

United States Postal Service Marina Mail Processing Center and Jack Wittenberg. Case 31-CA-11803(P)

26 July 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN, HUNTER, AND DENNIS**

On 16 May 1983 Administrative Law Judge Gordon J. Myatt issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision and to adopt the recommended Order.

The complaint alleges that the Respondent discharged employee Jack Wittenberg on 21 August 1981¹ for distributing newsletters to fellow employees concerning their terms and conditions of employment and their Union in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. The judge granted the Respondent's renewed motion to dismiss the complaint on the basis that the complaint is time-barred by Section 10(b) of the Act. We agree with the judge for the reasons explained fully below.

The facts relevant to our disposition of this case are undisputed and may be treated briefly. In 1976 Wittenberg wrote five newsletters addressed to his coworkers at the Inglewood Post Office, which were posted on the union bulletin board at the facility. The letters, in the main, harshly criticized the Respondent's management of the facility and its present policies. In 1980 Wittenberg distributed five more newsletters written in the same vein. Finally, on 20 January Wittenberg issued a newsletter in which he dared the Postal Service to discharge him for his past letterwriting activities; accused a supervisor of perjury; and attacked the Respondent, *inter alia*, for alleged "Dishonesty," "Ineptitude," "Discrimination," "Sadism," "Nazism," and "Totalitarianism."

On 29 January Wittenberg received from the Respondent a letter of charges and proposed removal dated 27 January, advising him that the Respondent intended to remove him no later than 30 days from receipt of the letter for violation of Postal Service standards of conduct and failure to follow instructions. This letter referred to selected passages of his 20 January letter, including his perjury al-

legation and his accusations against the Respondent.

Wittenberg timely filed a response to the charges cited in the letter of proposed removal. In a "Letter of Decision" dated 25 February, however, and received by Wittenberg 27 February, the Respondent informed Wittenberg that the evidence supported the charges cited in the letter and that his removal would be effective 2 March. The letter also informed Wittenberg of his right to appeal the removal decision to the Merit Systems Protection Board (MSPB) within 20 days of the effective date of removal. On 3 March Wittenberg was placed in a nonpay/nonduty status.

Wittenberg filed a timely appeal with the MSPB. After a hearing, the MSPB issued an initial decision 17 July upholding the Respondent's removal action. That decision was to become final on 21 August absent a petition for review. Wittenberg filed a timely petition for review, but on 27 July the MSPB denied review, and the initial decision became final 5 days later. Because Wittenberg had failed to notify or serve a copy of the petition for review on the Respondent, the Respondent did not officially remove Wittenberg's name from its employment rolls until 21 August. On 6 January 1982 Wittenberg filed the instant unfair labor practice charge.

Pending the resolution of Wittenberg's MSPB appeal, the Respondent kept Wittenberg on its employment rolls in a nonpay/nonduty status, and continued to pay his health and life insurance premiums and make contributions on his behalf to the Civil Service Retirement Fund. The Respondent also paid Wittenberg a one-time bonus of approximately \$420, which resulted from the Union's negotiation of a new national agreement with the Respondent. The Respondent complied with the terms of a 1974 memorandum of understanding between itself and the then Civil Service Commission in placing Wittenberg on nonpay/nonduty status.

Before the hearing, the Respondent moved to dismiss the complaint as time-barred by Section 10(b) of the Act. Administrative Law Judge James T. Barker denied the motion without prejudice to its renewal at the hearing. The Respondent renewed the motion at the hearing, but Judge Myatt reserved ruling until issuance of the decision.

In his decision, the judge granted the motion to dismiss, ruling that the 6-month statute of limitations commenced at least by 3 March 1981, when Wittenberg was placed on nonpay/nonduty status and ceased to perform work for the Postal Service, and had expired by the time Wittenberg filed his unfair labor practice charge on 6 January 1982. The judge rejected the General Counsel's conten-

¹ All dates are 1981 unless otherwise indicated.

tion that the limitations period did not begin to run until 21 August 1981, when the Respondent officially removed Wittenberg's name from its employment rolls. We agree with the judge that the complaint should be dismissed because it is time-barred, but only for the reasons that follow. We also specifically hold that the limitations period commenced 27 February 1981, when Wittenberg received the Respondent's letter advising him of his removal.

In the past, the Board has construed the 10(b) period to begin not from the time an employee receives unequivocal notice of an adverse employment action, but instead from the time the action becomes effective. Appellate courts, however, have disagreed with the Board's interpretation.

In *Roman Catholic Diocese of Brooklyn*,² a school teacher, James Mirrione, was notified 13 June 1974 by letter that his employment contract, due to expire 31 August 1974, would not be renewed. The Board decided that the 23 December 1974 charge alleging that the employer had violated Section 8(a)(3) by refusing to retain Mirrione was timely filed. The Board merely stated that "[a]lthough Mirrione was notified of his nonrenewal on June 13, 1974, it is clear that this nonrenewal was effective September 1, 1974, and the charge so alleges."³ On appeal, the Second Circuit found the allegation time-barred, reasoning as follows:

The issue is whether Mirrione could have filed an unfair labor practice charge at any time after the final rejection of his application for re-employment. . . . The action taken by Nazareth [the employer] on June 13 was not tentative but a final decision not to hire Mirrione for the coming school year and any alleged unfair labor practice under § 8(a)(3) would have to be filed with the NLRB within six months of that event. No reason appears why Mirrione could not have done so.⁴

In *California School of Professional Psychology*,⁵ the Board considered the timeliness of a charge filed 12 February 1976 alleging that the employer had unlawfully refused to renew Professor Michael F. Cohen's teaching contract when it expired 31 August 1975. The Board rejected the employer's contention that the limitations period commenced 23 July 1975 when the employer informed Cohen by letter that his contract would not be renewed. The Board noted that the decision did not affect Cohen until 31 August 1975, that it was not effec-

tive until that date, and that the employer "could have changed its mind and offered Cohen a new contract, or Cohen could have invoked the dispute resolution procedures in his employment contract seeking a reversal of the decision not to renew."⁶

The Ninth Circuit reversed the Board and found that Cohen's charge was filed too late, holding, like the Second Circuit, that "the time limit of § 10(b) should begin running when the employee can first file an unfair labor practice charge to protect his interests."⁷ The court stated:

The Board contends that the decision not to rehire Cohen was not final until the prior contract expired, because the School could have changed its decision or Cohen could have invoked his contractual grievance procedure. But this confuses the unfair labor practice in issue—the decision not to rehire—with the date Cohen's teaching duties ceased. One purpose of § 8(a)(1) and (3) is to deter employers from using hiring and firing decisions to discourage assertion of employees' rights under § 7 of the National Labor Relations Act, 29 U.S.C. § 157, including the right to unionize. . . . The employer's clear statement that it will not rehire a union activist can discourage union activity by employees fearful for their jobs; the particular date set for termination to take effect is of little importance. Thus, that Cohen continued to work under his old contract did not diminish the potential deterrent effect of the School's allegedly improper termination decision.⁸

Accordingly, the court concluded that Cohen could have filed a charge on the date he received his termination letter, 23 July 1975, and thus his 12 February 1976 charge was filed too late.

The court in *California School* relied not only on the Second Circuit's decision in *Nazareth Regional High School*, supra, but also on its own opinion in *NLRB v. Longshoremen ILWU Local 30*, 549 F.2d 698 (9th Cir. 1977). There the court held that the time period for filing a charge against a union for unlawfully imposing a fine on an employee commenced on the date he received notice of the fine's imposition.

In two recent decisions, the United States Supreme Court considered the issue of when limitations periods begin under three antidiscrimination statutes.

² 222 NLRB 1052 (1976), enf. denied in relevant part sub nom. *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977).

³ Id. at 1057 fn. 39.

⁴ 549 F.2d at 882.

⁵ 227 NLRB 1657 (1977), enf. denied 583 F.2d 1099 (9th Cir. 1978).

⁶ Id. at fn. 1.

⁷ 583 F.2d at 1101.

⁸ Id. at 1102.

At issue in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), was the 180-day filing period for a charge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and the limitations period for a suit under a separate statute, 42 U.S.C. § 1981.⁹ Columbus Ricks, a college professor, filed a grievance after the school's board of trustees formally voted to deny him tenure 13 March 1974. During the pendency of his grievance, the president of the board officially notified Ricks on 26 June 1974 that he would be offered a 1-year "terminal" contract that would expire 30 June 1975. Ricks signed the contract. After the grievance was denied, he filed an employment discrimination charge with the EEOC 28 April 1975. The EEOC issued a "right to sue letter" more than 2 years later. Thereafter, on 9 September 1977, Ricks filed a complaint in district court alleging, inter alia, that the college had discriminated against him on the basis of his national origin in violation of Title VII and 42 U.S.C. § 1981.

