2022-2162

In the Supreme Court of the United States

Michael Caney, Petitioner

v.

Department of the Treasury, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTORARI

Michael Caney
Retired DAV
Unit 70
111 Daniel Shays Highway
Belchertown, MA 01007

Department of the Treasury
Secretary of the Treasury
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C.

Merit Sys. Protection Board
Attn: Ms. Jinnifer Everling
1615 M Street, NW
Washington, D.C. 20419

QUESTIONS PRESENTED

This Petition for a Writ of Certiorari requests the court to review the United States Court of Appeals for the Federal Circuit, ON MOTION, ORDER dated December 23, 2022 as follows:

1. **Do the Code of Federal Regulations (CFR) provide for federal court jurisdiction in situations where jurisdiction is barred by the United States Code?**

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TABLE OF AUTHORITIES

Cases

The decision of the United States Court of Appeals for the Federal Circuit is published at 2022-2162

Caney v. Department of the Treasury, BN07528710110, June 26, 1987

Caney v. Department of the Treasury, BN07528710110, dated May 17, 1991

Statues

28 U.S.C. Sec. 1295

5 U.S.C. 7703

5 CFR Section 1201

Rules

Supreme Court Rule, Rule 10. Considerations Governing Review on Writ of Certiorari.

Authorities

Fedora v. Merit Systems Protection Board 848 F.3d 1013, 1016 (Fed. Cir. 2017)

Robey v. U.S. Postal Service, 2007, 105 M.S.P.R. 539, affirmed 253 Fed. Appx. 933, 2007 WL3256608, certiorari denied 128 S.Ct. 1925, 552 U.S. 1322, 170 L.Ed.2d 766)

Ciafrei v. Bentsen, 877 F.Supp. 788 (D.R.I. 1995)

The Times Union, October 19, 2006 (Suit Tells Trouble in Airport Security) (MAJ David Erickson, Bronze Star (2) Heroism

South Texas College, February 20, 2019 (Hernandez and Liss)

Former Secretary of Defense Donald Rumsfeld

United States Constitution (Due Process Clause and Ninth Amendment)

PETITION FOR A WRIT OF CERTORARI

Petitioner Loring M. Caney, Jr. respectfully requests the issuance of a writ of certiorari to review the judgement of the United States Court of Appeals for the Federal Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Federal Circuit is published at 2022-2162 and is reproduced at Petitioners. Exhibit A.

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered judgement on December 23, 2022. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1295.

FEDERAL RULE INVOLVED

Supreme Court Rule, Rule 10. Considerations Governing Review on Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner requests to know if the Code of Federal Regulations (CFR) provide for federal court jurisdiction in situations where jurisdiction is barred by the United States Code (Title 28 United States Code (U.S.C.) Section 1295 (Jurisdiction of the United States Court of Appeals for the Federal Circuit) paragraph (a) (9); and, Title 5 Sections 7703(b)(1) (Judicial review of decisions of the Merit Systems Protection Board) as reflected within the ON MOTION / ORDER of the United Court of Appeals for the Federal Circuit dated December 23, 2022. The CFR Title 5 Section 1201.118 (Board reopening of final decisions); and, CFR Title 5 Section 1201.120 (Judicial Review) offer's a vehicle for United States Court of Appeals for the Federal Circuit jurisdiction where none currently exists relative to the introduction of "new evidence" after the time for filing for cases under the jurisdiction of the MSPB.

I agree in principle with the government attorney in his assessment as reflected within the ON MOTION / ORDER as reflected above that the United States Court of Appeals for the Federal District does not have jurisdiction in this case pursuant to 28 United States Code (U.S.C.) Section 1295 (Jurisdiction of the United States Court of Appeals for the Federal Circuit) paragraph (a) (9); and, Title 5 Section 7703(b)(1) (see Petitioners Exhibit A). I have not discovered any United States Code statue that disputes the above assertions. **However**, there are regulations within the Code of Federal Regulations that are contradictory to the United States Code and offer a jurisdictional vehicle in opposition to the ON MOTION / ORDER dated December 23, 2023.

