July 3, 1990

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

DECISION No. 90-11

IN THE MATTER OF: K G K

This case is before the Board of Appellate Review on the appeal of K G K from an administrative determination of the Department of State that he expatriated himself on May 24, 1968 under the provisions of section 349(a)(6), now section 349(a)(5), of the Immigration and Nationality Act by making a formal renunciation of his United States nationality before a consular officer of the United States at Lima, Peru. 1/

For the reasons that follow, we find the appeal is time-barred. Consequently the Board lacks jurisdiction to consider it. The appeal is dismissed.

I

Appellant K acquired the nationality of the United States under the provisions of section 201(c) of the Nationality Act of 1940 by virtue of his birth of American citizen parents at [redacted], Peru on [redacted]. 2/ Since he was born in Peru, he became a citizen of that country as

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1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), reads as follows:

> Sec. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality -
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> ...
>
> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; ...

2/ Section 201(c) of the Nationality Act of 1940, 8 U.S.C. 601(c) read as follows:

well. He grew up in [redacted] and received his early schooling there until he was about 16 years old when he went to preparatory school in the United States. He later attended Villanova University. While at university he registered for U.S. Selective Service. After graduating from Villanova, he returned to Peru around the end of 1967 or early in 1968.

Upon return to Peru, appellant became active in his family's business enterprises. In his brief he described the family's economic position:

> In 1961, When Mr. K was fifteen, his father died, leaving a wife and three children. His estate consisted of a trust in the United States to be funded by /a U.S. mining company/ ... and a number of family held Peruvian businesses....
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> In 1963 /the mining company/ ceased funding the trust, ... A lawsuit ensued, ultimately exhausting the family's assets in the United States and yielding no compensation. Later that same year, /appellant's mother/ was diagnosed as having terminal cancer. With no medical insurance, and no other means through which debts could be satisfied, her expenses were paid by the Peruvian businesses.

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2/ (Cont'd.)

> Sec. 201. The following shall be citizens of the United States at birth:
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> . . .
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> (c) A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has resided in the United States, or one of its outlying possessions, prior to the birth of such person;...

> During the period 1966-1968, an extremely nationalistic climate was developing in Peru regarding foreign investment, jeopardizing the family's only means of paying for their ailing mother's medical care, and their own maintenance expenses. To avoid scrutiny and possible nationalization of the businesses, the family listed the only Peruvian-born member, Mr. K , as the majority shareholder in the businesses.

Not long after his return to Peru, appellant allegedly realized that his dual nationality would present problems. Around the spring of 1968 he states he was notified that his Selective Service status had been changed from 2-S (student exemption) to 1-A (available for service). Having been ordered to report for a physical examination in the United States, he decided to go to the United States Embassy at Lima to discuss the matter. Thus, he has indicated, was his citizenship status brought to a head. Neither appellant nor the record has indicated what advice appellant was given by the Embassy on that occasion. However, he states that a week or two later he returned to the Embassy where he apparently had a long discussion with a consular officer about the problems arising from his holding United States and Peruvian citizenship, beginning with the fact that he had been classified as available for military service. Precisely what appellant told the consular officer who handled his case and what she told him is far from clear at this distance from 1968. The contemporary record which is meager is not enlightening; the Embassy preserved no record of its discussion with appellant on that day. In a report to the Department of State made after his renunciation, the Embassy stated simply that appellant "came to the Embassy several times to make his position /on renouncing citizenship/ clear and definite." At the hearing before the Board on March 16, 1990, appellant endeavored to recall what transpired and how he was led to renounce his United States citizenship. The following summarizes his recollection of the discussion as elicited by direct and cross examination and questioning by the Board.

The consular officer with whom he discussed his draft classification and the implications of his holding two citizenships allegedly told him he would have to choose between

Peruvian and United States nationality. 3/ When counsel for the Department inquired whether the officer had explained to him the implications of former section 350 of the Immigration and Nationality Act, appellant was unsure, but he thought that probably it was because of that section that he had been told he had to renounce one or the other of his citizenships. 4/

We take note that section 350 of the Immigration and Nationality Act provided for divestiture of American nationality of a person born abroad of U.S. citizen parents who claimed the benefits of his foreign nationality (appellant held a Peruvian passport) and continued to live abroad continuously for three years after his 25th birthday, unless the person made an oath of allegiance to the United States and had his residence outside the United States solely for one of seven reasons. The record shows that appellant could not have established that his residence abroad was solely for any one of those reasons. To preserve his U.S. citizenship, therefore, he would have had to take up residence in the United States by 1970, his twenty-fifth birthday, in addition to making an oath of allegiance to the United States. 5/

