



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for June 15, 2018

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and they are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

COURT DECISIONS

PRECEDENTIAL:

Petitioners: Derek Williams, Harris Winns

Respondent: Merit Systems Protection Board

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Numbers: [2017-1535](#), [2017-1663](#)

MSPB Docket Numbers: DA-0752-15-0530-M-1, SF-0752-15-0165-M-1

Issuance Date: June 11, 2018

Jurisdiction

- "Employee"

The petitioners filed separate Board appeals challenging their removals from the U.S. Postal Service. In both cases, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction, finding that the petitioner was not an "employee" with appeal rights to the Board under 5 U.S.C. § 7511(a)(1)(B)(ii) because the petitioner did not complete 1 year of current continuous service. The petitioners filed petitions for review and the Board affirmed the initial decisions.

On appeal to the Federal Circuit, petitioner Winns argued that he was an "employee" with Board appeal rights under *Roden v. Tennessee Valley Authority*, 25 M.S.P.R. 363 (1984). He claimed that, under

Roden, he could qualify as an “employee” based on a “continuing employment contract” theory because he had worked in a series of temporary appointments. The Board consequently requested remand to consider whether *Roden* was still good law. On remand, the Board held that regulations promulgated by the Office of Personnel Management (OPM) superseded *Roden* and abrogated the “continuing employment contract” theory. As a result, the Board held, based on 5 C.F.R. § 752.402, that the series of temporary appointments held by petitioner Winns did not qualify as “continuous employment,” and it dismissed the appeal for lack of jurisdiction.

Petitioner Williams argued on appeal to the Federal Circuit that he was an “employee” with Board appeal rights under *Roden* because he held an appointment immediately prior to his final appointment that should count toward the 1 year of “current continuous service.” The Board asked for a remand to consider his argument. On remand, the Board concluded that it lacked jurisdiction over the appeal given it had overruled *Roden* in its decision in petitioner Winns’s appeal. Petitioner Williams also argued, in the alternative, that he retained his appeal rights from his prior appointment pursuant to the Board’s opinion in *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344 (1991). In *Exum*, the Board held that an employee could retain appeal rights from a prior position if the agency failed to inform the employee that the change in position might result in a loss of appeal rights. The Board found that petitioner Williams did not satisfy the *Exum* requirements, however, because he failed to show that he would not have accepted his new position if he had known of his loss of appeal rights.

Holding: The court affirmed the Board’s dismissals for lack of jurisdiction.

1. The court determined that the Board correctly found that petitioners Williams and Winns did not meet the requirement of “current continuous service,” as defined by OPM. The court agreed with the Board that the “continuing employment contract” theory in *Roden* was contrary to OPM’s regulations and that those regulations are entitled to *Chevron* deference.
2. The court agreed with the Board that petitioner Williams did have appeal rights under *Exum*, and it overruled *Exum*. The court affirmed its previous holding in *Carrow v. Merit Systems Protection Board*, 626 F.3d 1348, 1353 (Fed. Cir. 2010), that an agency’s failure to advise Federal employees on the terms of their appointment does not create appeal rights for positions that were not given appeal rights by Congress. It noted that the Board previously had limited the *Exum* rule to transfers

within the same agency, but it concluded that its reasoning in *Carrow* applied to both transfers within the same agency and to a different agency. The court further noted that its decision is distinguishable from situations in which an employee with appeal rights is coerced or deceived into resigning or retiring, and it specifically did not consider situations in which an employee is coerced or deceived into accepting a new position, because it was not alleged by petitioner Williams.

3. The court rejected petitioner Williams's argument that the Board's decision to overrule *Roden* while his appeal was ongoing violated his due process rights.

NONPRECEDENTIAL:

Watkins v. Merit Systems Protection Board, No. [2018-1420](#) (Fed. Cir. June 8, 2018) (MSPB Docket No. DC-0831-18-0148-I-1) (affirming the Board's dismissal of the petitioner's appeal concerning his request for an immediate retirement annuity under the Civil Service Retirement System on two grounds: that the Board lacked jurisdiction and that the appeal was duplicative of a still-pending appeal on the same claim).

Garvin v. Merit Systems Protection Board, No. [2018-1083](#) (Fed. Cir. June 11, 2018) (MSPB Docket No. DC-1221-17-0550-W-1) (affirming the Board's decision that dismissed the petitioner's individual right of action appeal for failure to nonfrivolously allege jurisdiction and/or failure to exhaust her administrative remedies).

Watson v. Federal Bureau of Prisons, No. [2017-1979](#) (Fed. Cir. June 12, 2018) (Arbitrator's decision in No. 14-57399-A) (finding, sua sponte, that the court lacked jurisdiction over the mixed case and transferring the case to district court even where the employee asserted that he had abandoned his discrimination claims because the court determined that the case still presented at least claims of violations of the Rehabilitation Act).