheney states that:

[a]s to any IRCA claim filed within 180 days of the claimant receiving notice that the regulation may have been applied to them or within twelve months after the last date of publication of notice, whichever is sooner, the DoD waives any defense based upon timeliness of filing of a claim of discrimination based upon application of the regulation.

Huynh v. Cheney, at 6 (emphasis added).

Complainant states that he was required to fill out a security clearance form in 1987 "in order to be able to continue working on defense contracts. . . ." Attachment to Complaint at 1. Complainant, however, does not state whether he knew the reason he was denied the security clearance; he contends only that his employers knew he would be refused one. Id. He also states that he "started his legal actions as soon as he was officially informed about the illegality of the use of the Regulation. . . ." Complainant's Answer to Respondents Regarding Unfair Immigration-Related Employment Practices at 6. EG&G sent two notices regarding the Huynh settlement to Complainant. One was mailed on April 8, 1992 and was apparently lost. A second letter was sent to Complainant and allegedly signed by him on May 5, 1992. Unfortunately, his signature and the date on which it was signed is not legible in the copy provided to the bench.

Notwithstanding these letters, DOD and EG&G argue that Complainant knew about the 5/10 rule during 1987 or latest, by the

time he was terminated in 1991. Either date would cause the limitations period to have run because his complaint would have been filed more than 180 days later. Under the Huynh settlement, the charge must be filed within 180 days of the time the charging party knew or reasonably should have known of the application of the 5/10 rule.

DOD was required, pursuant to the Huynh settlement, "to publish a notice of the settlement within forty days of the court's order i.e., in late January, 1992." Bozoghlanian v. Unisys Corp., OCAHO Case No. 94B00067 (November 18, 1994) at 9. All "cleared DoD contractors" were required to place a notice of the settlement where employees could see it. Huynh v. Cheney, at 2. "In addition, DOD was required, within 70 days (or around March, 1992) of the order, to publish the notice in 90 publications for various periods of time." Bozoghlanian v. Unisys Corp., at 9. One way or another, Complainant was made aware of the 5/10 rule and the settlement in Huynh. The question is whether Complainant knew or reasonably should have known of the application of the 5/10 rule as to him within 180 days of his filing an OSC charge.

### III. *Order*

1. The ambiguity surrounding the application of Huynh to this case necessitates an inquiry as to when Complainant obtained or reasonably should have obtained knowledge of the reasons he was denied a security clearance and the settlement agreement in Huynh v. Cheney. The parties are requested to file comments which address the issues of (1) when Complainant received notice that DOD's 5/10 year regulation had been applied to him and (2) that he was entitled to a waiver of the 180 day limitation period under Huynh. In addition, the parties may address the issue of whether a Huynh waiver can be applied to DOD contractors.

2. Responses to this Order will be timely if filed **not later than December 16, 1994**. A party may reply to the filing of another party **not later than December 30, 1994**. Following receipt of the filings contemplated by this Order of Inquiry, I may dispose of the case or, alternatively, schedule a telephonic prehearing conference.

### **SO ORDERED.**

Dated and entered this 23rd day of November, 1994.

---

MARVIN H. MORSE  
Administrative Law Judge