The Supreme Court held that the Title VII action was barred by that statute's 180-day charge-filing limitations period, and that the § 1981 claim was also too late under the applicable 3-year statute of limitations, because both periods began to run by 26 June 1974 when Ricks was offered the terminal contract. The Court rejected the contention that the limitations periods did not begin until 30 June 1975, Ricks' final date of employment. The Court stated:

[T]he only discrimination alleged occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks. . . . That is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later.¹⁰ The Court of Appeals for the Ninth Circuit correctly held, in a similar tenure case, that "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." . . . It is simply insufficient for Ricks to allege that his termination "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." . . . The emphasis is not upon the effects of earlier employment decisions; rather, it

⁹ The statute of limitations in § 1981 cases is that applicable to similar claims under state law. The parties in *Ricks* agreed that the applicable limitations period under Delaware law is 3 years.

¹⁰ The Court noted elsewhere in its decision that it did not need to decide whether the limitations periods began 26 June 1974, when Ricks was offered a terminal contract, or on the earlier date when Ricks learned of the tenure denial, because even counting from the later date the limitations periods had run. 449 U.S. at 262 fn. 17.

"is [upon] whether any present violation exists."¹¹

Chardon v. Fernandez, 454 U.S. 6 (1981), applied the principles established in *Ricks* to a situation involving employee terminations rather than tenure denial. Nontenured administrators in the Puerto Rico Department of Education were notified on dates before 18 June 1977 that their appointments would terminate on certain dates between 30 June 1977 and 8 August 1977. Plaintiff Fernandez filed a complaint under 42 U.S.C. § 1983 on 19 June 1978 alleging that the terminations violated the statute. The applicable limitations period was 1 year. The court rejected the First Circuit's attempt to distinguish *Ricks* on the ground that *Ricks* involved an allegedly illegal denial of tenure, while here the defendant's termination of its employees was the illegal act, and thus the limitations period did not commence until the appointments ended. The Court noted that in both *Ricks* and *Chardon* "the operative decision was made—and notice given—in advance of a designated date on which employment terminated,"¹² and reiterated that for limitations purposes the relevant fact is the time of the alleged discriminatory act rather than its effective date. ("In *Ricks*, we held that the proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful. . . . The fact of termination is not itself an illegal act." *Id.* at 8, footnote omitted.)

Section 10(b) of the National Labor Relations Act provides in pertinent part "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." We think the Supreme Court's rationale in construing the limitations periods for alleged unlawful employment discrimination under Title VII, 42 U.S.C. § 1981, and 42 U.S.C. § 1983, applies with equal force to unfair labor practice cases under our Act. As indicated above, courts of appeals have applied the same reasoning to NLRB cases arising before *Ricks* and *Chardon*.

In keeping with the teaching of *Ricks* and *Chardon*, the Board will henceforth focus on the date of the alleged unlawful act, rather than on the date its consequences become effective, in deciding whether the period for filing a charge under Section

¹¹ *Id.* at 258. The Court also disposed of the alternative contentions that since the initial decision was merely an expression of intent that limitations periods did not begin to elapse until Ricks' grievance was denied, and that the pendency of the grievance tolled the limitations periods. The Court decided that "entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative." *Id.* at 261. As to the second argument, the Court said, "The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made." *Id.* at 261.

¹² 454 U.S. at 8.

10(b) has expired. Where a final adverse employment decision is made and communicated to an employee—whether the decision is nonrenewal of an employment contract, termination, or other alleged discrimination—the employee is in a position to file an unfair labor practice charge and must do so within 6 months of that time rather than wait until the consequences of the act become most painful.¹³ We therefore overrule our earlier decisions in *Roman Catholic Diocese* and *California School*, as well as other decisions inconsistent with today's holding.

Applying our reasoning to the instant facts, we find that Wittenberg received unequivocal notice of the Respondent's decision to terminate him from his position when he received the Respondent's letter 27 February telling him that his removal would be effective 2 March 1981. Wittenberg's appeal of the decision to the MSPB did not toll the time for filing. *Delaware State College v. Ricks*, supra, 449 U.S. at 261. Accordingly, by the time he filed his charge on 6 January 1982, the 10(b) limitations period had expired. Therefore, the complaint must be dismissed.

Member Zimmerman suggests that we decide an issue unnecessarily, because the judge found that the limitations period commenced by 3 March 1981 at the latest, and that the judge's decision could therefore have been adopted unanimously.

Although the judge found it unnecessary to choose between 27 February and 3 March 1981, because both dates fell more than 6 months before the filing of the charge, he specifically relied on *Ricks* and *Chardon* in granting the motion to dismiss, stating, "I am persuaded that application of *Ricks* and *Chardon* warrant a ruling favorable to the Respondent . . ." More specifically, he found that "*Ricks* is not limited to tenure cases but has far broader application to terminations of employment where limitations periods are at issue," rejected the General Counsel's attempt to distinguish *Ricks* and *Chardon* on the ground that they involved employment contracts, and squarely stated:

In both the Supreme Court and Board cases, the basic issue to be resolved regarding the limitations periods was the question of when the asserted unlawful termination of employment occurred. This is true whether there is a series of employment contracts or whether the employment circumstances are such as those in the instant case.

We are therefore at a loss to comprehend how Member Zimmerman can at the same time suggest

he would have adopted the judge's decision and set forth arguments in the dissent that the judge himself rejected.

In any case, the General Counsel specifically excepted to the judge's reliance on *Ricks* and *Chardon*, and asked in his brief that the Board "fully consider this case and render a decision that will provide guidance to those who must apply and interpret Board law in the future."

We turn now to the merits of Member Zimmerman's position as stated in his partial dissent. Our dissenting colleague argues that the court of appeals opinions in *Nazareth* and *California School* and the Supreme Court decisions in *Chardon* and *Ricks* are distinguishable because they involve "one fact pattern—employees who were notified that their employment would cease when their contracts or appointments expired." He contends that in those cases "notification [of the decision not to renew the employee's contract or appointment] was the only affirmative act from which any alleged discrimination could flow." Member Zimmerman further argues that, unlike the situation where expiration of a contract or appointment is involved, a discharge in any other context does not trigger the 10(b) period "until the notice is implemented by action," and that the "discharge constitutes an action separate and distinct from the notice."

Chardon involved notice to nontenured school administrators that their appointments would expire on certain dates. The Court in *Chardon* emphasized that "a final decision had been made to terminate their appointments," and added, "[T]hat they were afforded reasonable notice cannot extend the period within which suit must be filed." 454 U.S. at 8. It is thus plain that Member Zimmerman's attempted distinction between notice of termination and termination was rejected by the Court. Nor have the courts that have applied *Ricks* and *Chardon* drawn a distinction between an employer's telling an employee he will be discharged and informing him that his contract or appointment will not be renewed. See, e.g., *Vuksta v. Bethlehem Steel Corp.*, 540 F.Supp. 1276 (E.D.Pa. 1982) (180-day period for filing EEOC charge commenced on date employer told engineer his employment would soon be terminated, notwithstanding that he continued to work for another month and remained on employee list for 15 months); *Pfister v. Allied Corp.*, 539 F.Supp. 224 (S.D.N.Y. 1982) (2-year Age Discrimination in Employment Act statute of limitations commenced on date employee given written notification of termination, rather than last day of work, 2 weeks later).

¹³ *Delaware State College v. Ricks*, supra, 449 U.S. at 258; *Chardon v. Fernandez*, supra, 454 U.S. at 8.

Member Zimmerman is correct that we overrule *Mack Trucks*, 230 NLRB 993 (1977), petition for review denied in unpublished opinion 573 F.2d 1302 (3d Cir. 1978), cert. denied 439 U.S. 825 (1978). There, the employer informed a truck salesman, Hill, by letter dated 28 October and received 29 October 1975, that his employment was "cancelled" in accordance with his employment contract, effective 6 November 1975. The charge was filed 5 May 1976. The judge reasoned that two alleged unfair labor practices were involved, an 8(a)(1) when Hill was notified of his termination, and another when the discharge was implemented. The judge thus concluded that the unlawful discharge allegation was not time-barred. Plainly, under today's decision, the 10(b) period would have commenced on 29 October and thus would have expired before the charge filing.

We are puzzled, however, concerning Member Zimmerman's position regarding this case. Because Hill received notification of removal under the terms of an employment contract, the facts would seem to permit Member Zimmerman, under his interpretation of *Ricks* and *Chardon*, to join us in overruling that case.

