

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

98 M.S.P.R.191

BRIAN D. ELLEFSON,
Appellant,

DOCKET NUMBER
DA-315H-01-0169-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: February 28, 2005

Brian D. Ellefson, Glenpool, Oklahoma, pro se.

Timothy D. Johnson, Esquire, Fort McCoy, Wisconsin, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Susanne T. Marshall, Member
Barbara J. Sapin, Member
Member Marshall issues a dissenting opinion.

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of the initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the appeal for further proceedings.

BACKGROUND

¶2 On April 9, 2000, the appellant was appointed to the competitive service position of Heavy Mobile Equipment Repairer with the agency. Initial Appeal File (IAF), Tab 3, Subtab 4E. His appointment was subject to his completion of a

one-year initial probationary period. *Id.* On November 16, 2000, the agency terminated the appellant from his position during the probationary period based on his alleged failure to demonstrate his fitness for continued employment. IAF, Tab 3, Subtabs 4A & 4C.

¶3 On December 18, 2000, the appellant appealed the agency's action. IAF, Tab 1. The administrative judge issued an acknowledgment order informing the appellant that the Board might lack jurisdiction over his appeal because he was a probationary employee. IAF, Tab 2 at 2-3. The administrative judge advised the appellant that the Board would have jurisdiction over a probationer's termination only if he made a non-frivolous claim that the action was based on partisan political reasons or marital status. *Id.* The administrative judge informed the appellant that he had the burden of proving that the Board had jurisdiction over his appeal and directed him to file evidence and argument to meet that burden. *Id.* The appellant did not respond to the administrative judge's acknowledgment order. The agency moved to dismiss the appeal for lack of jurisdiction. IAF, Tab 3, Subtab 1.

¶4 The administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 4. The administrative judge found that the appellant had failed to make a non-frivolous allegation that the agency took the termination action because of partisan political reasons or marital status discrimination; thus, the administrative judge concluded that the appellant, as a probationary employee terminated for post-appointment reasons, had not met his burden of establishing the Board's jurisdiction over his appeal. *Id.* at 2-3.

¶5 The appellant has filed a petition for review in which he asserts, inter alia, that he relied on the agency's notification of termination, which provided him with limited appeal rights, and that he was denied his right to be heard. Petition for Review File (PFRF), Tab 1 at 4. The agency argues in response that the Board does not have jurisdiction over the appeal because the appellant was a

probationary employee and he has not alleged discrimination based on marital status or partisan affiliation. PFRF, Tab 3.

ANALYSIS

¶6 The Board has jurisdiction over appeals that are authorized by law, rule or regulation. 5 C.F.R. § 1201.3(a); *Antolin v. Department of Justice*, 895 F.2d 1395, 1396 (Fed. Cir. 1989). Prior to 1999, it was considered well established that a probationary employee had no statutory right to appeal an adverse action to the Board. *See, e.g., Von Deneen v. Department of Transportation*, 33 M.S.P.R. 420, 422, *aff'd*, 837 F.2d 1098 (Fed. Cir. 1987) (Table). A probationer had a regulatory right of appeal only if he made a non-frivolous allegation that he was terminated due to discrimination based on marital status or for partisan political reasons, or because of conditions arising before appointment to the position in question. 5 C.F.R. §§ 315.804-.806; *Von Deneen*, 33 M.S.P.R. at 422. In the latter instance, the only ground for appeal was that the agency did not follow the procedural requirements of 5 C.F.R. § 315.805. *Coleman v. Veterans Administration*, 3 M.S.P.R. 274, 276 (1980).

¶7 In 1999, the Federal Circuit reviewed a Board decision dismissing, for lack of jurisdiction, the appeal of a non-preference eligible employee in the excepted service who was serving a probationary period. *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144 (Fed. Cir. 1999). In doing so, the court examined the meaning of the statutory term “employee” at 5 U.S.C. § 7511(a). The statute provides:

- (1) “employee” means--
 - (A) an individual in the competitive service—
 - (i) who is not serving a probationary or trial period under an initial appointment; or
 - (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Rate Commission; and

(C) an individual in the excepted service (other than a preference eligible)--

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less.

