DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: D[redacted] G[redacted] A[redacted]

Motion for Reconsideration

The Board of Appellate Review on February 16, 1990 dismissed as time-barred the appeal of D[redacted] G[redacted] A[redacted] from an administrative determination of the Department of State, dated May 27, 1987, that he expatriated himself on March 20, 1987 pursuant to section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(5), by making a formal renunciation of his United States nationality before a consular officer of the United States at London, England.

A[redacted] moves for reconsideration of the Board's decision.

Before we may consider the substance of appellant's arguments for reconsideration of our decision, we must determine whether his motion was filed within the limitation prescribed by the applicable federal regulations.

I

22 CFR 7.10 provides in pertinent part:

> The Board may entertain a motion for reconsideration of a Board's decision, if filed by either party. The motion shall state with particularity the grounds for the motion, including any facts or points of law which the filing party claims the Board has overlooked or misapprehended, and shall be filed within 30 days from the date of receipt of a copy of the decision of the Board by the party filing the motion.

On February 20, 1990, the Board dispatched to A[redacted], who was then living in Canada, a copy of its opinion on his appeal in care of the United States Consulate General at Vancouver under cover of a letter from the Chairman. The Consulate General forwarded the Chairman's letter and its enclosure to Anderton by registered mail. A[redacted] signed the postal receipt on March 9, 1990, thus acknowledging receipt on that day of the Chairman's letter and a copy of the Board's opinion.

A[redacted] wrote to the Board on March 23, 1990 expressing interest in whether the Board would reconsider its decision on his appeal. His letter reads:

> Thank you for the letter outlining the Board's decision on my appeal. Obviously it is not the reply I had hoped for.
>
> However, since receipt of your letter I have talked with an attorney in Bellingham, WA who handles citizenship cases. He informed me that there is a precedent in approving some forms of time-barred appeals.
>
> Should this information be correct and the lawyer was to submit an appropriate brief on my behalf, would the Board reconsider its position on my case?
>
> If what I am asking is not within the jurisdiction of the Board, are there any options that would allow me to regain my U.S. citizenship?
>
> I would be very grateful for any assistance in this matter.

The Board did not consider that A[redacted]'s letter constituted a motion for reconsideration as prescribed by 22 CFR 7.10. Accordingly, the Chairman wrote him on April 18, 1990, stating in relevant part:

> We do not understand the information you received from an attorney 'that there is a precedent in approving some form of time-barred appeals.' In the absence of any citation of law and authorities, it would appear not to be practicable for us to offer any comment.
>
> You will recall that when you initiated the appeal I sent you a copy of the federal regulations applicable to the work of the

> Board. 22 CFR Part 7. Section 7.10 of the regulations (copy enclosed) provides that either party in a loss of nationality appeal may file a motion for reconsideration within 30 days of receipt of the Board's decision. The postal receipt shows that you received a copy of the Board's opinion on March 9, 1990. Therefore, in your case a motion for reconsideration should have been filed on or before April 9th. Under 22 CFR 7.11, the Board, however, has discretion to enlarge the time for filing any papers upon a showing of good cause. If you were to file a motion for reconsideration, you would presumably address not only substantive matters but also endeavor to show good cause why you did not make a filing within the time allowed.

Counsel, whom A[redacted] had retained apparently upon receipt of the Board's opinion, wrote to the Board on May 14, 1990, stating that:

> ...As far as I can determine, the timelines for him to file a Motion for Reconsideration in his matter may still be open.
>
> In the event that the timelines /sic/ are still open for Mr. A[redacted] to file a Motion for Reconsideration, I hereby request an additional two months to prepare Mr. A[redacted] Motion for Reconsideration.
>
> Mr. A[redacted] was in to see me only this last week. His case has issues I believe will interest the Board of Appellate Review, however, it will take me some time to prepare his matters.

The Chairman replied to counsel on May 30, 1990.

> The time for Mr. A[redacted] to file a motion for reconsideration

> has passed, unless he is able to show good cause why the motion could not be filed within 30 days after he received a copy of the Board's opinion. See sections 7.10 and 7.11 of 22 CFR Part 7 (copy enclosed).
>
> The record shows that Mr. A[redacted] received a copy of the Board's opinion on March 9, 1990. A motion for reconsideration should have been filed not later than April 9, 1990. If Mr. A[redacted] wishes to pursue a motion for reconsideration of the Board's decision, he should promptly address the issue of timely filing and explain fully and in detail why he did not or could not file a motion on or before April 9, 1990. Upon receipt of such a submission, the Board will decide whether good cause has been shown. If we so decide, we will entertain a motion for reconsideration.