Finally, Member Zimmerman asserts that we are overruling a myriad of other cases involving many different types of situations under Section 10(b). Our holding, however, is simply and clearly stated. We do not consider or discuss what, if any, implications it may have in contexts not before us.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER ZIMMERMAN, dissenting in part.

My colleagues announce a new rule of law that the 10(b) limitations period commences when an employee is notified that he will be terminated and not on the date the employee actually is terminated. Further, they unnecessarily delay the decision in this case and waste Board resources by announcing this new rule where the choice of date has no effect on the result.¹ I dissent from both actions.

¹ Like the judge, I find the 10(b) limitations period to run from 3 March 1981, the date employee Wittenberg was placed on nonduty/nonpay status. Placement in such status in the ordinary case does not constitute a final discharge action. However, under the terms of the 1974 memorandum of understanding between the Respondent and the then Civil Service Commission, the Respondent agreed, once it decided to discharge a "preference eligible" employee, such as Wittenberg, to place such employee on nonduty/nonpay status pending the outcome of an appeal to the Merit Systems Protection Board. The memorandum makes clear that placement in such status is tantamount to discharge and that the effective date of the discharge is the date on which the employee is placed in such status. Under these circumstances, I find the 3 March 1981 date controlling, and since that date is more than 6 months prior to

The judge found it unnecessary to decide the issue decided by my colleagues. Since he found Wittenberg's actual termination date—3 March 1981—outside the limitations period, he found it unnecessary to decide whether the limitations period in fact commenced at the time the Respondent notified Wittenberg of its intention to terminate him—27 February 1981.

The Respondent filed no exceptions to this finding. Yet my colleagues, without expressing any disapproval of the finding that the 10(b) period commenced at least by 3 March, make the unnecessary finding that the 10(b) period commenced on the earlier date. In so finding, they reverse prior Board decisions and announce that henceforth the limitations period will run from the date "an unequivocal adverse employment decision is made and communicated to an employee."

My colleagues' insistence on announcing a new rule in this case is unwarranted. The General Counsel's exceptions were filed 3 June 1983. Had they simply adopted the judge's decision, which could have been done unanimously and quickly, the case could long ago have issued. Instead, by choosing this case to state a new rule, they have unnecessarily delayed our decision in this and other cases awaiting action by us. Faced as we are with an unprecedented backlog and delay in issuing decisions, we neither have the time nor resources to indulge ourselves in the luxury of deciding issues which interest us but which are not squarely before us—particularly without full argument by the parties.²

There is no reason to believe the 10(b) issue decided is an issue of such moment as to require immediate comment. Indeed, it is a rare case where the notice of discharge occurs outside the limitations period but the discharge occurs inside the limitations period. My colleagues' action, therefore, in this case amounts to an advisory opinion—an action normally avoided by the Board and one

the filing of the instant unfair labor practice charge, the charge is time-barred by Sec. 10(b).

² My colleagues suggest that the judge's comments regarding the *Ricks* and *Chardon* cases necessitated a decision by them of whether the limitations period began when the Respondent gave Wittenberg notice of his discharge. They simply misread the judge's comments.

In the passage quoted in the majority opinion, the judge stated, in essence, that under the *Ricks* and *Chardon* holdings, the limitations period begins "when the asserted unlawful termination of employment occurred" regardless of whether or not an employment contract was involved. Since the judge found that the asserted unlawful termination in this case occurred when Wittenberg was placed in a nonduty/nonpay status, he found the limitations period commenced by that date, thereby concluding that the charge was time-barred.

Under this reasoning, which my colleagues in no way attack, the judge is correct in stating that the issue of whether the limitations period commenced on notification of the discharge is irrelevant. It is readily apparent, therefore, that nothing in the judge's opinion lends any support to or justification for my colleagues' action in deciding that issue.

completely without justification when no party seeks such an opinion.

The rule announced by my colleagues flows from a misreading of two circuit court cases³ and two Supreme Court cases.⁴ These cases all involve employees working under employment contracts or appointments which set a definite term of employment. On expiration of their contracts or appointments the employees' employment automatically terminated without the necessity of any action by the schools. These cases, therefore, must be viewed in the narrow context in which they arose, and are clearly distinguishable from the situation where, as here, the termination requires affirmative action by an employer. A review of these cases illustrates this point.

In the *Nazareth Regional High School* case the school notified one of its teachers in writing on 13 June 1974 that his employment contract, which ran until 31 August 1974, would not be renewed. The issue in the case was whether the 10(b) period commenced on 13 June or 31 August. The Board found the later date controlling, but the Second Circuit disagreed, finding that the violation, if any, occurred on 13 June when the employer made its final decision not to rehire the teacher, that an unfair labor practice charge could have been filed from that date on, and that the charge, to be timely, had to be filed within 6 months of that date.

In the *California School* case the school notified a teacher on 23 July 1975 that it would not renew his faculty contract which expired on 31 August 1975. Again, the issue was which date began the limitations period and again the Board chose the later date. The Ninth Circuit, adopting the Second Circuit's decision in *Nazareth*, found that the employer's 23 July decision not to rehire the teacher was the unfair labor practice in issue and that the 10(b) period commenced on that date.

In the *Ricks* case, which did not arise under the Act, the college notified a faculty member on 13 March 1974 that he would not be given tenure. Pursuant to this decision and its policy of not immediately discharging a faculty member who does not receive tenure, the college on 26 June 1974 offered the teacher a 1-year "terminal" contract that would expire 30 June 1975. On 9 September 1977 the teacher filed a lawsuit contending that the college's tenure decision was racially motivated.

³ *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977); *NLRB v. California School of Professional Psychology*, 583 F.2d 1099 (9th Cir. 1978).

⁴ *Delaware State College v. Ricks*, 499 U.S. 250 (1980); *Chardon v. Fernandez*, 454 U.S. 6 (1981).

The district court dismissed the suit as untimely, holding that the limitations period commenced by 26 June 1974 when the college offered the teacher the 1-year contract. The Third Circuit reversed, holding that the limitations period commenced only when the teacher was terminated on 30 June 1975 after expiration of the 1-year contract.

The Supreme Court agreed with the district court that the limitations period commenced by 26 June 1974. The Court noted that the only alleged discrimination occurred at the time the tenure decision was made and communicated to the teacher; the teacher's termination on 30 June 1975 was not alleged as discriminatory. In this regard, the Court observed, "It appears that termination of employment at Delaware State is a delayed, but inevitable consequence of the denial of tenure." 449 U.S. at 257-258. Accordingly, the limitations period began to run not from the termination date but rather from the tenure decision date.

Following *Ricks*, the Supreme Court in the *Chardon* case held that the statute of limitations commenced when administrators were informed that their appointments would terminate on a specific date. In finding the case controlled by the *Ricks* decision, the Court noted (454 U.S. at 8):

The fact of termination is not itself an illegal act. In *Ricks*, the alleged illegal act was racial discrimination in the tenure decision. *Id.* at 259. Here, respondents allege that the decision to terminate was made solely for political reasons, violative of First Amendment rights. There were no other allegations, either in *Ricks* or in these cases, of illegal acts subsequent to the date on which the decisions to terminate were made.

By finding that the holding of these cases applies to all discriminatory discharges, the majority has extended the principle of law formulated by these court decisions well beyond its intended application. As noted, all four of the cases involved one fact pattern—employees who were notified that their employment would cease when their contracts or appointments expired.⁵ As viewed by the

⁵ In *Chardon*, the wording of the school's termination letter, stating that "the appointment to the position you now occupy expires with the termination of the present school year" (648 F.2d 765, 766), and the Supreme Court's assertion that "the practice of the Puerto Rico Department of Education was similar in principle" to that of Delaware State College in the *Ricks* case suggest that the administrators in the *Chardon* case had appointments only for the term of the school year. In any event, in *Chardon* the only decision at issue was the decision to cancel the administrators' appointments; their terminations at the end of the school year were the inevitable consequence of that decision and were not alleged to be unlawful.

courts, the only issue was whether the school's decision not to renew the employee's contract or appointment was unlawful. In such circumstances, notification of that decision was the only affirmative act from which any alleged discrimination could flow. Once the decision was made not to renew the employee's contract or appointment, the school needed to do and did in fact do nothing more. As the Court said in *Ricks* and *Chardon* the terminations in these cases were, in and of themselves, benign acts, impeachable only by resorting to events outside the limitations period, i.e., the notifications.⁶

Such is not the case where, as here, the discharge is unrelated to the expiration of an employment contract or appointment and itself constitutes the alleged unlawful act. Notice of such a discharge, consequently, does not begin the running of the statute of limitations with respect to the discharge. Indeed, the employee is not in fact discharged until the notice is implemented by action. In such cases, the discharge constitutes an action separate and distinct from the notice, and Section 10(b) is no bar to consideration of the discharge occurring within the limitations period.