5 U.S.C. § 7511(a).

¶8 As a non-preference eligible in the excepted service, Ms. Van Wersch was entitled to appeal to the Board if, at the time of her termination, she qualified as an “employee” under section 7511(a)(1)(C). The court observed that subsections (i) and (ii) in paragraph (C) are separated by the word “or,” and it found that the plain meaning of “or” is disjunctive and implies alternatives. *Van Wersch*, 197 F.3d at 1148. Thus, the court held that an individual is an “employee” if he meets the requirements of either 5 U.S.C. § 7511(a)(1)(C)(i) *or* (ii). *Id.* at 1151. The court acknowledged that its literal reading of the statute produced a result that appeared to be contrary to the legislative history of the Civil Service Due Process Amendments of 1990, and it stated that if the language of section 7511(a)(1)(C) could fairly be read as ambiguous, “the government would have a compelling case for its reading of the statute.” *Id.* at 1152. However, the court found that, far from being ambiguous, the language of section 7511(a)(1)(C) was “crystal clear,” and that the legislative history could not “trump the irrefutably plain language that emerged when Congress actually took pen to paper.” *Id.*

¶9 Subsequently, in *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), *pet. for reh’g en banc denied*, 329 F.3d 1354 (Fed. Cir.

2003), which was issued while the petition for review in this appeal was pending, the United States Court of Appeals for the Federal Circuit determined that the reasoning of *Van Wersch* compelled the same result with respect to competitive service employees under 5 U.S.C. § 7511(a)(1)(A). The court held that a probationary individual who is excluded from “employee” status under 5 U.S.C. § 7511(a)(1)(A)(i) is nevertheless an “employee” with Board appeal rights if the individual meets the definition provided at 5 U.S.C. § 7511(a)(1)(A)(ii). *McCormick*, 307 F.3d at 1342-43. Thus, a competitive service individual serving a probationary period is an “employee” entitled to appeal to the Board if he has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. *Id.*; 5 U.S.C. § 7511(a)(1)(A)(ii). In so holding, the court overruled Board precedent which had found that Congress intended subsection (i) to apply exclusively to appointments that require a probationary or trial period and subsection (ii) to apply exclusively to appointments that do not require probationary or trial periods. *See, e.g., Youngs v. Department of the Army*, 73 M.S.P.R. 551, 556 (1997).

¶10 With respect to Ms. McCormick, the Federal Circuit concluded that she met the definition of “employee” under subsection (ii) because she was an individual who “has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less.” *McCormick*, 307 F.3d at 1342-43. The court, however, did not define the phrase “current continuous service.” The plain language of 5 U.S.C. § 7511(a)(1)(A)(ii) refers only to “current continuous service,” with no requirement that such service must be in the same or similar positions. *See Mathis v. U.S. Postal Service*, 865 F.2d 232, 234 (Fed. Cir. 1988) (recognizing that 5 U.S.C. § 7511(a)(1)(A) does not include the “same or similar positions” requirement for individuals in the competitive service). By contrast, subsections (B) and (C)(ii) of 5 U.S.C. § 7511(a)(1) explicitly refer to “current continuous service in the same or similar positions.” *Id.* In addition, the definition of “employee” for subchapter I of Chapter 75 (setting forth procedures

for suspensions for 14 days or less), which otherwise mirrors the language at 5 U.S.C. § 7511(a)(1)(A), explicitly refers to “current continuous employment in the same or similar positions.” 5 U.S.C. § 7501(1).^{*} Thus, when Congress intended to impose a same or similar positions requirement, it knew how to, and did so clearly and unequivocally.

¶11 The legislative history of the Civil Service Reform Act of 1978 (CSRA) does not explain why the “same or similar positions” language was not included in 5 U.S.C. § 7511(a)(1)(A)(ii). The Senate Report stated that section 7511(a)

. . . continues the present coverage of certain other appointments, for which there is no probationary or trial period, after they complete one year of current continuous employment. The changes in the wording of this subsection from existing law provide coverage to employees serving under several kinds of appointments not in existence at the time the present law was enacted.

S. Rep. No. 95-969, at 48 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2770.

¶12 The 1978 civil service regulations, issued prior to passage of the CSRA, provided:

a) Employees covered. This subpart [subpart B setting forth the procedures for removals, suspensions for more than 30 days, furloughs without pay, and reductions in rank or pay] applies to:

(1)(i) Any career, career-conditional overseas limited, indefinite, or term employee, or any employee serving under a career executive assignment, in a competitive position who is not serving a probationary or trail [sic] period and (ii) any employee serving in a competitive position who has completed *1 year of current continuous employment* except one serving under a temporary appointment with a definite time limitation or a limited executive assignment;...

* That provision states:

(1) “employee” means an individual in the competitive service who is not serving a probationary period or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less....” 5 U.S.C. § 7501(1).

5 C.F.R. § 752.201 (1978) (emphasis supplied). Thus, the 1978 regulations did not include a “same or similar positions” requirement for competitive service employees. Nor did the regulations define the phrase “current continuous employment.” See 5 C.F.R. § 752.102 (1978) (definitions).