The Pro se Petitioner Loring Caney was terminated from employment as an IRS, Special Agent in 1987 and appealed to the Merit Systems Protection Board (MSPB). The parties subsequently filed a settlement agreement in which, in pertinent part, the agency agreed to rescind the appellants (Caney) removal and replace it with the appellant's voluntary resignation effective the same date. In addition, all parties agreed that Mr. Caney could, under the terms of the Settlement Agreement, pursue a 1-day suspension that led to his termination from employment. The initial decision relative to this matter has become the Board's final decision by operation of law on or about June 1987. The case before this court is not, **at this time**, based on the merits of his termination from employment **but will be** pending the decision by this court. The question to the court concerns the question of jurisdiction of the United States Court of Appeals for the Federal Circuit as it relates to the U.S. Code as reflected above versus applying the Code of Federal Regulations associated with Title 5 CFR Section 1201 and the acquisition of "new evidence".

REASONS FOR GRANTING THE WRIT

This Court should Grant Certiorari as reflected in the Supreme Court Rules, Rule 10, (Considerations Governing Review on Writ of Certiorari) for the following reason: "The United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court" (do the Code of Federal Regulations (CFR) provide for federal court jurisdiction in situations where jurisdiction is barred by the United States Code?).

As reflected within the ON MOTION, ORDER of the United States Court of Appeals for the Federal Circuit dated December 23, 2022 the following are important questions as reflected within the Order and need to be settled by the Supreme Court as follows:

1. The government has argued within its ORDER that "we lack jurisdiction" within this matter. In terms of federal legislation that is true. In terms of federal law there does not appear to be a caveat that supports judicial review or jurisdiction relative to the MSPB when the introduction of **"new evidence"** is involved beyond the final order or decision date of the Board. This deadline is jurisdictional and not subject to equitable tolling (see Fedora v. Merit Systems Protection Board 848 F.3d 1013, 1016

(Fed. Cir. 2017). So how does one remedy this jurisdictional question as it relates to legislation and case law in support of the United States Code when one is harmed by the prohibition? The answer is found in Title 5 CFR 1201 (Chapter II Merit Systems Protection Board)

(Practices and Procedures). The question asked above concerns the Code of Federal Regulations (CFR) Title 5 Section 1201.118 (Board reopening of final decisions). First from a "common sense" perspective the basic premise of this case is founded upon the acquisition of "new evidence previously unavailable" and the right of Mr. Caney to be heard as it relates to that evidence. How can someone comply with the 60-day filing requirement beyond the final decision date to the Board when the final order or decision of the Board was in 1987 and the acquisition of the "new evidence" was not made by Mr. Caney until January 2022. This problem confronts not only Mr. Caney in the current case as it has in the past, but might have confronted others in the past who chose not to litigate the matter along with an untold number of federal employees going forward into the future with the same set of circumstances. It matters not that the acquisition of "new evidence" was 1 day or 30 years beyond the final decision date – the problem is the lack of process and associated jurisdictional authority that have been raised in order to introduce "new evidence" beyond the 60-day filing requirement. The CFR (Title 5 Section 1201.115 (d)) defines new evidence as "new and material evidence or legal argument is available that despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed". This is further documented in the attached MSPB Opinion and Order (Petitioners Exhibit B) when Mr. Caney's termination was adjudicated by the MSPB as being untimely filed based upon the same argument – untimely filed after the final decision date in 1987. The information reflected in the attached was based upon the arrest of defrocked DEA Agent Edward O'Brien who, as it turned out was a narcotics trafficker. That "new information" was discovered because it took 3 years from the