This position is well established in both Board and court law. In *Mack Trucks*,⁷ the employer notified employee Hill orally on 29 October 1975 that he would be terminated. The employee then received a letter on 30 October stating that this discharge was effective 6 November 1975. The employee alleged that his discharge violated Section 8(a)(3), but only the 6 November date fell within the 10(b) period. The judge found the charge timely filed, stating (230 NLRB at 999):

Under all the circumstances, I am of the opinion that the situation in this case must be viewed as having involved two independent violations of Section 8(a)(1) of the Act. The first occurred when Hill was initially given notice of his unlawful termination. Undoubtedly the Board would have entertained an unfair labor practice charge at this time, i.e., even before the discharge was implemented. On the other hand, I think it clear that a second and

independent unfair labor practice occurred on the date the discharge in fact was implemented.

The judge's reasoning was adopted by the Board, the Board's decision was enforced by the Third Circuit, and the Supreme Court denied certiorari.⁸

The *Mack* decision is but one in a long line of Board and court decisions holding that, when two separate unfair labor practices could be alleged, a charge filed within 6 months of the latter conduct is timely within the intentment of Section 10(b). See *Plumbers Local 214 (D. L. Bradley Plumbing)*, 131 NLRB 942 (1961), enfd. 298 F.2d 427 (7th Cir. 1962); *Great Atlantic & Pacific Tea Co.*, 145 NLRB 362 (1963), enfd. in part 340 F.2d 690 (2d Cir. 1965); *Teamsters Local 200 (State Sand)*, 155 NLRB 273 (1965), enfd. 63 LRRM 2032 (D.C. Cir. 1966), cert. denied 385 U.S. 929 (1966); *Painters District Council No. 9 (Westgate Painting)*, 186 NLRB 964 (1970), enfd. 453 F.2d 783 (2d Cir. 1971), cert. denied 405 U.S. 988 (1971); *General Motors Acceptance Corp.*, 196 NLRB 137 (1962), enfd. 476 F.2d 850 (1st Cir. 1973); *City Roofing Co.*, 222 NLRB 786 (1976), enfd. 560 F.2d 1370 (9th Cir. 1977). Accord: *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960).

It is in my judgment clear that the majority has incorrectly dated the start of the limitations period in the instant case, as well as in all future discharge cases, from the date of mere notice to the employee. When the discharge is unlawful in itself, regardless of the issuance of prior notice, a charge filed within 6 months of the discharge is timely. That has always been the rule, and my colleagues have advanced no valid reason to change it. I therefore dissent.

⁸ While it is true, as my colleagues assert, that employee Hill worked under an employment contract, Hill's discharge was unrelated to the expiration of that contract. The employer's decision did not involve the renewal of Hill's contract when it expired; rather, the employer terminated Hill during the term of the contract. In these circumstances, the termination itself was an affirmative act which occurred during the limitations period. Accordingly, the cases relied on by my colleagues are clearly distinguishable, and my colleagues' reversal of the *Mack* decision is unwarranted.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. Upon a charge filed by Jack Wittenberg, an Individual, on January 6, 1982, against United States Postal Service, Marina Mail Processing Center (Postal Service), the Regional Director for Region 31 issued a complaint and notice of hearing on February 26, 1982. The gravamen of the complaint is that Respondent Postal Service dis-

⁶ Contrary to my colleagues' assertion, I do not suggest that the *Ricks* and *Chardon* cases have applicability only in cases involving employment contracts or appointments of definite duration. Rather, in my view those cases require, as the judge stated, that the limitations period begins from the date of the conduct which necessitates the termination. In the fact pattern presented in those cases, the limitations period began from the date of the decision denying tenure or canceling the appointments. That decision was the unlawful act which required the terminations. While it is less likely that a factual situation similar to that in the *Ricks* and *Chardon* cases will occur in the absence of an employment contract or appointment which sets a definite term of employment, nothing in my opinion forecloses that possibility.

⁷ 230 NLRB 993 (1977), enfd. 573 F.2d 1302 (3d Cir. 1978), cert. denied 439 U.S. 825 (1978).

charged Wittenberg on August 21, 1981,¹ for distributing newsletters to fellow employees concerning their terms and conditions of employment and concerning their Union. It is alleged that the publication and the distribution of the newsletters by Wittenberg were protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). The complaint asserts that by discharging Wittenberg for this reason, Respondent Postal Service violated Section 8(a)(1) and (3) of the Act.

Respondent filed an answer in which it admitted certain allegations of the complaint, denied others, and specifically denied the commission of any unfair labor practices. In addition to its answer, Respondent filed a motion to dismiss the complaint (supported by a lengthy memorandum) on the ground that the complaint herein was time-barred by Section 10(b) of the Act.² The General Counsel filed an opposition to the motion to dismiss along with an equally well-documented memorandum. Respondent's motion to dismiss was denied by the Deputy Chief Administrative Law Judge without prejudice to the right of Respondent to renew the motion at the time of the hearing herein.

A hearing was held in this matter in Los Angeles, California, on November 9 and 10, 1982. All parties were represented by counsel and afforded a full opportunity to examine and cross-examine witnesses and to present relevant material evidence on the issues under consideration. Briefs were submitted by counsel and have been considered.

On the entire record in this matter and on my observation of the witnesses I make the following

FINDINGS OF FACT

I. JURISDICTION

Postal Service is an independent establishment of the Executive Branch of the Government of the United States engaged in the operation of various facilities throughout the United States providing postal services to the nation. The facility located in Inglewood, California, is the only facility involved in this proceeding. Jurisdiction over this matter vests in the National Labor Relations Board by virtue of Section 1209 of the Postal Reorganization Act, 39 U.S.C. § 101 et seq.

II. THE LABOR ORGANIZATION INVOLVED

American Postal Workers Union, Inglewood Branch, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues Raised by the Renewed Motion to Dismiss*

As noted, Respondent Postal Service filed a prehearing motion to dismiss based on the ground that the un-

¹ Unless otherwise indicated, all dates herein refer to the year 1981.

² Sec. 10(b) provides, in pertinent part:

Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board

derlying charge in this case was filed more than 6 months after the occurrence of the operative events asserted to constitute the unfair labor practices here. This motion was denied without prejudice to the right of Respondent Postal Service to renew it at the hearing.³ At the hearing, Respondent Postal Service renewed its motion prior to the taking of testimony. Ruling on the renewed motion was reserved until issuance of this decision. Since a ruling favorable to Respondent would preclude consideration of the other issues raised by this case, it is necessary to consider the factual circumstances which provide grounds for the motion at this point.⁴

1. The activity of Wittenberg prior to 1980

On January 6, 1976, Wittenberg issued the first of a series of five newsletters addressed to his coworkers at Respondent's Inglewood facility.⁵ Among other things, Wittenberg criticized management's operation of the facility and asserted that corruption was "running rampant throughout the Inglewood Post Office." He urged the employees to stand together and repudiate the injustices which he asserted had been heaped upon them. (G.C. Exh. 4.) Wittenberg charged that employees selected for promotion were not the best qualified, and he also was critical of the Union's representation of the employees. He encouraged employees to contact him and to write letters to their congressmen urging an investigation of the manner in which the Annex was operated. Wittenberg posted this newsletter on the Union's bulletin board in the employees' breakroom.

On January 26, 1976, Wittenberg published his second newsletter. He cited, so-called hypocrisy in the manner in which supervisors and managers operated the facility. The newsletter stated that, while employees were to remain gainfully employed at all times, supervisors were constantly breaking the requirements they sought to enforce against the employees; i.e., abuse of sick leave and prolonged breaks. In particular, the newsletter claimed that a supervisor was observed "in hot pursuit of some female employee" and that one supervisor was observed wandering around the work floor "playing with himself." (G.C. Exh. 5.) He further asserted that the shortcomings of the Postal Service were due to poor management and urged the employees to write to then President Ford and to Senator Cranston. As in the case of the first newsletter, Wittenberg again posted this document on the Union's bulletin board in the breakroom.

On January 29, 1976, Ray Brown, tour superintendent during Wittenberg's shift, summoned him into the office

³ See G.C. Exh. 1(g). In denying the motion, my ruling thereon stated, *inter alia*, "Board decisions appear to define a liberal construction of the Section 10(b) limitations provision not fully consonant with Court precedents and rationale relied upon by Respondent."

⁴ For purposes of the motion to dismiss, all factual matters found below are uncontroverted even though a detailed account of the circumstances surrounding the factual findings are not set forth.

