

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

2008 MSPB 247

Docket No. NY-0752-07-0359-I-1

**Christopher D. Roche,
Appellant,**

v.

**Department of Transportation,
Agency.**

December 8, 2008

Eric S. Tilton, Esquire, Carle Place, New York, for the appellant.

Mary M. McCarthy, Esquire, Jamaica, New York, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision dismissing his removal appeal for lack of jurisdiction. For the reasons stated below, we GRANT the petition and AFFIRM the initial decision as MODIFIED by this Opinion and Order. The appellant's appeal is DISMISSED for lack of jurisdiction.

BACKGROUND

¶2 Until his removal, the appellant was employed as an air traffic control specialist at the agency's Federal Aviation Administration (FAA). *See* Appeal File, Tab 8, Subtab 4A (form documenting the appellant's removal). In its notice of decision to remove him from that position, the agency advised him that he

could appeal the action to the Board. *Id.*, Subtab 4C at 1-2. The appellant subsequently filed a timely appeal of his removal with the Board's New York Field Office. Appeal File, Tab 1.

¶3 While the appeal was pending, the administrative judge to whom it was assigned issued an order indicating that the appellant might not be entitled to appeal his separation to the Board. Order of Apr. 25, 2008, at 1-2, Appeal File, Tab 21. He stated in the order that the appellant had been employed by the agency for less than 2 years at the time of his separation; that the record indicated that he was employed in the excepted service and was not a preference eligible; and that there was a question, under those circumstances, as to whether he was covered by [5 U.S.C. § 7511](#), a section the administrative judge described as providing “the definition of an employee in the excepted service who [could] appeal [his removal] to the Board” *Id.* The administrative judge therefore ordered the appellant to show that his appeal was within the Board's jurisdiction, and he ordered the agency to file a response addressing the issue. *Id.* at 2.

¶4 In their responses to the administrative judge's order, the appellant and the agency both argued that [5 U.S.C. § 7511\(a\)\(1\)](#) was inapplicable to this case, that the appellant's entitlement to appeal was governed by the FAA's own personnel management system (PMS), and that, under the PMS, the appellant was an “employee” entitled to appeal his removal. Appeal File, Tab 23 (appellant's response at 4-7); *id.*, Tab 24 (agency's response at 2-5). The appellant also argued that he was entitled to appeal even if the definition in [5 U.S.C. § 7511](#) applied because the kind of position he had held had formerly been in the competitive service or, in the alternative, because he was a preference eligible. *Id.*, Tab 23 (response at 7-10).

¶5 The administrative judge did not concur in these arguments; he issued an initial decision in which he found that section 7511(a)(1) was applicable; he found further that the appellant was not covered under that section; and he

accordingly dismissed the appeal for lack of jurisdiction. Initial Decision at 3-7, Appeal File, Tab 25.

¶6 The appellant has filed a timely petition for review of the initial decision, again arguing that his entitlement to appeal his removal to the Board is governed by the definition of “employee” that is provided in the FAA’s PMS; that he is entitled to appeal under that authority; and that, even if [5 U.S.C. § 7511](#) is applicable, he meets the requirements of that section. Petition for Review (PFR), PFR File, Tab 1. The National Air Traffic Controllers Association has submitted an amicus curiae brief in support of the appellant’s position that the PMS definition is applicable. PFR File, Tab 3. The agency has not responded to the appellant’s petition, and neither party has responded to the amicus brief.

ANALYSIS

Applicability of [5 U.S.C. § 7511\(a\)\(1\)](#)

¶7 Under [5 U.S.C. §§ 7512\(1\)](#) and 7513(d), an individual who meets the definition of an “employee” under [5 U.S.C. § 7511\(a\)\(1\)](#) generally is entitled to appeal his removal to the Board. Effective April 1, 1996, the Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 104-50 § 347, 109 Stat. 436, 460 (1995), as amended by Pub. L. No. 104-122, § 1, 110 Stat. 876, 876 (1996), divested the Board of jurisdiction over those appeals insofar as they were filed by FAA employees, and it required the FAA to develop and implement a personnel management system for its own workforce. *See, e.g., Miller v. Department of Transportation*, [86 M.S.P.R. 293](#), ¶ 4 (2000). In 2000, however, Congress enacted the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61 (Ford Act). *Id.* That act revised [49 U.S.C. § 40122\(g\)](#), providing in paragraph (3) of that section that “an employee of the [FAA] may submit an appeal to the Merit Systems Protection Board . . . from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996.” Ford Act, § 307(a), 114 Stat. 61, 125.