Appellant stated that the consular officer advised him that there was one possibility of retaining both citizenships, but, appellant told the Board,

> /i/t would require an affidavit signed at the U.S. Embassy that, whatever I was doing in Peru, that by nature of my birth, in other words having been born in Peru, I would have to report any action in Peru to the U.S. Embassy first and that the affidavit would be signed that, whatever I was doing as a Peruvian would be done against my will and following the laws of that country.
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> At that point in time, that affidavit was something that, you know, generated

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3/ Transcript of Hearing in the Matter of K G K , Board of Appellate Review, March 16, 1990 (hereafter referred to as "TR"). TR 18-22. Direct examination.

4/ TR 22-29. Cross examination.

5/ Section 350, 8 U.S.C. 1482, was repealed by Pub. L. No. 95-432, Oct. 10, 1978, 92 Stat. 1046.

> a lot of fear in myself because Peru was going through a period of change in those days, a lot of nationalism, a lot of things like this. And I was afraid that somebody could use this affidavit against us, in other words, in, you know, some business transactions, and a series of things of this type.
>
> So, the affidavit to me was a dangerous tool at that time. I tried to see any other alternative, and there weren't any. 6/

Under questioning by the Board, appellant conceded that he had not been pressed by the Peruvian authorities to renounce his United States citizenship; there was no question of his having to be solely Peruvian in order to protect his family's business interests in the threat of possible nationalization. 7/ But he understood from the consular officer he had three alternatives under United States law (i.e., section 350 of the Immigration and Nationality Act): (1) renounce Peruvian citizenship; (2) renounce United States citizenship; (3) execute an affidavit which appellant described as informal renunciation of his Peruvian citizenship in the presence of the United States authorities. 8/ Since he could not renounce Peruvian citizenship without an act of Peru's Congress and since he feared, for reasons we have noted above, to execute an affidavit stating that he was living in Peru under duress, he was left no alternative but to renounce United States citizenship.

It appears that after the second meeting with an embassy officer appellant went home and reflected further on his situation. On May 24, 1968 he returned to the Embassy and that day made a formal renunciation of his United States nationality.

The record shows that appellant executed an affidavit (drafted mainly by him with some language supplied by the consular officer) explaining why he was renouncing his citizenship. It reads in pertinent part as follows:

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6/ TR 18-19.

7/ TR 55-56.

8/ TR 62-64.

/I/ have lived all of my life in Peru with my parents. All of my personal ties, therefore, are in Peru. My intentions are to remain in Peru permanently.

. . .

That I feel it only proper that I choose the Peruvian citizenship in order to direct my loyalties to this country, rather than be drawn between the two. I intend to play an active role in this country's development as a Peruvian citizen, but must feel free to participate in all activities within the Peruvian society, without my acts being questioned as a foreigner;

That all of my personal assets, to include property and business are in Peru, some of which are partly owned by Peruvians. My commercial and civic ambitions therefore are in Peru and as a Peruvian citizen I desire to fully participate towards higher personal goals in these areas;

That I possess the /Selective Service/ classification of 1-A. It was recently changed from II S and I was ordered to report for a medical examination;

That I am not renouncing due to recent changes in Selective Service regulations. However, the draft has finally forced me to make a decision I have previously considered; 9/

That in renouncing my American citizenship I would like to state that I do not consider this an unfriendly act, but

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9/ The record shows that appellant suffered from Calve-Legg-Pethes' disease, an ailment affecting his ability to walk. We note that appellant's counsel has asserted that if appellant had undergone an armed forces physical, he would have been found unfit for military service.

> only a decision to choose between the two countries I am now a citizen of, in order to direct my attentions /sic/ only to Peru;....

He added that he was renouncing his nationality of his own free will.

Appellant also executed a statement of understanding in which he declared that he was renouncing his citizenship voluntarily; that he realized he would become an alien toward the United States; that the serious consequences of renunciation had been explained to him by the consular officer and that he understood the consequences.

Thereafter appellant made the oath prescribed for renunciation of United States nationality. A week later, on June 5, 1968, in compliance with the statute, the consular officer who administered the oath of renunciation to appellant executed a certificate of loss of nationality (CLN). 10/ Therein the officer certified that appellant acquired the nationality of the United States by birth in Peru of American citizen parents; that he acquired the nationality of Peru by birth therein; that he formally renounced his United States nationality on May 24, 1968; and thereby expatriated himself under the provisions of of section 349(a)(6) of the Immigration and Nationality Act.

