

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

**2008 MSPB 102**

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Docket No. SF-315H-08-0119-I-1

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**James Fitzgerald,  
Appellant,  
v.  
Department of the Air Force,  
Agency.**

May 12, 2008

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James Fitzgerald, Mount Airy, Maryland, pro se.

Major Christopher B. Bennett, March Air Reserve Base, California, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 This case is before the Board on interlocutory appeal from the March 14, 2008 order of the administrative judge (AJ) staying the proceedings and certifying for review by the Board her ruling that the Board has jurisdiction over this appeal. For the reasons discussed below, we AFFIRM the AJ's ruling AS MODIFIED by this Opinion and Order, VACATE the stay order, and RETURN the case to the AJ for further adjudication on the merits.

## BACKGROUND

¶2 The relevant facts in this case are not in dispute. Effective August 7, 2005, the agency appointed the appellant to the excepted service position of WG-8852-10 Aircraft Mechanic with the Adjutant General – DC, Andrews Air Force Base, Maryland. Initial Appeal File (IAF), Tab 9 at 18. The Standard Form (SF) 50 documenting the action indicated that the appointment, made pursuant to 32 U.S.C. § 709(b),<sup>1</sup> was subject to the completion of a 1-year trial period and required the appellant to remain an active member of the Air National Guard. *Id.* On August 7, 2006, the appellant completed his trial period. IAF, Tab 9 at 11. Effective August 4, 2007, the agency terminated the appellant’s employment pursuant to “[5] CFR 715,”<sup>2</sup> due to his “Appointment In Department of the Air Force.” *Id.* at 10. On August 5, 2007, the agency’s March Air Reserve Base in California effected a career-conditional appointment of the appellant to a WG-8852-10 Aircraft Mechanic position in the competitive service. *Id.* at 6. The SF 50 indicated that the appointment was subject to the completion of a 1-year probationary period and that the appellant occupied the position as an Air Reserve Technician (ART). *Id.* at 6-7. Effective November 14, 2007, the agency terminated the appellant during his “Prob/Trial Period.” IAF, Tab 9 at 3.

¶3 After the appellant timely appealed the action to the Board, IAF, Tab 1, the AJ informed him that the Board might not have jurisdiction over the appeal because probationary employees and employees serving on a Veterans Recruitment Appointment, who have less than 1 year of current continuous service in the same or similar position, have limited appeal rights, IAF, Tab 2 at 2. The AJ notified the appellant that he could appeal to the Board if he

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<sup>1</sup> Section 709 of title 32 addresses the employment of National Guard Technicians (NGTs) under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force.

<sup>2</sup> 5 C.F.R. part 715, subpart B applies to voluntary separations such as resignations.

nonfrivolously claimed that his termination was based on partisan political reasons or marital status discrimination, and that he could also appeal a violation of the procedures set forth at 5 C.F.R. § 315.805 if his termination was based on matters that occurred before his appointment. *Id.* The AJ ordered the appellant to file evidence and argument proving that the action was within the Board's jurisdiction. *Id.* The appellant filed responses to the AJ's order, IAF, Tabs 3-4, and the agency moved to dismiss the appeal for lack of jurisdiction, IAF, Tab 5.

¶4 The AJ subsequently issued a jurisdictional order noting that the appellant might have the appeal rights of a permanent employee as defined in 5 U.S.C. § 7511(a)(1)(A)(i) or (ii) if he had prior federal service meeting certain requirements. IAF, Tab 10 at 4. In this regard, the AJ informed the appellant of the criteria set forth at 5 C.F.R. § 315.802(b), under which prior federal service can count toward the completion of a probationary period, and notified him that he could appeal his termination if, at the time the action was taken, he had completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. *Id.* at 4-5. The AJ noted that she was unaware of any Board or court decisions addressing the crediting of service in the excepted service of an NGT toward completion of the probationary period and/or the 1-year current continuous service requirement if the former NGT is appointed to a competitive service position in the same agency and line of work with no break in service. *Id.* at 6. The AJ therefore ordered the parties to file argument, and any supporting evidence, addressing the above issues. *Id.* at 7.