¶13 In 1988, the Office of Personnel Management (OPM) amended its Part 752 regulations to include the following definition of current continuous employment: “a period of employment or service immediately preceding an adverse action *in the same or similar positions* without a break in Federal civilian employment of a workday.” 5 C.F.R. § 752.402(b) (emphasis supplied). In its Federal Register notice, OPM stated that this definition applied only to a small class of competitive service employees who had appointments that did not require that they serve a probationary or trial period. OPM explained:

OPM realizes that the law providing coverage for employees in the competitive service is somewhat confusing and not self-explanatory. The confusion arises because there are employees in the competitive service who serve in two types of appointments. The majority serve under career, career-conditional, or certain other nontemporary appointments which require a probationary or trial period of service. Of this group, only those employees who have yet to complete the necessary probationary or trail [sic] period (required either because their current appointment is their first period of Government service, or because they have been appointed from a register to a different position) are excluded from Part 752 protections. Once they complete the current probationary period, they do not have to serve another probationary period, even after a break in Government service, unless they are again appointed from a register. (See 5 CFR Part 315.) *The definitions of “current continuous employment” and “similar positions” do not apply to this group.*

A much smaller group of competitive service employees serve in appointments (such as temporary appointments pending establishment of a register (TAPER), status quo, or special tenure appointments) which require no probationary or trial period. *It is this second group of employees to which our regulatory definitions are addressed.*

53 Fed. Reg. 21,619 (June 9, 1988) (emphasis supplied). Because OPM viewed the current continuous service requirement as a substitute for a probationary

period, it made sense that such service must be served in the same or similar positions. In *McCormick*, however, the Federal Circuit rejected the view that Congress intended subsection (ii) of 5 U.S.C. § 7511(a)(1)(A) to apply only to appointments that do not require a probationary or trial period. Moreover, the court concluded that Ms. McCormick had 1 year of current continuous service without analyzing whether her prior appointment as a “Social Insurance Specialist” with the Department of Health & Human Services was similar to her appointment as a “Contract Negotiator” with the Department of the Air Force. Therefore, it appears that the court did not construe “current continuous service” as requiring such service to be in the “same or similar positions.”

¶14 In light of the plain language of 5 U.S.C. § 7511(a)(1)(A)(ii), which omits the phrase “same or similar positions,” and in order to be consistent with the Federal Circuit’s opinion in *McCormick*, we hold that current continuous service need not be in the same or similar positions in order for an individual in the competitive service to qualify as an “employee” under that subsection. We further hold that, for competitive service employees, “current continuous service” means a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday. See 5 U.S.C. § 7511(a)(1)(A)(ii); *Mathis*, 865 F.2d at 234; cf. 5 C.F.R. § 752.402(b) (so defining “Current Continuous Employment,” but including the “same or similar requirement”).

¶15 From the paucity of information in the record, we are unable to determine whether the appellant has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. The appellant indicated on his appeal form that he began his federal service on January 27, 1992, see IAF, Tab 1 at 2 (question 21), and this allegation is corroborated by the SF-50s provided by the agency, see IAF, Tab 3, Subtabs 4A & 4E (indicating a service computation date of Jan. 27, 1992). The appeal must therefore be remanded for the administrative judge to determine whether, during the year

immediately preceding his separation, the appellant's service was without a break in service of a workday and was under other than a temporary appointment limited to 1 year or less. If so, the appellant would meet the definition of "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii) and the Board would have jurisdiction over his appeal.

¶16 Even if the appellant had a break in service, he may be an "employee" under subsection (i) of section 7511(a)(1)(A) if his prior service can be "tacked" to his probationary period. Prior service in competitive service positions can be credited towards completion of a later probationary or trial period in a competitive service position if the employee shows that: (1) The prior service was rendered immediately preceding the appointment; (2) it was performed in the same agency; (3) it was performed in the same line of work; and (4) it was completed with no more than one break in service of less than 30 days. 5 C.F.R. § 315.802(b); *Francis v. Department of the Navy*, 53 M.S.P.R. 545, 547-48 (1992); *see also Illich v. Department of the Air Force*, 96 M.S.P.R. 11, ¶¶ 6 (2004) (McPhie, Acting Chairman, separate opinion) (explaining that 5 C.F.R. subpart 315H, which is entitled "Probation of an Initial Appointment to a *Competitive Position*" (emphasis added), applies only to certain employees serving in or separated from competitive service positions).