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10/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads as follows:

> Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

The Emabassy forwarded the CLN to the Department under cover of a memorandum which read as follows:

> In the enclosed affidavit Mr. K has stated his reasons for submitting his renunciation. He came to the Embassy several times in order to make his position clear and definite.
>
> The reporting officer is of the opinion that Mr. K is not renouncing solely for reasons of draft evasion. He states he does believe himself to be a Peruvian rather than a United States citizen. The order to report for the Selective Service medical examination finally forced him to make a decision he had not previously taken for reasons of business and convenience.

The Department approved the CLN on June 26, 1968 and the same day sent a copy to the Embassy at Lima to forward to appellant. On July 8, 1968 the Embassy sent a copy to appellant under cover of a letter which read as follows:

> Dear Mr. K , we have received a communication from the Department of State that your certificate of loss of nationality has been accepted, and we are returning a copy to you to keep for your records. Sincerely yours, signed Valentin Blacque, American Consul. Enclosure: as stated.

Counsel entered an appeal on behalf of appellant from the Department's determination in May 1988.

II

The initial issue presented is whether the Board may consider and determine an appeal entered twenty years after appellant received notice of the Department's administrative determination of loss of nationality. To exercise jurisdiction, the Board must be able to conclude that the appeal was or may be deemed to have been filed within the limitation prescribed by the governing regulations, since the courts have generally held that timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960).

Under existing regulations, the time limit for filing an appeal from the Department's administrative determination

of loss of nationality is one year "after approval by the Department of the certificate of loss of nationality or a certificate of expatriation." 11/ The regulations require that an appeal filed after one year be denied unless the Board determines for good cause shown that the appeal could not have been filed within one year after approval of the certificate. 12/ The present regulations, nowever, were not in force on June 26, 1968, when the Department approved the CLN that was issued in appellant's case.

The regulations in effect in 1968 with respect to the limitation on filing an appeal prescribed that an appeal be taken "within a reasonable time" after receipt of notice of the Department's administrative holding of loss of nationality. 13/ We believe that the reasonable time limitation should govern in appellant's case, rather than the limitation of one year after approval of the CLN under existing regulations, for it is generally accepted that a change in regulations shortening a limitation period operates prospectively, in the absence of an expression of a contrary intent to operate retrospectively.

"What constitutes reasonable time" the Court of Appeals said in Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981),

> depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties. See Lairsey v. Advance Abrasives Co., 542 F.2d 928 930-31 (5th Cir. 1976); Security Mutual Casualty Co. v. Century Casualty Co., 621 F.2d 1062, 1067-68 (10th Cir. 1980).

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11/ 22 CFR 7.5(b)(1) (1989).

12/ 22 CFR 7.5(a) (1989).

13/ 22 CFR 50.60 (1967-1979) provided that:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law or fact shall be entitled, upon written request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review.

See also PRC Harris, Inc. v. The Boeing Company, 700 F.2d 894, 897 (2nd Cir. 1983) where the court said that in determining whether a motion, made under a federal rule allowing motions to be filed within a reasonable time after the making of a judgment, is timely, "we must scrutinize the particular circumstances of the case, and balance the interest in finality with the resons for the delay."

In Lairsey v. Advance Abrasives Co., 542 F.2d 928 (5th Cir. 1976), the court was called on to determine whether a motion had been filed within a reasonable time after a judgment was entered. The court noted that the rule allowing the motion set up an outside limit of one year and prescribed a reasonable time standard "which by its nature invites flexible application in varying circumstances." 542 F.2d at 930. Continuing, the court quoted 11 Wright & Miller, "Federal Practice and Procedure," section 2866 at 228-29:

> 'What constitutes reasonable time must of necessity depend upon the facts in each individual case.' The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner.

542 F.2d at 930.

To determine whether the appeal now before the Board was filed within a reasonable time after receipt of notice that the Department had made its decision, we must apply the criteria set forth in the foregoing decisions, principally whether appellant was able to learn earlier of the grounds of the Department's decision, whether he has offered a substantial reason for the delay and whether allowing the appeal would prejudice the Department of State. The weight to be given the interest in finality is a function of the conclusions that the Board reaches with respect to the other criteria.

The rationale for granting one a reasonable period of time within which to appeal an adverse citizenship determination is pragmatic and fair. It allows one sufficient time to prepare a case showing that the Department's decision was wrong as a matter of law or fact, and makes allowance for the intervention of unforeseen circumstances beyond a person's control that might prevent him from acting promptly. At the same time the rule penalizes excessive delay. For delay may be prejudicial to the rights of the opposing party; passage of an appreciable period of time before moving for review

inevitably obscures the events surrounding performance of the expatriative act.

