



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for January 22, 2021

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PRECEDENTIAL COURT DECISIONS

Case Name: Mouton-Miller v. Merit Systems Protection Board

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

Case Number: [2020-1266](#)

MSPB Docket Number: AT-0752-19-0643-I-1

Issuance Date: January 19, 2021

JURISDICTION

PROBATIONARY PERIOD

- SUPERVISORY PROBATIONARY PERIOD

The appellant held an excepted-service supervisory position at the U.S. Postal Service. She was then, without a break in service, appointed to a competitive-service supervisory position at the Department of Homeland Security (DHS). This latter appointment was subject to the completion of a 1-year supervisory probationary period pursuant to 5 U.S.C. § 3321(a)(2). Before the end of the appellant's probationary period, DHS demoted her to a non-supervisory position due to alleged performance issues. While DHS initially reduced the appellant's step when effectuating this action, it later determined that it did so in error and provided her with back pay and other employment benefits associated with the step correction.

The appellant appealed her demotion to the Board. In an initial decision, the Board dismissed the appellant's appeal for lack of jurisdiction, finding that because the appellant did not complete her competitive-service supervisory probationary period, the Board was barred under 5 U.S.C. § 7512(C) from adjudicating the merits of her demotion as an adverse action. Once the initial decision became the Board's final decision, the appellant sought review in the U.S. Court of Appeals for the Federal Circuit.

Holding: In a 3-0 panel decision, the court affirmed the Board's dismissal of the appellant's adverse action appeal for lack of jurisdiction.

- 1. As set forth in 5 U.S.C. § 7512(C), adverse action appeals under the Board's jurisdiction do not include, "the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager." Therefore, the appellant in this case had the burden to prove that she completed her competitive-service supervisory probationary period under 5 U.S.C. § 3321(a)(2). The court outlined that section 3321 expressly refers to the competitive service, as do the accompanying regulations at 5 C.F.R. §§ 315.901-909. Thus, the court determined that tacking to meet the probationary period timing requisite is generally permitted between two competitive-service supervisory positions. However, the tacking of supervisory roles in the excepted and competitive services is prohibited.**
- 2. In applying these holdings to the appellant in this case, the court found that she could not tack on her service as a supervisor in an excepted-service position at the U.S. Postal Service to her competitive-service supervisory position with DHS when calculating the duration spent in her supervisory probationary period. It was undisputed that DHS demoted the appellant before her 1-year competitive-service supervisory probationary period concluded. Thus, 5 U.S.C. § 7512(C) applies and prohibits the Board from taking jurisdiction to hear the merits of the appellant's demotion as an adverse action appeal.**
- 3. The appellant misplaced her reliance on Board decisions recognizing that "current continuous service" under 5 U.S.C. § 7511(a)(1)(A)(ii) includes the excepted and competitive services. The jurisdictional issue in this case is not whether the appellant is an "employee" under 5 U.S.C. § 7511; rather, it is whether she completed her competitive-service supervisory probationary period. The court clarified that the interpretation of "current continuous service" under section 7511 is "irrelevant" when**

determining whether an agency subjected an individual to an appealable adverse action under section 7512.

- 4. The appellant did not allege that DHS demoted her due to partisan political affiliation or marital status, meaning the Board could not take jurisdiction under 5 C.F.R. § 315.908(b).**
- 5. The court recognized an agency's broad discretion under 5 C.F.R. § 315.905 to determine the length of a competitive-service supervisory probationary period. In this case, DHS did not have an internal policy on the matter and relied on the statute and regulations.**

NONPRECEDENTIAL COURT DECISIONS

Searcy, Jr. v. Department of Agriculture, No. [2020-2089](#), (Fed. Cir. January 21, 2021) (MSPB Docket No. AT-1221-17-0227-W-1): The Board dismissed the appellant's individual right of action appeal for failing to state a claim upon which relief could be granted and due to the doctrine of res judicata. On appeal, the Federal Circuit affirmed the Board's decision by holding: (1) the Board did not err when making its jurisdictional determination based solely on the written record; (2) the Board's jurisdiction to hear claims under the Whistleblower Protection Enhancement Act of 2012 does not extend to claims under 5 U.S.C. § 2302(b)(11); (3) the Board correctly applied the doctrine of res judicata, as the appellant's claims are premised on the same facts previously investigated and litigated and the statutes cited by the appellant do not bar the application of this doctrine; and (4) the remaining arguments proffered by the appellant were found to be meritless.

Huang v. Department of Homeland Security, No. [2020-70242](#), (9th Cir. January 15, 2021) (MSPB Docket No. SF-1221-19-0228-W-1): In this individual right of action appeal, the Board found that while the appellant established a prima facie case of reprisal based on the agency's perception of her as a whistleblower, the agency proved by clear and convincing evidence that it would have suspended her regardless of this perception. The appellant sought review in the Ninth Circuit Court of Appeals under the All Circuit Review Act. The court affirmed the Board's decision, finding: (1) the Board did not err in assessing the strength of the agency's evidence in support of the suspension; (2) the Board did not commit an error in finding insufficient evidence of retaliatory animus; (3) the third *Carr* factor played no role in the analysis because the agency did not set forth a similarly-situated comparator who was not a whistleblower but still received the same discipline; and (4) the Board's conclusion that the agency met its clear and convincing standard is supported by substantial evidence.

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