Because FAA employees generally were entitled to appeal their removals to the Board before April 1, 1996, they are again entitled to appeal them under the Ford Act. *See, e.g., Wright v. Department of Transportation*, [89 M.S.P.R. 571](#), ¶ 9 (2001).

¶8 Title 49 of the U.S. Code does not define the word “employee” for purposes of section 40122(g)(3). We must decide, therefore, what meaning Congress intended in enacting this provision.

¶9 In its ordinary usage, the word “employee” would appear to mean any person who works for another. *See, e.g., Black’s Law Dictionary* 543 (7th ed. 1999) (defining “employee” as a “person who works in the service of another person . . . under an express or implied contract of hire, under which the employer has the right to control the details of work performance”). In the context of section 40122(g)(3), however, this meaning is clearly too broad. If applied here, it would include political appointees, as well as those who, with no prior federal service, have just begun to work for the FAA. Nothing in the Ford Act or its legislative history suggests that Congress intended to confer Board appeal rights on such a broad range of individuals. It appears, therefore, that a narrower definition, intended to be applied in the federal employment context, should be applied here. FAA’s PMS and [5 U.S.C. § 7511](#)(a)(1) each provide a definition that is arguably applicable.

¶10 As we have indicated above, the appellant argues that the definition of “employee” in [5 U.S.C. § 7511](#)(a)(1) is not applicable to him, and that the applicable definition is instead the definition of “employee” that is provided in the FAA’s PMS. In support of this argument, he refers to [49 U.S.C. § 40122](#)(g)(2), which provides that, except for the sections and chapters listed in that paragraph, the provisions of title 5 of the U.S. Code do not apply to the FAA. PFR at 5-6. As the appellant notes, *id.* at 6, neither section 7511 nor any other section of chapter 75 is listed in section 40122(g)(2). The appellant asserts, therefore, that the definition of “employee” that applies here is that in the FAA’s

PMS, and he notes that the agency agrees with him that the Board has jurisdiction over this case. *Id.* at 7-8.

¶11 We note first that the agency’s concurrence in the appellant’s position that the Board has jurisdiction over this appeal does not establish that this position is correct, and does not relieve the Board of the responsibility of making its own determination on the subject. *See Heath v. U.S. Postal Service*, [107 M.S.P.R. 366](#), ¶ 6 (2007) (while parties may stipulate to facts, the ultimate question of jurisdiction is a legal matter not subject to stipulation). Moreover, the Board has consistently held that the definition of “employee” that is provided in section 7511(a)(1) is applicable to cases such as this. In *Cruz-Packer v. Department of Homeland Security*, [102 M.S.P.R. 64](#), ¶¶ 7-9, 12 (2006), for example, the Board addressed the issue of whether it had jurisdiction, under [49 U.S.C. § 40122\(g\)](#), over the removal appeal of an FAA employee; it stated that it could exercise jurisdiction over such an appeal if the appellant met the definition of an “employee” under [5 U.S.C. § 7511](#); and it found that it had jurisdiction over the appeal because the appellant met the criteria of [5 U.S.C. § 7511\(a\)\(1\)](#). In other cases, it has also applied [5 U.S.C. § 7511\(a\)\(1\)](#) in determining whether an FAA employee has appeal rights under 49 U.S.C. § 40122(g)(3). *E.g.*, *Coleman v. Department of Homeland Security*, [101 M.S.P.R. 564](#), ¶ 4 (2006); *Zambito v. Department of Homeland Security*, [100 M.S.P.R. 550](#), ¶¶ 6, 8-13 (2005); *Connolly v. Department of Homeland Security*, [99 M.S.P.R. 422](#), ¶¶ 8, 16 (2005).¹

¹ Although the appellant argues that *Cruz-Packer* and *Zambito* “do not fully support the” administrative judge’s findings regarding jurisdiction, PFR at 10, we disagree. In those cases, the Board directly addressed the effect of the statutory provision that is at the heart of this case, i.e., [49 U.S.C. § 40122\(g\)\(3\)](#), and directly addressed the issue of which individuals were entitled to appeal their involuntary separations to the Board under that provision. *Cruz-Packer*, [102 M.S.P.R. 64](#), ¶¶ 7-8; *Zambito*, [100 M.S.P.R. 500](#), ¶¶ 8-9. It also applied the provisions of [5 U.S.C. § 7511](#) in determining whether the appellants in those cases were “employees” entitled to appeal their separations to the Board. *Cruz-Packer*, [102 M.S.P.R. 64](#), ¶ 9; *Zambito*, [100 M.S.P.R. 500](#), ¶¶ 10-12.