⁵ At the time these newsletters were written and publicized by Wittenberg, he was working at the Bellanca Annex of the Inglewood Post Office. Sometime in 1977, the bulk of the operations at the Annex was transferred to the Marina Mail Processing Center where Wittenberg worked until his discharge in 1981. These facilities employed approximately 1200 employees.

for a discussion regarding his newsletters. During the discussion Brown told Wittenberg that the statements contained in the newsletters were slanderous and defamatory and that he could be sued. He gave Wittenberg a direct order not to post any more newsletters on the Union's bulletin board. Wittenberg took issue with Brown and stated that he had a "constitutional right" to produce the newsletters without any prior restraint from the Postal Service.⁶

Shortly after his discussion with Brown, Wittenberg immediately drafted another newsletter. (See G.C. Exh. 6.) In this newsletter Wittenberg described his version of what occurred during his discussion with Brown and decried the fact that he was also denied union representation during the discussion. He related the experience to that which takes place in totalitarian countries and used such expressions as "Sieg Heil," "KGB," and "storm-troopers." He reasserted his belief that an investigation of the Annex was necessary. Wittenberg gave this newsletter to the president of the Union who in turn posted it on the Union's bulletin board in the Annex.

On February 2, 1976, Wittenberg issued his next newsletter. (G.C. Exh. 7.) Again Wittenberg took management to task concerning the operation of the Annex and the treatment of the employees. He indicated that, because of his past newsletters, management was closely monitoring his breaks. He also criticized management for not following up on suggestions he made to improve the operation of the Postal Service, and he attributed this failure to the fact that he had been tabbed as an individual with a "bad attitude." He informed the employees that it was time to take steps to correct the failings of management and that a petition would be circulated among them requesting a congressional investigation.⁷

On February 5, Brown again called Wittenberg in to give him official counseling for failure to follow the orders given during the discussion on January 29. Brown accused Wittenberg of posting and distributing defamatory literature on the postal premises and Wittenberg responded that the Union, and not he, had posted the newsletters after his conference with Brown.⁸

The next newsletter published by Wittenberg was dated February 9, 1976. (G.C. Exh. 10.) In this newsletter Wittenberg stated that his constitutional rights had been violated by management of the Annex and urged the employees to fight against those who would deny them these freedoms. Wittenberg again urged his fellow employees to fight back by writing to governmental authorities. He also urged them to attend the next union meeting in order to sign the petition which he had circu-

lated among the employees. This newsletter was also posted by the Union on the bulletin board.⁹

In late October 1976, Wittenberg complained that employees who were playing dominoes during their break period did so in such a noisy fashion that it created a noise which was irritating to him and caused him to suffer physically. As a result of this, Wittenberg filled out a request for sick leave on November 16, 1976. In his request, Wittenberg claimed that his ears hurt and his nervous system was unable to stand the banging of the ivory dominoes against the Formica table top. Thelma Dickinson, his then-acting supervisor, took issue with this request and an argument ensued. During the course of the confrontation between Wittenberg and Dickinson, Wittenberg stated he had "a goddamn petition signed by other employees and the goddamned supervisors haven't done anything about it." He also told Dickinson, "go screw yourself, lady."

On November 19, 1976, Dickinson issued Wittenberg a written notice of suspension for a period of 10 days. The notice charged Wittenberg with using loud and profane language toward a supervisor. (G.C. Exh. 19.) Wittenberg grieved the suspension through the Union and also filed an EEO complaint against Dickinson concerning the incident. In the course of the investigation of the EEO complaint (which apparently extended throughout most of the year of 1977), Wittenberg was provided with excised copies of other employees' disciplinary records, presumably for comparison purposes in pursuing his complaint. Although the copies were excised to prevent identification of the employees to whom they related, Wittenberg was able to identify at least 10 of the employees from the records.

In March 1977, Wittenberg was provided with a copy of the initial investigator's report on his EEO complaint. (G.C. Exh. 31.) This report contained a notation dated January 4, 1977, to the effect that the investigator had discovered that, while Dickinson was deciding to write up a complaint against Wittenberg for his conduct during the incident, Respondent's personnel office had already written up the complaint. However, in a subsequent EEO investigative affidavit, dated August 30, 1977, on the same matters (R. Exh. 1), Dickinson stated she wrote up the 10-day notice of suspension after receiving advice from her tour superintendent.¹⁰

⁶ At the beginning of the discussion with Brown, Wittenberg asked that a union representative be present and Brown denied this request.

⁷ Wittenberg drafted and circulated a petition among the employees shortly after this newsletter was issued. He testified that the petition had been suggested by the editor of the union newspaper and that, while the Union was interested in such a petition, it did not want to be actively involved. Wittenberg solicited virtually all the signatures from the 156 employees who signed the petition and he sent the petition on to congressional officials. (See G.C. Exh. 8.)

⁸ Wittenberg grieved this disciplinary counseling through the Union and, prior to arbitration, Respondent and the Union reached a settlement on this grievance and another grievance arising out of an incident occurring between Wittenberg and an acting supervisor at a later date.

⁹ On February 13, 1976, the Union appointed Wittenberg to the position of special correspondent for its newspaper. Thereafter, Wittenberg wrote articles, which were published in the Union's newspaper, containing material similar to that set forth in his newsletters.

¹⁰ The grievance over the 10-day suspension and Wittenberg's prior grievance over the "official counseling" with Brown on February 5, 1977, were settled as part of a package arrangement between the Union and Respondent. The 10-day suspension was reduced to an official written warning and the notation of the counseling by Brown remained in Wittenberg's file. Because Wittenberg had served the 10-day suspension at the time of the settlement of the grievances, he was entitled to pay for that period. Wittenberg, however, refused to accept the pay as a matter of principle.

2. The 1980 newsletters and Wittenberg's subsequent removal from the Postal Service

In mid-July 1980, Wittenberg again authored a series of newsletters. Unlike the situation relating to the 1976 newsletters, however, Wittenberg undertook to distribute copies of these newsletters directly to the employees at the postal facility. Initially, he did this by placing copies on the tables in the breakroom, on lunchroom tables and, when asked, gave copies directly to employees on the work floor.

The first 1980 newsletter was distributed by Wittenberg sometime in mid-July. In this document, Wittenberg attacked the "Absence Control Program" recently initiated by Respondent. He characterized the program as "odious and illegal." Wittenberg complained that the program was applied in a disparate fashion to employees as contrasted to supervisors. He cited two alleged instances wherein an employee died and another committed suicide as a result of Respondent's sick leave policy. He urged employees to write to a particular congressman and senator (whose addresses he supplied) for assistance in addressing the problem.

The second newsletter issued in 1980 was also distributed to the employees in the manner described above. This newsletter was distributed sometime during the end of July. The letter attacked the representation given to the employees by the Union. Wittenberg gave employees advice on how to revoke their dues authorizations given to the Union. He accused the Union of agreeing to a management proposal to change the "California scheme" mail-sorting procedures. He claimed that the change would allow less skilled employees to perform the job, thereby causing greater inefficiency. He was critical of several named union and management officials and urged the employees to take over control of the Union. He noted that there would be an election of union officials within a few months and argued that there was a need for the employees to select and train new union officials. (G.C. Exh. 13.)

The third 1980 newsletter was addressed to what Wittenberg perceived to be the deficiencies of management. This newsletter was distributed approximately a week after the second newsletter and in the same manner. Wittenberg defined the word "libel" and indicated he would not state anything that he could not prove personally without adding the word "rumor." Also, where he did not witness an event or incident, he would not claim it to be true unless he had the word of other witnesses to such an occurrence. He asserted that the Postal Service was inefficient and made three recommendations which he claimed would improve the mail processing. He then stated that the Postal Service was "dishonest." He referred to a lawsuit which he claimed the Postal Service lost "because of their creative method of adding up overtime."¹¹ In further reference to the alleged dishonesty, Wittenberg stated the following:

But even worse they steal money from the American tax payer [sic] and then have the audacity to brag about it. Last year the Postal service [sic] claimed to have made a substantial profit. When the facts came out we find fraud It seems that the Postal Service got \$720,000,000 by telling congress that they needed the money for workmen's compensation injuries. They used about \$150,000,000 of this for that purpose and the rest for production. A very neat swindle that they were very proud of.

He also criticized the Marina Mail Processing Center for alleged irregularities in veteran preference hiring and EEO matters. He then decried that there was special treatment for special employees. In this category he labeled as rumor that management was participating in "on-the-job sex." He also labeled as rumor that a supervisor pointed a gun at a female employee. He accused supervisors of being functionally illiterate and claimed to have proof that he would present in his next newsletter. Finally, he accused members of supervision of engaging in perjury, falsifying reports, and engaging in forgery. (See G.C. Exh. 14.) Sometime after the distribution of the third newsletter, Wittenberg was confronted by his supervisor, Ann Ryan, regarding employees reading his newsletters on the work floor. It is uncontroverted that, during the conversation, Ryan instructed Wittenberg not to distribute the newsletters on the postal premises. Wittenberg told Ryan that the Postal Service might as well fire him, so that he could sue them.

