



# U.S. Merit Systems Protection Board

CASE REPORT

DATE: August 29, 2008

**Note:** These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and 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.

## BOARD DECISIONS

- ▶ **Appellant: Henry W. Humme**  
**Agency: Department of the Interior**  
**Decision Number: [2008 MSPB 205](#)**  
Docket Number: DE-3443-05-0111-I-1  
Issuance Date: August 21, 2008

### **Board Procedures/Authorities**

- **Reopening and Reconsideration**

### **Jurisdiction**

- **Probationers**

The appellant requested that the Board reopen his appeal, which was dismissed for lack of jurisdiction in January 2005. The appellant received an appointment with the agency's Southwestern Indian Polytechnic Institute (SIPI) in March 2003, subject to a probationary period of 3 years, under a demonstration project authorized by Public Law No. 105-337. The agency terminated his employment effective December 10, 2004. The administrative judge (AJ) based the dismissal on her finding that the appellant failed to prove he was an "employee" under [5 U.S.C. § 7511](#)(a)(1)(C)(i) or (ii), and explicitly stated that she made no determination as to the effect of the demonstration project on the appellant's Board appeal rights. The appellant attaches a memorandum dated August 10, 2007, from the President of SIPI, which states that the demonstration project under which the appellant was hired had been terminated retroactive to October 2000. The appellant asserted that he did not become aware of this memorandum until February 2008. He argues that, because the demonstration project was not properly implemented and was retroactively terminated, his employment was subject to OPM regulations, his probationary period would have been 1 year, not 3 years, and that he had successfully completed his probationary period prior to his termination.

**Holdings: The Board granted the appellant's request to reopen and remanded the appeal to the regional office for further adjudication:**

1. In deciding whether to exercise its authority to reopen under [5 U.S.C. § 7701\(e\)\(1\)\(B\)](#) and [5 C.F.R. § 1201.118](#), the Board balances the desirability for finality against the public interest in reaching the right result, and has the discretion to reopen an appeal to prevent a “manifest injustice” when an error implicates a party’s “basic procedural rights.”

2. Civil service positions in the executive branch are in the competitive service unless one of three exceptions applies, one of which is “positions which are specifically excepted from the competitive service by or under statute.” The statute authorizing SIPI to conduct a demonstration project excepted that demonstration project from the requirements of Title 5 of the United States Code, and had the effect of exempting SIPI from conditioning its appointments on the passage of a competitive examination. Accordingly, the appellant would have been properly placed in the excepted service if the demonstration project had been validly implemented.

3. In the absence of the demonstration project, however, it is unclear whether the appellant’s position was specifically excepted from the competitive service. Because the resolution of that issue has a direct impact on the Board’s jurisdiction over the appellant’s appeal of his termination, a remand is required.

► **Appellant: Lori E. Heath**

**Agency: Department of Agriculture**

**Decision Number: [2008 MSPB 204](#)**

Docket Number: CH-0752-07-0675-I-1

Issuance Date: August 21, 2008

Appeal Type: Adverse Action by Agency

Action Type: Removal

**Timeliness - PFR**

The agency filed a petition for review (PFR) of an initial decision that found that the agency failed to prove its charge of improper conduct, and sustained the appellant’s defense of disability discrimination. The original deadline for filing a timely PFR was March 13, 2008, but the agency asked for and received an extension to April 4. According to the agency representative, she was on work-related travel that day and only realized after 6 p.m. that she had lost the thumb drive on which the petition was stored. She chose not to file a further request for an extension until the following Monday, April 7, which was denied. She explained that her workload and a weekend of Army Reserve commitments prevented her from recreating and submitting the PFR until April 27.

**Holding: The PFR was dismissed as untimely filed without good cause shown. The agency representative has not shown that she exercised due diligence or ordinary prudence under the circumstances, in that she did not take the simple step of requesting a further extension based upon her unusual circumstances.**