¶12 We note further that our reviewing court, whose precedent is binding on us, *see Fairall v. Veterans Administration*, [33 M.S.P.R. 33](#), 39, *aff'd*, [844 F.2d 775](#) (Fed. Cir. 1987), has taken the same position. In *Coradeschi v. Department of Homeland Security*, [439 F.3d 1329](#), 1332-34 (Fed. Cir. 2006), it held that an individual claiming a right to appeal to the Board under [49 U.S.C. § 40122](#) could file such an appeal only if he met the definition of an “employee” under 5 U.S.C. § 7511, and it proceeded to apply that definition to the plaintiff in that case.

¶13 In arguing that section 7511 is not applicable, the appellant relies on *Jewell v. Department of Homeland Security*, 2005 MSPB Lexis 2860 *4 (Initial Decision, May 19, 2005), *petition for review denied*, 100 M.S.P.R. 63 (2005) (Table), an initial decision in which a Board administrative judge found that the definitions of section 7511 did not apply to an appeal under [49 U.S.C. § 40122\(g\)](#), and that those in the FAA’s PMS applied instead. PFR at 7-8. He notes that the Board denied a petition for review of that initial decision, and he seems to argue that the denial reflects the Board’s conclusion that the decision was correct. *See id.* Initial decisions of the Board have no precedential value, however, and the petition for review in this case was denied by nonprecedential final order, rather than by a precedential opinion and order. *E.g., Fitzgerald v. Department of the Air Force*, [108 M.S.P.R. 620](#), ¶ 15 (2008); *Jewell*, [100 M.S.P.R. 63](#). Furthermore, the Board’s denial of a petition for review does not necessarily indicate that the Board concurs in every aspect of the initial decision. The Board generally does not consider issues that are not raised on review; and, even when the petitioning party establishes that the administrative judge made an error in adjudicating the case, the Board may deny the petition if the error does not affect the outcome of the case. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (an adjudicatory error that is not prejudicial to a party’s substantive rights provides no basis for reversal of an initial decision). Finally, the initial decision in that case suggests that the appellant met the definition of

“employee” that is provided in [5 U.S.C. § 7511](#). *Compare Jewell*, 2005 MSPB 2860 *4 (finding that agency rules, which provided a Board appeal right to “non-screener personnel who have at least two years of current continuous service in the same or a similar position,” provided the appellant with a Board appeal right),² with [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(ii\)](#) (an individual in the excepted service who is not a preference eligible is an “employee,” for purposes of chapter 75, if he “has completed 2 years of current continuous service in the same or similar positions . . .”).

¶14 The appellant also argues, in effect, that, although Congress restored FAA employees’ right to appeal certain actions, it did not restore the statutory provisions defining the categories of individuals who could appeal those actions. *See* PFR at 9-10. Before the enactment of the 1996 legislation mentioned above, however, the Board did not have jurisdiction over all removals. Instead, it had jurisdiction over only those that were appealable under 5 U.S.C. chapter 75, i.e., removals of individuals who met the definition of an “employee” under [5 U.S.C. § 7511\(a\)\(1\)](#), who were not otherwise excluded by [5 U.S.C. § 7511\(b\)](#), and whose removals were not excluded from Board jurisdiction by [5 U.S.C. § 7512\(A\)](#), (B), (D), or (E). We see nothing in [49 U.S.C. § 40122\(g\)](#), or in the legislative history of that section, that reflects any congressional intent to expand the Board’s jurisdiction beyond what it had prior to April 1, 1996. In fact, the language of 49 U.S.C. § 40122(g)(3) that is quoted above – providing the right to appeal “any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996” – is inconsistent with any such intent.

¶15 In addition, the appellant seems to argue that paragraph (h) of [49 U.S.C. § 40122](#) supports his position. *See* PFR at 9-10. Under that paragraph, an FAA

² A copy of the initial decision in *Jewell*, which the appellant submitted below with his response to the show-cause order mentioned above, is included under Tab 23 of the appeal file.

employee “who is the subject of a major adverse personnel action may contest the action either through any contractual grievance procedure that is applicable to the employee as a member of the collective bargaining unit or through the [FAA’s] internal process relating to review of major adverse personnel actions . . . , or under section 40122(g)(3).” According to the appellant, construing the third of these alternatives – i.e., an appeal to the Board under section 40122(g)(3) – as applying only when the removed individual is an “employee” under 5 U.S.C. § 7511 would be inconsistent with the language of paragraph (h). PFR at 10.