¶5 After the parties filed their responses, IAF, Tabs 11-12, the AJ notified them of her determination that the Board had jurisdiction over the appeal because the appellant's NGT service counted toward the completion of his probation in his ART position, thereby qualifying him as an "employee" under 5 U.S.C. § 7511(a)(1)(A)(i), and also counted toward the 1-year current continuous service requirement for an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii). IAF, Tab 14 at 1. The AJ noted, however, that the agency had asked that the jurisdictional

ruling be certified for interlocutory appeal to the full Board. *Id.* at 2. The AJ therefore afforded the parties an opportunity to address the issue of certifying an interlocutory appeal in this case. *Id.* at 3-4. After receiving submissions on that issue, the AJ reiterated her ruling that the Board had jurisdiction over the appeal and certified her ruling for interlocutory appeal. IAF, Tab 17.<sup>3</sup>

### ANALYSIS

¶6 An interlocutory appeal is an appeal to the Board of a ruling made by a judge during a proceeding. 5 C.F.R. § 1201.91. A judge may certify an interlocutory appeal if she determines that the issue presented is of such importance to the proceeding that it requires the Board’s immediate attention. *Id.* More specifically, a judge will certify a ruling for review only if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion, and an immediate ruling will materially advance the completion of the proceeding, or that the denial of an immediate ruling will cause undue harm to a party or the public. 5 C.F.R. § 1201.92; *see Cooper v. Department of the Navy*, 98 M.S.P.R. 683, ¶ 5 (2005). These requirements are satisfied here. The issues of whether prior service as an NGT can be counted toward the completion of the probationary period of an individual appointed in the competitive service, and whether such service counts as “current continuous service” under 5 U.S.C. § 7511(a)(1)(A)(ii), appear to be matters of first impression about which there is substantial ground for difference

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<sup>3</sup> The AJ noted that the agency appeared to have provided the appellant with minimum due process by giving him six days of advance notice of his termination, with a statement of the underlying reasons, and providing him an opportunity to submit a written reply with supporting documentation, as well as an oral reply. IAF, Tab 17 at 1 n.1. She further indicated, however, that “it must be determined whether the agency’s failure to comply with section 7513(b) was a harmful procedural error,” and that the reasonableness of the penalty and any challenge to the charge were still at issue.

of opinion, and immediately resolving the AJ's rulings will materially advance the completion of the proceedings. The AJ therefore properly certified this case.

¶7 The Board has jurisdiction over the removal of an "employee." 5 U.S.C. §§ 7512(1), 7513(d). The term "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)(1). The Board, interpreting and applying OPM's regulations, has held 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, e.g., Ellefson v. Department of the Army*, 98 M.S.P.R. 191, ¶ 14 (2005); 5 C.F.R. § 752.402(b) (defining "[c]urrent continuous employment" as a period of

employment or service immediately preceding an adverse action in the same or similar positions<sup>4</sup> without a break in federal civilian employment of a workday).<sup>5</sup>

¶8 In *Williams v. Department of Defense*, 96 M.S.P.R. 335, ¶ 12 (2004), the Board noted that the question of whether service in the excepted service could count toward the 1-year current continuous service requirement of 5 U.S.C. § 7511(a)(1)(A)(ii), appeared to be an issue of first impression. The Board noted that, although Mr. Williams' prior service in the excepted service may or may not count toward the completion of the 1-year current continuous service requirement, it did not need to decide that issue because an intervening temporary appointment Mr. Williams had received meant that he did not have 1 year of current continuous service "under other than a temporary appointment limited to 1 year or less." *Id.* ¶¶ 12-13; *cf. Beets v. Department of Homeland Security*, 98 M.S.P.R. 451, ¶ 8 (2005) (finding it unnecessary to address whether prior service in the competitive service counted toward 2 years of current continuous service under 5 U.S.C. § 7511(a)(1)(C)(ii) because the positions in question were not "the same or similar"). Unlike Mr. Williams, the appellant's appointment to the excepted service position of WG-8852-10 Aircraft Mechanic with the District of Columbia Adjutant General at Andrews Air Force Base, Maryland, was not a temporary appointment limited to 1 year or less. Thus, the first question before

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<sup>4</sup> The "same or similar positions" requirement set forth in the regulation does not apply to competitive service employees. *Thompson v. Department of the Treasury*, 100 M.S.P.R. 545, ¶ 7 n.1 (2005).

<sup>5</sup> In 1988, the Office of Personnel Management, interpreting 5 U.S.C. § 7511(a)(1)(A), issued a final rule defining the term "current continuous employment." 53 Fed. Reg. 21,619, 21,623 (1988). The term "current continuous *employment*" in the applicable statute, however, was changed without comment in 1990, to "current continuous *service*" under the Civil Service Due Process Amendments. *Compare* 5 U.S.C. § 7511(a)(1)(A) (1988) *with* Pub. L. No. 101-376, § 2(a), 1990 U.S.C.C.A.N. (104 Stat.) 461, *and* H.R. Rep. No. 101-328, at 1, 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 695, 700.

us is whether prior service in the excepted service can count toward the 1-year current continuous service requirement for individuals in the competitive service.

