



U.S. Merit Systems Protection Board

Case Report for January 6, 2017

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BOARD DECISIONS

Appellant: Harris L. Winns

Agency: United States Postal Service

Decision Number: [2017 MSPB 1](#)

Docket Number: SF-0752-15-0165-M-1

Issuance Date: January 4, 2017

Appeal Type: Adverse Action by Agency

Action Type: Removal

Current Continuous Service

Continuing Contract Theory

The agency employed the preference-eligible appellant in a series of four temporary, time-limited appointments. Each appointment was for less than a year and each was separated by a break in service of at least several days. Most recently, following a 5-day break in service, the agency appointed the appellant to a temporary Postal Support Employee position. Approximately 9 months later, before that appointment expired, the agency terminated the appellant's employment for alleged misconduct. The appellant appealed his termination to the Board. The administrative judge dismissed the appeal for lack of jurisdiction, finding, in pertinent part, that the appellant failed to nonfrivolously allege that he was an employee with Board appeal rights pursuant to 5 U.S.C. § 7511(a)(1)(B) because he had not completed 1 year of current continuous service at the time of his termination.

The appellant filed a petition for review of the initial decision. In relevant part, the appellant argued, for the first time on review, that he had Board appeal rights under the "continuing employment contract" theory set forth in *Roden v. Tennessee Valley Authority*, 25 M.S.P.R. 363, 367-68 (1984), in which the Board found that a preference-eligible employee who held a series of five temporary appointments to the same position, separated by short breaks in service, established jurisdiction over his termination appeal, even though he held the appointment from which he was terminated for less than a year. The Board denied the appellant's petition for review without addressing his arguments regarding *Roden*. The appellant appealed the Board's final order to the U.S. Court of Appeals for Federal Circuit, which subsequently granted the

Board's request to remand the case to the Board for further consideration of the appellant's arguments regarding *Roden*.

Holding: The Board affirmed the initial decision, except as modified by the opinion and order to supplement the administrative judge's jurisdictional analysis and to find that *Roden* and subsequent decisions relying on the "continuing employment contract" theory articulated in *Roden* are no longer good law.

1. The Board explained that OPM's regulation, 5 C.F.R. § 752.402, which defines "current continuous employment" for purposes of 5 U.S.C. § 7511(a)(1)(B) as a "period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday," does not provide for an exception to the requirement that the service be without a break of a workday in the cases of a "continuing employment contract" or any other circumstances.
2. The Board held that, under 5 C.F.R. § 752.402, neither the employee's service in *Roden*, nor the appellant's service at issue in the current appeal, qualified as "current continuous service."
3. The Board further found that OPM's definition of "current continuous service" is entitled to *Chevron* deference because it is in accordance with the plain meaning of "continuous" and the legislative history of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, and it is both reasonable and consistent with the statute.
4. The Board observed that *Roden* was incorrectly decided to the extent that it found that an appellant could establish Board jurisdiction on the basis of a "continuing employment contract" theory regardless of whether he fell within the definition of an employee with Board appeal rights because parties cannot confer jurisdiction by a contract or agreement where none otherwise exists.
5. The Board overruled *Roden* and its progeny to the extent that they held that an appellant may establish "current continuous service" for the purposes of 5 U.S.C. § 7511(a)(1)(B) under a "continuing employment contract" theory, despite a break in service of a workday.

Appellant: Joyce M. Delorme

Agency: Department of the Interior

Decision Number: [2017 MSPB 2](#)

Docket Number: DE-3443-12-0472-C-1

Issuance Date: January 4, 2017

Appeal Type: Miscellaneous

Action Type: Miscellaneous "3443" Action

Settlement Agreements

Enforcement

Citing regulations pertaining to the termination of probationary employees, the agency separated the appellant from her excepted-service position. The appellant filed a Board

appeal, and the administrative judge dismissed the appeal for lack of jurisdiction because the appellant did not meet the definition of an employee with Board appeal rights under 5 U.S.C. § 7511(a)(1). The appellant filed a petition for review of the initial decision, and the Board remanded the matter for further adjudication on the issue of jurisdiction. On remand, while the issue of jurisdiction was still unresolved, the parties entered into a settlement agreement. In relevant part, the settlement agreement provided that the agreement was “submitted for enforcement by the [Board].” In the remand initial decision dismissing the appeal as withdrawn, the administrative judge found that the agreement was lawful and freely reached but that, because the issue of jurisdiction over the underlying matter was unresolved, the Board could accept the agreement into the record only for the limited purpose of memorializing that the appeal was withdrawn as part of an agreement.

The appellant filed a petition for enforcement of the remand initial decision. The administrative judge dismissed the petition for enforcement, concluding that the settlement agreement was not enforceable by the Board because the question of whether the Board had jurisdiction over the underlying matter appealed had not been determined. The appellant filed a petition for review of the compliance initial decision.

Holding: The Board vacated the compliance initial decision and remanded the compliance appeal to the field office for further adjudication in accordance with the opinion and order.

- 1. The Board found that the plain language of 5 U.S.C. §§ 1204(a)(1)-(2) and 7701(h), as well as public policy considerations, support the exercise of enforcement authority over settlement agreements that have been entered into the record, independent of any prior finding of Board jurisdiction over the underlying matter being settled.**
- 2. The Board overruled *Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 590-91 (1989), and its progeny to the extent that they required that jurisdiction be established over the underlying matter appealed before a settlement agreement could be accepted into the record and enforced by the Board.**

COURT DECISIONS

NONPRECEDENTIAL:

Corkery v. Department of Homeland Security, [No. 2015-3216](#) (Jan. 4, 2017) (No. FMCS 13-02672-6) (affirming arbitration decision, which upheld the appellant’s removal and denying the union’s motion for sanctions).