¶16 The paragraph that immediately follows the one quoted above, however, i.e., paragraph (i) of section 40122, is inconsistent with this argument. That paragraph generally prohibits an individual from pursuing more than one of the three alternatives described in paragraph (h). It does so by providing that, “[w]here a major adverse personnel action may be contested through more than one of the indicated forums (such as the contractual grievance procedure, the [FAA’s] internal process, or that of the Merit Systems Protection Board), an employee must elect the forum through which the matter will be contested” (emphasis added). The language of this paragraph makes clear that not all “major adverse personnel actions” that may be appealed under the first or second of the alternatives listed in paragraphs (h) and (i) “may be contested through more than one of” those three alternative forums. Some of them, under this language, may be appealable under one forum but not under another.

¶17 Finally, we note that we addressed a somewhat similar matter in a case we decided shortly after the administrative judge issued the initial decision in the present case. In *Hart v. Department of Transportation*, [109 M.S.P.R. 280](#), ¶¶ 8-10 (2008), we held that the FAA’s PMS, and not 5 U.S.C. chapter 75, defined the procedural protections to which an employee affected by an adverse action was entitled. This holding is not inconsistent with a holding that the Board’s jurisdiction over removals of FAA employees is determined under [5 U.S.C. § 7511](#). Nothing in the Ford Act or elsewhere provides that the procedures to be

followed in effecting adverse actions are to be the same under that act as they were prior to April 1, 1996. As we have noted above, however, that act does provide that the appeal rights it was restoring in [49 U.S.C. § 40122\(g\)\(3\)](#) were to be the same rights that existed on March 31, 1996. Because only FAA employees who were covered under 5 U.S.C. § 7511 were entitled on that date to appeal their removals to the Board, only those who meet that section’s definition of an “employee” are entitled to appeal their removals to the Board under 49 U.S.C. § 40122(g)(3).

Whether the Appellant is an “Employee” under [5 U.S.C. § 7511\(a\)\(1\)](#)

¶18 We have indicated above that the appellant argues, in the alternative, that, even if [5 U.S.C. § 7511](#) is applicable, he meets the requirements of that section. Specifically, he asserts that FAA employees were part of the competitive service until April 1, 1996; he notes that competitive service employees are “employees” under section 7511(a)(1) if they have completed 1 year of current continuous service in the same or similar positions; and he states that he meets this criterion. PFR at 12.

¶19 As we have noted above, however, [49 U.S.C. § 40122\(g\)\(3\)](#) restored the right to appeal “any action that was appealable to the Board . . . as of March 31, 1996” (emphasis added). The action at issue here is the appellant’s removal from an excepted service position. Evidence that positions such as that held by the appellant would have been in the competitive service on that date is immaterial to the jurisdictional issues here.

¶20 Finally, the appellant argues that he is a preference eligible, and that his appeal right therefore should be determined based on [5 U.S.C. § 7511\(a\)\(1\)\(B\)](#), rather than on [5 U.S.C. § 7511\(a\)\(1\)\(C\)](#).³ PFR at 12-13. The administrative

³ Under [5 U.S.C. § 7511\(a\)\(1\)\(B\)](#), an individual may be an “employee” after completing only “1 year of service in the same or similar positions . . . ,” rather than the 2 years required under paragraph (a)(1)(C) of that section.

judge addressed this argument below and found that the appellant was not a preference eligible. Initial Decision at 5-7. We see no error in that finding. *See, e.g.,* [5 U.S.C. § 2108](#)(1)(D) (providing preference for 180 days or more of service on “active duty as defined by section 101(21) of title 38”); 38 U.S.C. § 101(21) (excluding active duty for training from the definition of “active duty”).

¶21 Because the appellant was removed from a position in the excepted service, because he is not a preference eligible, and because he had less than 2 years of current continuous service at the time of the removal, he is not an “employee” under [5 U.S.C. § 7511](#)(a)(1). The Board therefore lacks jurisdiction over his appeal.

ORDER

¶22 The appellant’s appeal is DISMISSED for lack of jurisdiction. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

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