Approximately a week after the distribution of the third newsletter, Wittenberg distributed the fourth 1980 newsletter. The distribution of this newsletter differed from the prior three. Because of his conversation with Ryan, Wittenberg placed each newsletter in a sealed envelope and put a notation on it that the newsletters should not be read on post office premises.

The fourth newsletter was entitled "Discrimination in Our Post Office." Wittenberg began by stating his ethnic and personal background and giving a description of his beliefs regarding EEO matters and the role that the Government should play in the lives of its citizens. He then began to criticize certain supervisors by name. He stated that Supervisor Bryan Donatto was lazy when he was a clerk and management made him a supervisor. He went on to state that when Donatto became a supervisor he did not remain in his work area because "it seems that he would rather chase after Thelma Dickinson than do his job." Wittenberg also listed Thelma Dickinson by name and stated that she had falsified at least one official document and had committed perjury.¹²

In the newsletter, Wittenberg also addressed the manner in which the EEO program functioned in the postal service and recounted his own experience following the issuance of his 1976 newsletters. He cited his counseling and the domino incident resulting in the confrontation with Dickinson. Wittenberg concluded the newsletter by stating that he anticipated retaliation for

¹¹ This was apparently in reference to a wage-and-hour suit filed against the Postal Service by the U.S. Department of Labor. The testimony indicates that this suit was settled prior to going to trial.

¹² This was apparently in reference to the discrepancy in the March 1977 EEO report and the statement in Dickinson's affidavit of August 1977 regarding the incident.

the newsletters and that the fourth newsletter would probably be his last because of the cost involved. He urged employees to make copies of the newsletter and give them to their friends. (G.C. Exh. 18.)

On September 9, 1980, Brown called Wittenberg into his office for an investigative meeting about the newsletters. A union steward was present during the course of this meeting. Brown had copies of the third and fourth newsletters in his possession and questioned Wittenberg about the truth of the allegations contained in them. Wittenberg replied that he believed what he had stated in the newsletters was true and he claimed to possess proof and facts at home. Brown reminded the employee that the instructions given to him at the counseling session on February 5, 1976, were still in effect. He told Wittenberg that he was to refrain from posting or distributing demeaning, derogatory, or inflammatory information against the Postal Service, the managers, or its employees. Wittenberg stated he was aware of the instructions and then repeated the statement that he had previously made to Ryan; i.e., that management should fire him, so he could sue the Postal Service.

Shortly after the meeting with Brown, Wittenberg issued another newsletter (Newsletter No. 5) on September 11, 1980. This newsletter was distributed in sealed envelopes in the same manner as the fourth newsletter. The newsletter was captioned, "HISTORY REPEATS ITSELF." (See G.C. Exh. 21.) In this document, Wittenberg described the experiences he encountered in distributing the 1976 newsletters and set forth his version of the meeting with Brown on September 9. He also complained about the failure of the union steward to effectively represent him at this meeting. In the newsletter, Wittenberg volunteered to read it, and any future letters, to interested employees on his breaks or during his lunch periods. He listed the hours when he was scheduled for breaks or lunch during his shift. Wittenberg concluded the newsletter by stating, among other things:

The purpose of my letters is not to throw you my gripes but to show you that we are all in this place together. My gripes are similar in many ways to your gripes. Each of us have similar unresolved problems.

On September 20, 1980, Wittenberg was served with a 5-day suspension letter by Ryan. (G.C. Exh. 22.) He was charged with violation of Respondent's standards of conduct. The particular section that he was cited with violating was section 661.3 of Respondent's employee/labor relations manual. According to the letter, this section "strictly prohibits any employee activity which adversely affects the confidence of the public and the integrity of the Postal Service." The letter went on to state, "although you may feel these publications are an expression of your personal beliefs, the expression of opinions in any form (either written or oral) which disrupts the harmony of the work place, publicly demeans fellow employees or impairs the efficiency of the Postal Service or public trust therein will not be tolerated."

The suspension letter specifically referred to Wittenberg's Newsletter No. 4 wherein he characterized Super-

visor Bryan Donatto as having been extremely lazy and alleged that Supervisor Thelma Dickinson falsified official records and committed perjury. The suspension letter also referred to the third newsletter in which Wittenberg wrote that "the U.S. Postal Service is dishonest." The suspension letter made reference to the instructions given to Wittenberg by Brown, both on February 5, 1976, and on September 9, 1980. The letter contained a warning that, if Wittenberg continued in this activity, it would result in his removal from the Postal Service.

After his 5-day suspension, Wittenberg ceased his newsletter activity for the balance of the year 1980. However, on January 20, 1981, Wittenberg issued Newsletter No. 6. (G.C. Exh. 23.) This newsletter contained a reproduction of the cartoon from the Denver Post depicting a book-burning incident by two characters purportedly representing the Moral Majority. In the text of the letter Wittenberg indicated that the above cartoon "could very well be Nazi swastikas or could very well say U.S. Postal Service." He then stated that anyone or any organization denying the employees the right to receive information was using "neo-Nazi tactics." Wittenberg enclosed a copy of the 5-day suspension letter he received in September 1980 and accused Brown of being a coward in that Wittenberg asserted Brown wrote the suspension letters he received, but did not have "the guts" to put his name on them.

In the letter, Wittenberg had a message to management regarding his past newsletters and his intentions in the future. He stated:

I have this to say to management. I have no regrets as far as any letters that I have written. You may as well terminate me because if you try any lesser penalty, I will only continue to attack you. Everything that I have written is true to the best of my knowledge. Defecate or get off the pot.

Wittenberg then addressed a message to Donatto and Dickinson. He indicated that Donatto was "a very likable person" and that he did not dislike him nor did he respect him. He stated that Donatto was "just a symptom of what's wrong with the post office." Wittenberg's message to Dickinson, however, was much stronger. He said:

What I said about Mr. Donatto also goes for you. But unfortunately you are guilty of something far worse. Namely falsifying a report and committing perjury. Someone once told me that you call yourself a christian [sic]. Doesn't bearing false witness doom you to hell if you don't admit it? . . . "

Wittenberg then went on to indicate the ways he felt the U.S. Postal Service lacked honesty. This particular passage stated:

Is the U.S. Postal Service dishonest? Let me count the ways. The U.S. Postal service makes me think of a number of fitting terms:

Dishonesty.
Ineptitude.

Discrimination.
 Sadism.
 Nazism.
 Totalitarianism.
 Et cetera and far into the night.

The newsletter concluded by urging the employees to vote for a particular individual as president of the Union, or in the alternative they could write in either Wittenberg's name or that of Mickey Mouse.¹³

On January 29, Wittenberg was served with a written notice of a proposed intention to remove him from the Postal Service no later than 30 days from receipt of the removal letter. This letter was signed by Supervisor Ryan, and charged Wittenberg with violation of the Postal Service's standards of conduct and failure to follow instructions. (G.C. Exh. 24.) The removal letter made specific reference to the comments contained in the sixth newsletter in which Wittenberg called Brown a coward and accused Dickinson of falsifying a report and committing perjury. The removal letter also referred to Wittenberg's claim that the Postal Service was dishonest and to the terms he used in making this accusation. Reference was also made to his statement that the managers of the postal facility were using neo-Nazi tactics against him.

Wittenberg filed a response to the charges contained in the letter of proposed removal on February 6, 1981. (G.C. Exh. 25.) In a "Letter of Decision" dated February 25, 1981, Respondent advised Wittenberg that the charges against him were supported by the evidence and that his removal would be effective March 2, 1981. (G.C. Exh. 26.) The employee was advised that he had a right to appeal the removal decision to the Merit Systems Protection Board (MSPB) no later than 20 days after March 2, 1981. He was also advised that, if he chose to appeal to MSPB, he would thereby waive access to any procedures under the National Agreement beyond step 3 of the grievance-arbitration procedures. Wittenberg received this letter on February 27.

Wittenberg filed a timely appeal of the removal decision to MSPB.¹⁴ After a hearing in June 1981, the presiding official for MSPB issued an initial decision on July 17, 1981, upholding the removal action. In the absence of a petition for review of the initial decision by the Board of MSPB within 35 calendar days of its issuance, the decision of the presiding official was to become final on August 21, 1981. (See R. Exh. 6.) Although Wittenberg filed a timely petition for review, Respondent officially removed him from its employment rolls on August 21, 1981.¹⁵ Wittenberg filed the underlying charge in the instant case on January 6, 1982.