date Mr. Caney signed a Settlement Agreement to then discover that DEA Special Agent O'Brien was engaged in dope smuggling as a result of a DEA federal investigation into the criminal activity of DEA Agent O'Brien. Special Agent O'Brien provided a memorandum that was instrumental in having Mr. Caney terminated from his position as an IRS Special Agent (please note that IRS Group Manager referenced within this document is former DEA Agent from Boston, MA as is former DEA agent and drug trafficker O'Brien). As then things take time to learn. In the words of the former Secretary of Defense Don Rumsfeld "you don't know what you don't know". Why should an employee who learns of criminal misconduct and behavioral misconduct not be able to use that information to overturn a termination of employment based upon a contradiction within the law. This is analogous to not allowing an individual who was convicted of a crime to not be allowed to use information that would exonerate him because the information was untimely presented to the adjudicating authority and therefore not subject to court appellate review regardless if the information would exonerate him of the crime. Although this situation is not criminal currently it has constitutional implications (Ninth Amendment to the United States Constitution) in that all people have constitutionally protected rights such as a right to be free of false accusations related to employment that should not be infringed upon – no one is saying that jobs are not lost for a number of reasons in America but making false accusations about someone should not one of them. The information that Mr. Caney has currently discovered is / contains "new information" not available when the record closed despite Mr. Caney's due diligence over the years in seeking it.

2. Currently there is no federal case law and or federal law in the U.S.C. associated with and coupling "timely filing requirements associated with the acquisition of new evidence" and "final orders or decisions of the Merit Systems Protection Board". The only guidance is reflected within the Code of Federal Regulations (CFR) Title 5 Section 1201.118 (Board reopening of final decisions) and CFR Title 5 Section 1201.114 (Petition and cross petition for review – content and procedure), (e) (Time for filing). However, Section 1201.114 is not material if "regardless of any provision

of this part, the Board may at any time reopen any appeal in which it has issued a final order or in which an initial decision has become the Board's final decision by operation of law" as reflected in CFR Title 5 Section 118. In this situation this is absolutely the case as Mr. Caney discovered "new evidence" a full 30 years after he was terminated from his position as an IRS, CID Special Agent. The information that Mr. Caney is presenting to the Merit Systems Protection Board (MSPB) is unusual and extraordinary and has taken years to develop thereby exhibiting a "pattern and practice" of misconduct and validating a behavior of malfeasance in violation of United States law, rule, and regulation associated with personnel actions by IRS management. It has taken years for the IRS, Criminal Investigation Division Group Manager to expose himself and his intent and for Mr. Caney to discover it (fired IRS employee Ms. Paula Ciafrei v. Bentsen 877 F.Supp. 788 (D.R.I 1995), Gulf War Combat veteran and hero MAJ David Erickson recipient of two Bronze Stars for heroism (Times Union October 19, 2006), Fabio Hernandez v. South Texas Community College and Paul B. Varville filed February 11, 2016 in Texas 389th District Court, and Mr. John Liss, South Texas College, 2017). The question becomes how to overcome this jurisdictional conundrum as it relates to the conflict in the United States Code (U.S.C.) v. the Code of Federal Regulations (CFR) and the United States Court of Appeals for the Federal Circuit jurisdictional and decision-making process. This then goes directly to the heart of the United States Supreme Court Rule 10 as follows: "The United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court" (do the Code of Federal Regulations (CFR) provide for federal court jurisdiction in situations where jurisdiction is barred by the United States Code in situations involving the acquisition of new evidence after the final decision date relative to situations involving the Merit Systems Protection Board?). The Code of Federal Regulations (CFR) Title 5 Section 1201.118 (Board reopening of final decisions) allows for "regardless of any other provision of this part, (i.e., Title 5 Section 1201.114 (Time for filing) the Board may at any time reopen any appeal in