Application of the criteria set forth in Ashford v. Steuart, supra, "yields little room for judicial construction," appellant stated in his brief. "While the judicial interest in finality is ponderous," the brief continued, "allowing its operation to invalidate Mr. K 's appeal would be truly unjust," noting that courts have permitted appeals originally considered untimely, in an effort to recognize the equally important interests in fairness. As appellant's delay is the product of error on the part of the Department of State and appellant's personal circumstances, application of the doctrine of fairness and equity should, it is argued, permit the Board to resolve the threshold issue of jurisdiction and entertain the appeal.

To justify his delay appellant relies mainly on what he terms a fact, namely, that the Embassy's letter of July 8, 1968 transmitting a copy of the approved CLN did not enclose information about the right to take an appeal to this Board. Not only did the sole communication the Embassy sent him after his renunciation not inform him of the right of appeal, he received no information about an appeal from the Embassy at any other time. Allegedly, he spoke to friends in Peru and the United States about the loss of his citizenship who told him that he had lost his citizenship, and (impliedly) that was that.

Thus, appellant was unaware until 1987 (when he first consulted legal counsel) that he might have the right to appeal from the Department of State's nolding that he expatriated himself. Through counsel he argues that the "point of discovery standard" is more properly applicable to appellant's case than the blind, inflexible standard" applied by the Department.

With respect to the issue of prejudice to the Department of State, appellant argues in his brief that "This concern is of marginal relevance under the facts...." This is so, he maintains, "because he /appellant/ is not relying on documentation now undiscoverable to plead his case." Therefore "no valid claims of prejudice persist."

We first address the reasons appellant gives for not seeking review of the Department's adverse decision until twenty years after it was made.

It appears that in July 1968 when the Embassy sent appellant a copy of the CLN only the certificate was enclosed in the letter. Evidently no information about the right to take an appeal to this Board was then sent to appellant, as prescribed by the Department's guidelines. However, twenty

years later can one be reasonably sure that appeal information was not enclosed, although not cited as being enclosed? Can one be reasonably sure that no supplemental letter was sent to appellant which enclosed appeal information? Passage of so much time forecloses any possibility of obtaining definitive answers to those pertinent questions.

Assume, for purposes of analysis, however, appellant's recollection that he received no information about taking an appeal is correct. What are the implications of such a fact? Failure, if failure there was on the part of the Embassy to send appellant notice of how he might take an appeal, does not in itself excuse a delay of twenty years. The Department's guidelines did not have the force of law; failure to comply with them was not a breach of a legal duty. The critical question is what responsibility did appellant have in the circumstances. He seems to argue that mere failure of the Embassy to send him appeal information absolves him from any responsibility to act before he did so. This is a proposition that we cannot accept. Appellant knew one vital fact: that he had expatriated himself. Such information should have been sufficient, if he had the will to act on it, to lead him to the knowledge that an appellate procedure was available to him. It is settled that: "/K/nowledge of facts putting a person of ordinary prudence on inquiry is the equivalent of actual knowledge and if one has sufficient information to lead him to a fact, he is deemed to be conversant therewith and laches is chargeable to him if he fails to use the facts putting him on notice. McDonald v. Robertson, 104 F.2d 945, 948 (6th Cir. 1939). See also U.S. v. Shelby Iron Co., 273 U.S. 571 (1926); Nettles v. Childs, 100 F.2d 952 (4th Cir. 1939). There is nothing of record to show that appellant made any effort to contest the Department's decision until around 1987 when he retained legal counsel. Indeed, at the hearing in response to a question from the Board, appellant conceded that he had not looked into the possibility of challenging the Department's decision. 14/ And he did not visit the Embassy after he renounced his citizenship. The means of ascertaining what recourse he had were readily at hand: a specific inquiry at the Embassy in 1968 would have disclosed that in May 1967 the Supreme Court had rendered its landmark decision in Afroyim v. Rusk, 387 U.S. 253 (1967). Inquiry would have further disclosed that as a consequence of Afroyim the Department informed all diplomatic and consular posts that:

> The legal questions concerning the applicability of the Afroyim decision

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14/ TR 50-51.