¶9 The starting point for any case involving statutory interpretation is the language of the statute itself, which must be examined to determine Congress' intent on the question at issue. *Adkins v. Office of Personnel Management*, 104 M.S.P.R. 233, ¶ 12 (2006). Statutory provisions should not be read in isolation; rather, each section of a statute should be construed in connection with other sections so as to produce a harmonious whole. *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 17 (2007). It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning. *Butler v. Social Security Administration*, 331 F.3d 1368, 1372 (Fed. Cir. 2003); *Styslinger*, 105 M.S.P.R. 223, ¶ 30.

¶10 Here, as reflected in the structure of 5 U.S.C. § 7511(a)(1), Congress was aware that the executive branch of government under title 5 of the United States Code included positions that generally fell within two categories: Competitive service and excepted service. *See* 5 U.S.C. §§ 2102-03 (describing the competitive and excepted service). Nevertheless, 5 U.S.C. § 7511(a)(1)(A)(ii), as well as 5 U.S.C. § 7511(a)(1)(B) and 5 U.S.C. § 7511(a)(1)(C)(ii), all refer to current continuous "service" without specifying that such "service" must be in the competitive or excepted service, respectively. In fact, because the same phrase, "current continuous service," is used in sections 7511(a)(1)(A)(ii), 7511(a)(1)(B), and 7511(a)(1)(C)(ii), we apply the above presumption that Congress intended the phrase to have the same meaning in each of those sections. This is especially true given the close proximity of these provisions to each other. *See Commissioner of Internal Revenue v. Lundy*, 516 U.S. 235, 250 (1996) (finding that the interrelationship and close proximity of certain provisions presented a "classic case" for application of the normal rule that identical words used in different parts of the same act are intended to have the same meaning). Thus, although each of the above sections defines the term "employee" by

reference to an individual or preference eligible presently “in” or occupying a position in the competitive or excepted service, we find that the phrase “current continuous service” in those sections means service, in either the competitive or excepted service, that immediately precedes an adverse action without a break in federal civilian employment of a workday. *See Dade v. Department of Veterans Affairs*, 101 M.S.P.R. 43, ¶¶ 9, 12 (2005) (finding that prior service as an Audiologist in the competitive service with the Department of the Army may be counted, under 5 U.S.C. § 7511(a)(1)(B)(i), toward the completion of 1-year of current continuous service in an Audiologist position with the Department of Veterans Affairs (DVA), even if the DVA Audiologist position was in the excepted service). This interpretation of 5 U.S.C. § 7511(a)(1)(ii) is consistent with 5 C.F.R. § 752.402(b), which does not define current continuous employment as a period of service confined to either the competitive or excepted service. *See McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶ 8 (2006) (noting that the definition of “current continuous service” is the same in competitive service and excepted service cases).

¶11 We now turn to the question of whether the appellant’s NGT service in particular, along with his service as an Aircraft Mechanic at the March Air Reserve Base, provide him with 1 year of current continuous service under 5 U.S.C. § 7511(a)(1)(A)(ii). As the successor to the state militias of the nation’s early years, the National Guard is a deeply imbedded feature of our national defense system. *Singleton v. Merit Systems Protection Board*, 244 F.3d 1331, 1333 (Fed. Cir. 2001). The role of the National Guard, however, does not fit neatly within the scope of either state<sup>6</sup> or national concerns. *Id.* The National

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<sup>6</sup> Although we refer in this paragraph, for purposes of convenience, to “state” concerns, agencies, authority, and control, we note that under 32 U.S.C. § 101(3), (6), the terms “National Guard” and “Air National Guard” mean certain qualifying parts of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia.

Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war, and on stand-by to be federalized to assist in controlling civil disorders. *Id.* The activity, make-up, and function of the National Guard are provided for, to a large extent, by federal law. *Id.* At the same time, the National Guard is available to serve state needs, and within each state, the National Guard is a state agency under state authority and control. *Id.*

¶12 Mirroring this special posture of the National Guard is the unusual status of its employees. In addition to purely military personnel, the National Guard employs civilians to perform a wide range of administrative, clerical, and technical tasks. Often the responsibilities and duties of these employees, who are generally referred to as NGTs, correspond directly to those of other civilian employees, yet they arise in a distinctly military context, implicating significant military concerns. *Special Counsel v. Everett*, 28 M.S.P.R. 348, 350 (1985), *overruled on other grounds by Ockerhausen v. State of New Jersey Department of Military & Veterans Affairs*, 52 M.S.P.R. 484, 489 (1992).

¶13 We note that 5 U.S.C. § 7511(b)(5) provides that “[t]his subchapter does not apply to an employee . . . who is described in section 8337(h)(1), relating to technicians in the National Guard,” and that section 8337(h)(1), in turn, provides that the term “technician” means an individual employed under section 709(a) of title 32 who, as a condition of the employment, is required under section 709(b) of such title to be a member of the National Guard and to hold a specified military grade. This case, however, does not involve an adverse action taken against an NGT who has appealed that action to the Board. Instead, it involves the question of how to treat NGT service in the excepted service in determining whether an individual in the competitive service has appeal rights to the Board.