which it has issued a final order or in which an initial decision has become the Board's final decision by operation of law". In this case the Boards initial decision has become the Board's final decision by operation of law. This conflict between the U.S.C. and the CFR has not been clarified relative to the question concerning "jurisdiction" and the acquisition of "new evidence" and should be according to Rule 10. (Considerations Governing Review on Writ of Certiorari). The MSPB can reopen an appeal regardless of any other provision of the CFR (5 CFR 1201.118) and when the Board makes its decision to either reopen or not, that decision becomes an initial decision then a final decision by operation of law and therefore subject to judicial review. The decision associated with reopening an appeal is a Board responsibility "in which there has been a final Board decision that authority is reserved to the Board (see Robey v. U.S. Postal Service, 2007, 105 M.S.P.R. 539, affirmed 253 Fed. Appx. 933, 2007 WL3256608, certiorari denied 128 S.Ct. 1925, 552 U.S. 1322, 170 L.Ed.2d 766) and Title 5 CFR 1201, and not of an Acting Clerk of the Board as reflected in the attached letter (Petitioners Exhibit C) with no judicial authority.

CONCLUSION

A Pro se preference eligible Disabled American Veteran (DAV) case can be very difficult to decide. In this case the Court's guidance is necessary to aid the MSPB or the United States Court of Appeals for the Federal Circuit in making these types of determinations, including the standard of review involving a Pro Se litigant, and the application of procedural and substantive Constitutionally protected Due Process as a protected right of all citizens pursuant to the United States Constitution. I pray for a meaningful opportunity to be heard to present all of the evidence. For the foregoing reasons, the petition for a writ of certiorari should be granted. Thank you.

Date:

Respectfully submitted,

Michael Caney

Michael Caney

Lieutenant Colonel (R), United States Army

Pro Se Disabled American Veteran (DAV)

End of Document

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

LORING M. CANEY, JR.,
Petitioner

v.

DEPARTMENT OF THE TREASURY,
Respondent

2022-2162

Petition for review of the Merit Systems Protection Board in No. BN-0752-87-0110-I-1.

ON MOTION

PER CURIAM.

O R D E R

The Department of the Treasury (Treasury) moves to dismiss. Loring M. Caney, Jr. opposes. We conclude that we lack jurisdiction and therefore grant the motion.

From the parties' submissions, it appears that Mr. Caney was terminated from employment at Treasury and his appeal related to that action was dismissed by the

Ex. A

ISSUED AS A MANDATE: December 23, 2022

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LORING M. CANEY, JR.,
Appellant,

v.

DEPARTMENT OF THE TREASURY,
Agency.

DOCKET NUMBER
BN07528710110

DATE: MAY 17 1991

Loring M. Caney, Jr., Belchertown, Massachusetts, pro se.

Elliot M. Carlin, Esquire, New York, New York, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of the June 26, 1987 initial decision that dismissed his appeal pursuant to the parties' settlement agreement.[1] For the reasons set forth below, we DISMISS the petition for review as untimely filed.

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1 Subsequent to the June 26, 1987 initial decision, the appellant filed three petitions for enforcement which were dismissed by the Board's Boston Regional Office. *See Caney v. Department of the Treasury*, Docket Nos. BN075287C0110 (Sept. 18, 1987), BN075287C9111 (Nov. 9, 1987), and BN075287C9122 (May 2, 1989). *See also Caney v. Department of the Treasury*, 36 M.S.P.R. 437 (1988), *aff'd*, 861 F.2d 729 (Fed. Cir. 1988) (Table).

Ex B

limit for filing a petition for review may be waived "for good cause shown" under 5 C.F.R. § 1201.114(f). To establish good cause for an untimely filing, a party must show that it exercised diligence or ordinary prudence under the particular circumstances of the case. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

In his petition for review, the appellant asserts that there is "new and heretofore unknown information." Specifically, the appellant states that the agency was documenting allegations of his misconduct based upon statements of an individual who was involved in drug-related misconduct and the theft of funds from another agency. The appellant concludes that, had he known that the agency's case was based on the statements of "a two-bit lying, dope-peddling thief...," he would never have entered into the settlement agreement. With its response to the appellant's petition, the agency profters a pleading submitted by the appellant on or about August 1, 1990, in a civil action[2] challenging the one-day suspension. That pleading alluded to drug-related misconduct by the same individual as newly discovered evidence. *See* Petition For Review File, Tab 4, Exhibit 1.