On February 27, 1991, counsel addressed a letter to the Board which he requested that the Board accept as a motion for reconsideration. The evidence in the letter, the counsel contended, constituted good cause for enlarging the time allowed to request reconsideration of the Board's decision. Counsel also contended that A[redacted]'s letter of March 23, 1990, was a motion for reconsideration. The Department filed a brief memorandum in opposition on March 11, 1991, taking the position that "the time has long since past to make his request viable." However, "the Department would have no objection to the Board entertaining the motion for reconsideration in the event it can find a basis under its regulations."

II

Appellant's argument that his motion for reconsideration should be deemed timely rests on the contention that his letter of March 23, 1990 was in fact a motion for reconsideration, and that since it was posted within 30 days of his receipt of a copy of the Board's opinion on his appeal, he had complied with the prescription of 22 CFR 7.10. (Parenthetically, it might be observed that counsel

undercuts that argument by asking the Board (letter of May 14, 1990) for an enlargement of time to prepare and submit A[redacted]s motion for reconsideration.) Appellant further argues that since his letter of March 23, 1990 was timely, it was reasonable for the Board to enlarge the time for filing a brief in support thereof. Counsel points out that in the spring of 1990 the Department of State issued a new standard to determine the issue of whether a person who performed a statutory expatriative act intended to relinquish citizenship. 1/

Appellant and counsel allege that they learned of the new standard around July 23, 1990 when they read about it in a specialized publication. They allegedly "thought it prudent to delay filing of this brief /letter to the Board of February 27, 1991/ until the announced evidentiary standards /sic/ that would be controlling were made public so that this brief could reference appropriate standards." Counsel's letter of February 27, 1991 notes that the Department released the standard to the public on September 21, 1990, but that appellant and counsel did not learn of the new standard until around December 1990. While acknowledging that the new standard does not apply to the case of one who makes a formal renunciation of nationality, appellant and counsel argue that "these standards, ... are such that the slightest evidence to tne contrary rebuts the presumption of intent." In this case, it is contended, appellant has shown that he did not have the intent to relinquish citizenship because he lacked the capacity due to depression. 2/ Furthermore, it is alleged, appellant's depression was so severe that it prevented him from making a timely appeal in the first instance.

1/ The Department issued the new standard in April 1990 in the form of an instruction to all diplomatic and consular posts for the processing of loss of nationality cases. In September 1990, the Department made the new standard public. In brief, the new standard is based on the premise that one who performs certain statutory expatriative acts (obtains naturalization in a foreign state, makes a pro forma declaration of allegiance to a foreign state, accepts a non-policy position in a foreign government) intends to retain citizenship. The presumption does not apply to cases where a citizen makes a formal renunciation of United States nationality, or to certain other types of cases, not here relevant.

2/ That statement is supported with an affidavit of a clinical psychologist who examined Anderton in May 1990, apparently for the first time.

III

The threshold issue is whether we may, as appellant urges us to do, accept his letter of March 23, 1990 as a motion for reconsideration of the Board's decision on his appeal. The letter plainly does not comply with the requirements of 22 CFR 7.10., for it does not state with particularity the grounds for the motion, including any points of fact or law which the moving party contends the Board overlooked or misapprehended.

At most, the March 23, 1990 letter might be considered notice of appellant's intent to file a motion for reconsideration. Assuming without so deciding that it was such notice, what is it reasonable to expect that appellant should have done after receiving the Chairman's reply? He had, as we have seen, retained legal counsel. It should have been obvious to appellant and counsel that the Board did not consider the March 23, 1990 letter a proper motion for reconsideration. It would therefore have been prudent immediately to file a statement with the Board setting forth the reasons he believed the Board erred in reaching its decision on his appeal, and, as the Board requested, explaining why he did not file his motion within the 30-day period allowed. He might then have requested leave to file a brief in support of the motion, a request, it is fair to say, which the Board would have granted. Instead, no action was taken, even after the Chairman explained clearly in his May 30, 1990 letter to counsel what appellant was required to do.

We do not agree that appellant was justified in not filing a motion and papers in support thereof until February 1991. Without taking a position on whether a motion and supporting evidence filed a reasonable time after July 1990 (when appellant and counsel learned of the Department's new evidentiary standard) would have been timely, we think that appellant should at that time at the latest have exercised diligence and inquired of the Department about applicability of the new standard to his case. Evidently he took no such initiative.

In short, although we accept for the sake of argument that appellant showed interest in having his case reconsidered by writing to the Board on March 23, 1990, he failed to take appropriate action despite explicit direction how he should proceed. While a motion filed in, say, July 1990 with colorable explanation of the delay might conceivably have been deemed timely, one filed in February 1991, 10 months after expiry of the limitation for filing, assuredly cannot be so considered.

IV

Not having been filed within 30 days after appellant received a copy of the Board's opinion on his appeal and no sufficient excuse for untimely filing having been presented, appellant's motion for reconsideration must be considered time-barred. It is accordingly dismissed.

Alan G. James, Chairman

Edward G. Misey, Member

George Taft, Member