> to other subsections of Section 349(a) and other provisions of the 1952 and 1940 Acts are being considered and will be the subject of further instructions. Individuals who inquire regarding loss of nationality on these other grounds should be advised that the matter is under consideration. 15/

Had he inquired in 1968 he would have been able to reserve his legal rights pending resolution of the Department's consideration of the implications of Afroyim for loss of nationality decisions under other sections of the Act. An inquiry in, say, 1969 or the early 1970's would have disclosed that the Attorney General had made a ruling that in loss of nationality proceedings the administrative authorities should be guided by the precept that Afroyim stood for the proposition that one who had expatriated himself might raise the issue of his intent to relinquish citizenship. 16/ That instruction informed posts that one like appellant might move for reconsideration of the Department's decision by filing an appropriate form. "It is not considered feasible," the instruction stated, "to give individual notice to each person who is recorded at each post as the subject of a prior determination of loss of nationality. In view of the enormous number of cases that are involved, the only practical means of informing the potential citizenship claimants is through extensive public notice."

Each post was directed to give "the most extensive publicity" to the instructions in newspapers or other mass media. The substance of the public statement to be made read as follows: "A recent Statement of Interpretation of the Attorney General of the United States may result in the reversal of many previous determinations of loss of United States citizenship. Any person who was the subject of such a determination or any person who may have a claim to United States citizenship through such person should communicate with this office."

Appellant has mentioned nothing about reading of the press notice that the Embassy at Lima presumptively issued in the spring of 1969, but it is interesting to note that at the hearing he stated that about a year after he made his renunciation somebody mentioned that the Supreme Court had decided a case which he understood was similar to his. 17/ He

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15/ Circular Airgram, CA-9211, June 1, 1968.

16/ Circular Airgram, CA-2855, May 16, 1969.

17/ TR 51.

did nothing as a consequence of being told about that case (apparently Afroyim v. Rusk). He believed he had already lost his citizenship and there was nothing he could do. He allegedly did not understand that the petitioner in the case about which he was told also had previously been held by the Department of State to have expatriated himself.

In short, we are of the view that appellant had cause to inquire much earlier than he did about possible recourse from the Department's decision. To countenance his argument that because he was not informed of the right of appeal (where there was no legal duty to inform him) he was justified in remaining passive so long would be contrary to public policy, for it would sanction allowing an appeal no matter how hoary and no matter how little diligence the actor showed in trying to seek review of a decision he believed unfair or unreasonable.

We cannot accept appellant's contention that the delay is not prejudicial to the Department of State. True, he is not, as he points out, relying on "documentation now undiscoverable" to plead his case. However, he alleges that the consular officer who handled his case gave him erroneous information, thus leading him to renounce. Further, he argues that he lacked the requisite intent to relinquish his citizenship. Under the decision of the Supreme Court in Vance v. Terrazas, 444 U.S. 252 (1980) the government bears the overall burden of proof that a valid expatriative act was done and done voluntarily with the intention of relinquishing citizenship. Here the Department obviously would be handicapped to undertake its burden of proof precisely because appellant has allowed so much time to elapse. We do not know what actually transpired during the several visits appellant made to the Embassy in the spring and summer of 1968. The consular officer involved cannot be located to testify. All we have by way of contemporary evidence is the brief report the Embassy sent the Department after appellant renounced. The observation of the court in Maldonado-Sanchez v. Shultz, 706 F.Supp. 54, 57 (D.D.C. 1989) is apposite:

> The Court agrees with defendant's [the Department of State] argument that to allow plaintiff to challenge his renunciation some twenty years after the fact is contrary to public policy. It places a tremendous burden on the government to produce witnesses years after the relevant events and to preserve documentation indefinitely. Moreover, a reasonable statute of limitations period serves the important function of mandating a review of the issuance of the CLN when the

relevant events are fresh in the minds of the participants.

Furthermore, because the original transaction has become obscure by time, the Board would find it difficult to render a just decision. It cannot be said that there was anything like reasonable diligence on the part of appellant. Had he moved sooner, as plainly he had reason to do, there might be more evidence to permit us to make a fair determination.

Twenty years is an extraordinarily long period of time for one to wait to assert a right to citizenship. Appellant has not demonstrated any extraordinary circumstances which would justify our holding that he sought review of his case within a reasonable time after he received notice that the Department had made its adverse decision. Since it would be prejudicial to the Department of State to allow the appeal, we must give the interest in finality great weight.

Balancing the principal elements which the courts hold must be taken into account in determining whether an appeal has been filed within a reasonable time after the making of the decision, we conclude that the delay in taking this appeal was excessive. The appeal is time-barred.

III

Since the appeal is time-barred, the Board is without jurisdiction to consider and decide it. Accordingly the appeal is dismissed.

Given our disposition of the case, we do not reach the substantive issues presented.

Alan G. James, Chairman

Warren E. Hewitt, Member

Frederick Smith, Jr., Member