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2 *Caney v. United States*, Civil Action No. 90-30064-F (D. Mass.). According to the agency, the U.S. District Court granted the Government's motion to dismiss the action on November 16, 1990. *See* Petition For Review File, Tab 4 at 2 n.2.

The agency's submission tends to show that the appellant may have been aware of what he now claims to be "new" information at least four months before he filed his petition and he has not provided any explanation for that delay. In any event, the appellant's submissions are not supported by either an affidavit or a statement signed under penalty of perjury, explaining why there is good cause for the late filing, consistent with 5 C.F.R. § 1201.114(f) and the terms of our show-cause order. The appellant's submissions, therefore, are insufficient to establish the assertions contained therein, *see, e.g., Jones v. Office of Personnel Management*, 41 M.S.P.R. 146, 148 (1989). Even if we accept the assertions as true, however, the appellant's delay in waiting at least four months to file the petition remains unexplained. Thus, the appellant has not established that his actions were those of a reasonably prudent person.[3] *See, e.g., Armstrong v. Office of Personnel Management*, 36 M.S.P.R. 37, 40 (1987).

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[3] The appellant also asserts that he was misled into settling because, although he thought the one-day suspension grievance was still pending, the agency had decided on May 11, 1987, to accept the grievance examiner's recommendation and sustain the one-day suspension. We note, however, that the agency's decision letter of May 11, 1987, was apparently received by the appellant on May 14, 1987, prior to his signing the settlement agreement. Even if we accept the appellant's assertions as true, the agency informed the appellant by letter of August 17, 1987, that the administrative appeal procedure for the one-day suspension was exhausted. The appellant has not shown why he was prevented for over three years from timely filing his petition.

The Board finds that the appellant has failed to establish good cause of the untimely filing of his petition, and that, therefore, waiver of the time limit is inappropriate. *See Shiflett v. U.S. Postal Service*, 839 F.2d 669, 670-74 (Fed. Cir. 1988) (the Board may grant or deny the waiver of a time limit for filing an appeal, in the interest of justice, after considering all the facts and circumstances of a particular case). *See also Pelatti v. Department of the Navy*, 45 M.S.P.R. 33, 36 (1990); *Hall v. Department of the Navy*, 44 M.S.P.R. 274, 276-77 (1990), *aff'd*, 914 F.2d 270 (Fed. Cir. 1990) (Table); *Vance v. Department of Agriculture*, 43 M.S.P.R. 48, 50 (1989), *aff'd*, 904 F.2d 45 (Fed. Cir. 1990) (Table); *Chiarella v. U.S. Postal Service*, 41 M.S.P.R. 16, 18-19 (1989), *aff'd*, 892 F.2d 1050 (Fed. Cir. 1989) (Table).

Accordingly, the petition for review shall not be considered.

ORDER

This is the final order of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision will remain the final decision of the Board with regard to the merits of the case. 5 C.F.R. § 1201.113.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final

decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board
1615 M Street, N.W.
Washington, D.C. 20419

Phone: 202 653 7200; Fax: 202 653 7130; E-Mail: mspb@mspb.gov

April 21, 2022

Mr. Loring M. Caney, Jr.
Summer Hill Condominiums
Unit 70
111 Daniel Shays Highway
Belcherstown, MA 01007

Re: *Loring Caney v. Department of the Treasury*
MSPB Docket No. BN-0752-87-0110-I-1

Dear Mr. Caney:

This is in response to your request for reconsideration dated March 3, 2022, of the Board's order dated May 17, 1991, in the appeal named above.

The order included a specific statement that it represents the final decision of the Board in this appeal and also notified you of your further review rights. The Board's regulations do not provide for your request for reconsideration of the Board's final decision. There is, therefore, no further right to review of this appeal by the Board.

Sincerely,

/s/

Jennifer Everling
Acting Clerk of the Board

Ex. C