¹³ Wittenberg distributed Newsletter No. 6 outside the postal premises by standing at the employees' gate to the parking lot. This entrance to the parking lot was equipped with a magnetic card-controlled gate and was used only by postal employees or employees of the outside contractor operating the cafeteria facilities.

¹⁴ The Union also pursued a grievance based on Wittenberg's discharge through step 3 of the National Agreement. However, this was done without the approval or the assistance of Wittenberg.

¹⁵ MSPB denied the petition for review on July 27, 1982, and the initial decision became final 5 days thereafter. (R. Exh. 7.) While Wittenberg's petition for review was timely filed with MSPB in Washington,

3. Wittenberg's status during the appeals process

As noted, Wittenberg's removal by Respondent Postal Service was effective March 2, 1981. This meant that on March 3, 1981, Wittenberg was placed on a nonduty/nonpay status by Respondent. As such, he remained on the employment rolls of the Postal Service pending the outcome of his appeal through the MSPB procedures. Respondent continued to pay the employee's health and life insurance premiums and make contributions on his behalf to the Civil Service Retirement Fund. In addition to these benefits, Wittenberg received a one-time bonus of approximately \$420 while on nonduty/nonpay status. The bonus resulted from a new National Agreement negotiated between the Union and Respondent.

By placing Wittenberg in a nonduty/nonpay status pending the resolution of his appeal, Respondent was following a practice which apparently was initiated by a Memorandum of Understanding entered into in 1974 between the Postal Service and the then Civil Service Commission.¹⁶ (See R. Exh. 5.) Under the terms of this agreement, when an employee against whom an adverse action of removal was initiated and who was placed in a nonduty/nonpay status pending outcome of an appeal (whether taken to the Commission or processed within the Postal Service), the Postal Service agreed to continue its contributions to the retirement fund for the employee for a period not to exceed six months in the aggregate in a calendar year. (R. Exh. 5, sec. 4(a).) Similarly, the Memorandum of Understanding provided that the Postal Service would continue to make its contributions for the life and health insurance benefits of an employee in this category. Such contributions were limited to a period of a year. (R. Exh. 5, sec. 4(b).)

Finally, for purposes of this decision, the Memorandum of Understanding provided the following for an employee in this category who was a preference eligible (entitled to rights under the Veterans' Preference Act):

5. (a) The Commission agrees that, if a preference eligible is placed in non-pay, non-duty status on or after the scheduled date of his removal pending the outcome of an appeal, this action of placing him in this status shall be tantamount to removal for the purposes of adjudicating the appeal and it shall not be considered as constituting a suspension, nor shall such person being in non-duty, non-pay status be a basis for a procedural reversal of the removal action. The effective date of the removal action for the purpose of time limits for filing such appeals shall be the effective date on which the employee is placed in non-pay, non-duty status. . . . [R. Exh. 5.]

D.C., he failed to notify or serve a copy on the Postal Service, thereby accounting for his removal from the employment rolls on August 21, 1981.

¹⁶ Apparently the National Agreement between Respondent Postal Service and the Union also provided that an employee grieving a removal action through the grievance-arbitration procedures would likewise be placed in a nonduty/nonpay status.

Ruling on the Renewed Motion to Dismiss

Respondent Postal Service contends in its renewed motion to dismiss that the effective date of Wittenberg's termination occurred on March 3, 1981—when the employee actually was placed on nonduty/nonpay status.¹⁷ The General Counsel's complaint, on the other hand, alleges that Wittenberg's employment was terminated for unlawful reasons on August 21, 1981—the date Respondent Postal Service removed him from the employment rolls and ceased making insurance and retirement contributions on his behalf. Thus, in ruling on the motion, the basic issue for purpose of the limitations period is—when did the discharge become effective? Stated in another fashion, at what point in time were the alleged unfair labor practices committed?

As noted in the ruling on the prehearing motion, the Board has applied a "liberal construction of the Section 10(b) limitations provision" in cases where this issue has been presented. For example, in *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), a school teacher was notified on June 13, 1974, that he would not be rehired in September for the coming school year. His existing contract expired on August 31, 1974, and he had been active in union activity. The charge relating to the failure to rehire was not filed until December 24, 1974. Rejecting a claim that the charge was time-barred by Section 10(b), the Board held the failure to rehire the teacher on September 1, 1974, was the point where the unfair labor practice occurred and thus was within the limitations period.

Similarly, in *Longshoremens ILWU Local 30 (U.S. Borax Corp.)*, 223 NLRB 1257 (1976), the Board rejected the 10(b) argument advanced by the Union. There, the union imposed a fine on a member for crossing a picket line and working during a strike. The fine was approved by the membership on September 17, 1974. The union notified the employee of the membership action by a letter dated September 18, 1974, and he did not respond to it. On March 6, 1975, the employee received notification through the union's counsel that the union intended to institute a civil action to collect the amount of the fine. The unfair labor practice charge in that case was filed on March 19, 1975. The Board upheld the administrative law judge's finding that the 6-month limitations period did not begin to run until the September 18 notification was received by the employee (September 20), therefore, the charge was not time-barred by Section 10(b).

Again, in *California School of Professional Psychology*, 227 NLRB 1657 (1977), the Board affirmed an administrative law judge's finding that a 10(b) argument was

¹⁷ It is noted at this juncture that Respondent Postal Service argues in its posthearing brief that the effective date of Wittenberg's termination was on February 26, 1981, when the "Letter of Decision" was received affirming the removal recommendation and making it effective March 2, 1981. While it is apparent that this earlier date was selected by Respondent to bring its arguments within the parameters of the court cases cited in support of this argument, it is of no real consequence here. Since the unfair labor practice charges were filed on January 6, 1982, both the February 26 and March 3, 1981 dates would of necessity fall outside the 6-month limitations period of Sec. 10(b) if Respondent prevails in its motion.

without merit. In that case a professor who engaged in union activity was notified on July 23, 1975, that his contract, due to expire on August 31, 1975, would not be renewed. The charge was filed on February 12, 1976. The Board held that the July 23 letter of notification merely informed the employee that he would not be rehired and that the unfair labor practice occurred on August 31, 1975, when his employment ended. *California School of Professional Psychology*, supra, fn. 1.

Finally, in *American Bakeries Co.*, 249 NLRB 1249 (1980), the Board adopted the administrative law judge's finding that the charge was not time-barred although a panel majority reversed the judge and deferred to an arbitration proceeding. In that case a provision in the collective-bargaining agreement required the Employer to notify the Union when a decision was made to discharge an employee. If the union agreed with the decision, the discharge was effective immediately. If the union disagreed, the matter was referred to an arbitrator for an expedited decision which was binding. Pending the arbitrator's decision, the employee so affected remained on the job and continued to receive his normal wages. The employer notified the union on December 1, 1977, that it made a decision to discharge two employees and the union disagreed. The matter went to an arbitrator on March 10, 1978, and his award upholding the employer's decision issued on March 28, 1978. The employees were then discharged on March 31, 1979. One of the discharged employees did not file an unfair labor practice charge until September 27, 1978, and the employer claimed it was time-barred by Section 10(b). The judge found that the actual date of discharge (March 31, 1978) was the operative date for the running of the limitations period and not the date the employer made the decision to fire the employees. *American Bakeries Co.*, supra at 1256.

Although the reception by the various circuit courts of appeals is mixed on the issue of the Board's reasoning as to when the limitations period begins to run, there is a central theme in each of the court decisions—whether affirming or rejecting the Board's position. For example, in *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977) (the appeal of *Roman Catholic Diocese of Brooklyn*), the Second Circuit rejected the Board's 10(b) reasoning as to when the unfair labor practice occurred. The court held that the notification to the teacher that he would not be rehired on June 13 was a "final decision" and the limitations period commenced to run from that event. The court defined the issue to be "whether [the teacher] could have filed an unfair labor practice charge at any time after the final rejection of his application for reemployment." (Emphasis added. *Id.* at 882.)

In *NLRB v. Longshoremens ILWU Local 30*, 549 F.2d 698 (9th Cir. 1977), the court upheld the Board's reasoning regarding the running of the limitations period. In so doing, the court stated "the six-month time period does not begin until the laborer was in a position to file the unfair labor practice charge, i.e., upon receipt of the notice of penalty." (Emphasis added. *Id.* at 701.)