¶17 For these reasons, the initial decision is vacated and the appeal is remanded for further adjudication. If, after considering evidence and argument from the parties, the administrative judge determines that the appellant is not an "employee" under 5 U.S.C. § 7511(a)(1)(A)(i) or (ii), then it would be appropriate to again dismiss the appeal for lack of jurisdiction. However, if the administrative judge determines that the appellant is an "employee," then the agency's action must be reversed. An agency's failure to provide a tenured public employee with an opportunity to present a response, either in person or in writing, to an appealable agency action that deprives him of his property right in his employment constitutes an abridgement of his constitutional right to minimum

due process of law, i.e., prior notice and an opportunity to respond. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). The record shows that the appellant received prior written notice of his proposed separation on November 14, 2000. IAF, Tab 3, Subtab 4C. The notice did not provide the appellant with an opportunity to reply, and he was separated two days later on November 16, 2000. *Id.*, Subtab 4A. Thus, if the appellant is an “employee,” the agency’s procedures for effecting the appellant’s separation did not comport with a tenured employee’s constitutional right to minimum due process of law because the appellant was not provided with an opportunity to respond, and the agency’s action must be reversed. *Daniel v. Department of Veterans Affairs*, 68 M.S.P.R. 459, 461-62 (1995) (reversing agency action where appellant was not provided with an opportunity to respond to the charges).

ORDER

¶18 The appeal is remanded for further adjudication.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF SUSANNE T. MARSHALL

in

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¶19 The administrative judge found that the appellant was a probationary employee who did not have adverse-action appeal rights as an “employee” under Chapter 75 of Title 5 of the United States Code. The administrative judge made that finding after issuing an acknowledgment order which afforded the appellant an opportunity to argue to the contrary and after the agency had filed a motion to dismiss on the basis that the appellant was a probationary employee when he was terminated. Initial Appeal File (IAF), Tab 2 and Tab 3, Subtab 1. As the administrative judge noted, the appellant filed nothing in response to the acknowledgment order or the agency’s motion. Initial Decision at 2.

¶20 The undisputed evidence shows that the agency gave the appellant a form SF-50 appointing him to a career-conditional appointment as a Heavy Mobile Equipment Operator. IAF, Tab 3, Subtab 4e. The SF-50 clearly and unambiguously states that the “appointment was subject to completion of one year initial probationary period beginning 04-09-00.” *Id.* The appellant accepted the appointment under that condition, and he never argued below to the contrary, even though given at least two opportunities to do so.

¶21 The agency terminated the appellant’s appointment six months into his probationary period because he failed to report to work on time and was absent without leave for two weeks before the agency ended his employment. *Id.*, Tab 3, Subtab 4d. Under these circumstances, the appellant has shown no reason to disturb the initial decision.

¶22 For the reasons stated in my concurring and dissenting opinion in *McCormick v. Department of the Air Force*, MSPB Docket No. DA-315H-00-0317-M-1 (Feb. 28, 2005), the agency followed the applicable

Office of Personnel Management (OPM) regulations when it appointed the appellant by informing him that his appointment was subject to a one-year probationary period. OPM's regulations and the Board's case law at the time, *Youngs v. Department of the Army*, 73 M.S.P.R. 551 (1997), required the agency to impose a one-year probationary period on the appellant.

¶23 The appellant filed nothing below to show that he was not properly informed that he had to serve a one-year probationary period when he was hired by the agency. The appellant has shown no error in the initial decision which found that he was not an "employee" with Chapter 75 appeal rights to the Board. His petition for review therefore should be denied by final order. Further, as stated in my concurring and dissenting opinion in *McCormick*, the due process analysis in the majority opinion is an unsupported expansion of the decisions of the United States Court of Appeals for the Federal Circuit in *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2003), *petition for rehearing en banc denied*, 329 F.3d 1354 (Fed. Cir. 2003), and *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144 (Fed. Cir. 1999). There is no legal basis for the Board to interject a due process inquiry into this appeal.

¶24 If Mr. Ellefson was an "employee" with Chapter 75 rights, the remedy is what the Federal Circuit ordered in *McCormick* and in *Van Wersch*, namely, a Chapter 75 proceeding before an administrative judge. The remedy is not the one that the majority proposes, which is automatically to reverse the agency action, which was taken in good faith under then-existing case law and OPM regulations, and give the appellant four plus years of back pay. Instead, as explained in my concurrence and dissent in *McCormick*, the remedy that the Federal Circuit

properly fashioned in *Van Wersch* and in *McCormick* is to remand the appeal and allow the agency to prove its charges in a Chapter 75 proceeding.

Date

Susanne T. Marshall
Member