¶14 A person like the appellant, who was employed under 32 U.S.C. § 709(a), must be a military technician (dual status) as defined in section 10216(a) of title 10, United States Code. 32 U.S.C. § 709(b). Section 10216(a)(1), in turn,

provides that, for purposes of that section “and any other provision of law,” a military technician (dual status) like the appellant “is a Federal civilian employee.” In fact, under 32 U.S.C. § 709(e), an NGT “is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States.” *See Ockerhausen*, 52 M.S.P.R. at 488 (even though National Guard technicians work for state organizations under the authority of a state official, they must be considered civilian employees of the Department of the Army or the Department of the Air Force to the same extent as other employees of the Department of the Army or the Department of the Air Force).<sup>7</sup> Such an NGT position is simply “outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.” 32 U.S.C. § 709(e). Given that military technicians like the appellant are considered, for purposes of “any other provision of law,” to be federal civilian employees, and that they are also considered to be employees of the Department of the Air Force and the United States to the same extent as other employees of the Department of the Air Force, we hold that the AJ correctly concluded that the appellant is an “employee” under 5 U.S.C. § 7511(a)(1)(A)(ii) because he completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less, i.e., he completed 1 year of employment or service immediately preceding an adverse action without a break in federal civilian employment of a workday. *See Ellefson*, 98 M.S.P.R. 191, ¶ 14; *Ockerhausen*, 52 M.S.P.R. at 488 (“[A] technician . . . must be deemed an employee in a covered position ‘in an agency’

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<sup>7</sup> We note that, under 20 C.F.R. § 1002.306, a National Guard civilian technician is considered a State employee for purposes of the Uniformed Services Employment and Reemployment Rights Act of 1994, but is considered a federal employee for “most other purposes.” In addition, for purposes of OPM’s regulations relating to restoration to duty from uniformed service, in the case of a National Guard technician employed under 32 U.S.C. § 709, the employing agency is the adjutant general of the state in which the technician is employed. 5 C.F.R. § 353.102(2).

who has the same rights as other civilian employees of those agencies, save those rights specifically denied them in the National Guard Technicians Act.”).

¶15 We recognize that, under 32 U.S.C. § 709(g), “[s]ections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.” As set forth above, subchapter II of chapter 75, relating to removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs for 30 days or less, does not apply to NGTs. 5 U.S.C. § 7511(b)(5). The agency argues that it is not logical for Congress to have “exclude[d] the service while the employee is a National Guard Technician, but then require[d] the federal agency to count the time that previously ‘did not apply’” when calculating a probationary period or current continuous service under 5 U.S.C. § 7511(a)(1)(A)(ii). IAF, Tab 16 at 4. However, 32 U.S.C. § 709(g) and 5 U.S.C. § 7511(b)(5) do not exclude *service* performed while an employee is an NGT; rather, they simply hold that such NGTs are not “employees” entitled to appeal to the Board while they hold such positions. The appellant was not employed under section 709 at the time of his termination in this case.<sup>8</sup> We also note that the agency relies upon an initial decision issued by a Board AJ finding that time spent in an NGT excepted service position cannot be applied toward the completion of a probationary period in the competitive service. IAF, Tab 16 at 4. Board initial decisions are of no precedential value, however, and cannot be cited or relied upon as controlling authority. *Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1988).

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<sup>8</sup> The agency is incorrect in suggesting that service in a position that is not covered by 5 U.S.C. § 7511(a)(1) can never be combined with subsequent service in a position covered by section 7511(a)(1) for purposes of determining an individual’s appeal rights. Although an individual who works for a Non-Appropriated Fund (NAF) activity has no ch. 75 rights as long as he holds such a position, *see Taylor v. Department of the Navy*, 1 M.S.P.R. 591 (1980), NAF service is credited toward completion of probation under a subsequent career-conditional appointment when the NAF service was in the same agency, the same line of work, and contained or was followed by no more than a single break in service not exceeding 30 days. 5 C.F.R. § 315.802(b).

¶16 Having found that the appellant meets the definition of “employee” set forth at 5 U.S.C. § 7511(a)(1)(A)(ii), and that the Board has jurisdiction over this appeal on that basis, we need not address the AJ’s ruling that the appellant also meets the definition of “employee” set forth at 5 U.S.C. § 7511(a)(1)(A)(i).

ORDER

¶17 Accordingly, we vacate the stay order issued in this proceeding and return the case to the AJ for further processing and adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.