This same court reviewed and rejected the Board's reasoning on the 10(b) question in *NLRB v. California*

School of Professional Psychology, 583 F.2d 1099 (9th Cir. 1978). There, the court reaffirmed its reasoning in *Local 30* and stated: "We have recognized, therefore, that the time limit of § 10(b) should begin running when the employee can first file an unfair labor practice charge to protect his interests." The court then adopted the rationale of the Second Circuit in *Nazareth Regional High School*, supra, and held that because the professor in the case before it could have first filed his unfair labor practice charge on July 23, 1975, when he received notification that he would not be rehired, "the six-month period of § 10(b) began running upon receipt of that letter." Id. at 1101. In response to the argument that the unlawful decision not to rehire was not final until the professor's prior contract expired (August 31, 1975), the court stated, ". . . this confuses the unfair labor practice in issue—the decision not to rehire—with the date Cohen's teaching duties ceased." Id. at 1102.

Thus, it is apparent that the circuit courts of appeals dealing with this issue have uniformly determined, whether sustaining or rejecting the Board's reasoning, that the point where the employee could have filed an unfair labor practice charge is the operative event which triggers the running of the 6-month limitations period. While I am mindful that an administrative law judge is bound by Board precedent alone until a definitive ruling is made by the United States Supreme Court, I find that inquiry in this matter does not stop with the circuit court decisions reviewing the Board cases.

Although counsel for the General Counsel contends that the Supreme Court decisions relating to the limitations period under Title VII of the Civil Rights Act of 1964 is not analogous or applicable to Board cases, I do not find much substance in this argument. As pointed out by Respondent, there is a limitations period that applies to Title VII cases much like that of the National Labor Relations Act. Therefore, it is necessary to fix the point at which the unfair employment practices occurred in those cases in order to calculate the time period within which to file a charge with the Equal Employment Opportunity Commission (EEOC). On this basis, I am persuaded that the Supreme Court decisions on this issue have substantial application to the cases involving the 6-month limitations period under the National Labor Relations Act.

In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Supreme Court was confronted with the question of whether a charge was timely filed with EEOC after an asserted unlawful denial of tenure. There, a university professor (Ricks) was formally notified on June 26, 1974, that he would not receive tenure and was offered a 1-year terminal contract, which he accepted. Ricks grieved the decision on the refusal to grant tenure and the grievance was denied on September 12, 1974. Ricks filed a charge with EEOC on April 28, 1975, shortly prior to the expiration of his terminal contract. In determining when the applicable 180-day limitations began to run, a majority of the Court held that the unfair employment practice complained of was the denial of tenure and the issue was the identification of that date. The majority decision rejected the argument that the operative date was the date on which the grievance was denied (which

would have made the EEOC charge timely). Rather, the Court held that "entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision [formal notification that tenure would not be granted] was in any respect tentative." Id. at 261. The Court also rejected the argument that the pendency of the grievance tolled the running of the limitations period, stating:

. . . we have already held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period. [Citation omitted.] The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made. [Ibid.]

In a subsequent case, involving nontenured school administrators, the Supreme Court applied its *Ricks* holding. *Chardon v. Fernandez* 454 U.S. 6 (1981). There, each administrator received notice on dates prior to June 18, 1977, that their appointments would be terminated at some specified date between June 30 and August 8, 1977. A complaint was filed on June 19, 1978, alleging violations of various Civil Rights statutes. The Supreme Court held that the dates of notification of the termination and not the actual dates of termination constituted the alleged unlawful conduct. In this regard, the Court stated:

As we noted in *Ricks*, "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." [Id. at 8.]

Thus, it is apparent that the decision of the Supreme Court in *Ricks* is not limited to tenure cases but has far broader application to terminations of employment where limitations periods are at issue. However, counsel for the General Counsel would make a further distinction and argues that the *Ricks* and *Chardon* cases, as well as the Board's cases in *Nazareth Regional High School* and *California School of Professional Psychology*, all involve employment contracts, and the instant case does not. I find this to be a distinction without any significant difference. In both the Supreme Court and Board cases, the basic issue to be resolved regarding the limitations periods was the question of when the asserted unlawful termination of employment occurred. This is true whether there is a series of employment contracts or whether the employment circumstances are such as those in the instant case.

Turning to the renewed motion to dismiss in this case, I am persuaded that application of *Ricks* and *Chardon* warrant a ruling favorable to Respondent Postal Service. It is evident that the only tentative action taken by Respondent Postal Service was the notice of proposed removal issued by Ryan on January 27, 1981. Any doubts about Respondent's intention to terminate Wittenberg were fully dispelled by the letter of decision issued on February 25, and received by the employee on February

27, 1981. It is clear that at this point, Wittenberg was advised that his employment would be terminated effective March 2, 1981, and he was in fact placed in nonduty/nonpay status on March 3, 1981.¹⁸

On the basis of the application of the Supreme Court decisions, I find this was the point where the asserted unlawful discharge occurred and not on August 21, as alleged by the General Counsel. It was at this point—most certainly on March 3, 1981—that Wittenberg could have filed an unfair labor practice charge. Therefore, I find the 6-month limitations period of Section 10(b) began to run from that moment forward. The fact Wittenberg that elected to pursue his appeal to MSPB did not toll the running of the limitations period. *Delaware State College v. Ricks*, supra. Nor does the fact that he was administratively on the employment rolls of Respondent Postal Service warrant a different conclusion. *Delaware State College v. Ricks*, supra; *Chardon v. Fernandez*, supra.

Although counsel for the General Counsel characterizes Wittenberg's nonduty/nonpay status as a "suspension" until the employee was administratively removed from the employment rolls, and analogizes the situation here to the facts found in the *American Bakeries* case,¹⁹ I do not agree. I find that case to be factually distinguishable from the instant case. In *American Bakeries* the employees continued to work and receive their normal wages until the arbitrator ruled on the discharge decision. Thus, it is apparent that the discharge decision in that case was a mere proposal (tentative) and not a final action which terminated the employment duties. It first had to be agreed to by the union and if there were no agreement, it depended on the outcome of the arbitrator's award. Unlike that situation, however, Wittenberg's employment duties here ceased when he was placed in a nonduty/nonpay status and he was on notice that he was not to return to his job. Thus, it is evident that the removal decision here was final and not temporary or for an indefinite period—as a suspension by its very definition would imply. Furthermore, its finality was not affected by "[t]he existence of careful procedures to assure fairness in the [removal] decision." *Delaware State College v.*

¹⁸ I do not find it necessary to determine here whether the date the letter of decision was received by Wittenberg or the date he was actually placed on nonduty/nonpay status was the date the limitations period of Sec. 10(b) began to run. As previously noted, both dates are outside the limitations period.

¹⁹ *American Bakeries Co.*, supra.

Ricks, supra; see also *Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976).²⁰

In light of the above, I find the renewed motion to dismiss is well founded and must be granted on the basis of the Supreme Court's decisions bearing on the issue of the commencement of the running of limitations periods such as found in Section 10(b) of the Act. Accordingly, I find the 6-month limitations period of Section 10(b) began to run on the date that Wittenberg was notified of his removal and ceased to perform any more work for Respondent Postal Service. In making this ruling, I do not deem it necessary to consider the arguments concerning the Memorandum of Understanding between the Postal Service and the Civil Service Commission or to determine whether the understanding has continued viability with the Office of Personnel Management (OPM) and MSPB as the successors of the Civil Service Commission. Since my ruling does not rely on the Memorandum of Understanding in determining the point where the unfair labor practice occurred, I do not find it necessary to weigh its impact on the issues presented here.

On these findings of fact conclusions of law and on the entire record I issue the following recommended²¹

ORDER

That Respondent Postal Service's renewed motion to dismiss the complaint on the basis that it is time-barred by Section 10(b) of the Act is granted and the complaint in this case is dismissed in its entirety.

²⁰ Compare *Bonham v. Dresser Industries*, 569 F.2d 187 (3d Cir. 1978) (applying limitations period to a charge filed under the Age Discrimination in Employment Act). In that case the complainant was terminated on October 31, 1975, and ceased working on the same date. However, he was paid his regular salary periodically from October 31 through December 31, 1975. In addition, the employee's insurance coverage was kept effective December 31 and his retirement benefits were calculated on the basis of a December 31, 1975 termination date. The court held that where an unequivocal notice of termination and the employee's last day of work coincide, then the alleged unlawful act will be deemed to have occurred on that date, notwithstanding the employee's continued receipt of certain employee benefits such as periodic severance payments or extended insurance coverage." (Emphasis added. Id. at 191.)

Although the unequivocal notice of termination in the instant case (February 27, 1981) and Wittenberg's cessation of work duties (March 3, 1981) do not coincide, it is evident that at least by the latter date the employee had clear notice he was not to return to his job. Therefore, this was the date the alleged unfair labor practice occurred.

²¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.