

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

AMY MITCHELL,
Appellant,

DOCKET NUMBER
DA-0752-11-0601-I-1

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: December 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Peter B. Broida, Esquire, Arlington, Virginia, for the appellant.

Jin-Hwa L. Frazier and Jill A. Weissman, Esquire, Washington, D.C., for
the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. Generally, we grant petitions such as this one only when: the initial decision contains erroneous

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. See Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).² After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

Effective April 12, 1998, the nonpreference eligible appellant received an excepted service appointment to a General Attorney position with the Social Security Administration (SSA). Initial Appeal File (IAF), Tab 1 at 16, Tab 32 at 4. On November 27, 2006, while still employed by SSA, the appellant received an appointment as a Special Assistant United States Attorney (SAUSA) with the United States Attorney's Office in the Department of Justice (DOJ or the agency) for a 1-year period, not-to-exceed (NTE) November 26, 2007. IAF, Tab 1 at 12, Tab 32 at 4. Her appointment was extended twice, once on November 26, 2007, for a 1-year period NTE November 26, 2008, and again for a 1-year period NTE November 26, 2009. IAF, Tab 1 at 10-11, Tab 32 at 4. During her appointment as an SAUSA, the appellant remained on the rolls of SSA. IAF, Tab 32 at 4.

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

On December 21, 2008, before the appellant's last appointment as an SAUSA expired, the appellant was hired by DOJ and received an excepted service appointment as an Assistant United States Attorney (AUSA), for a period NTE June 20, 2010, pending adjudication of a DOJ background investigation. IAF, Tab 1 at 9, Tab 32 at 5. The SF-50 documenting the appointment characterized the appointment, in the remarks section, as a "temporary appointment." IAF, Tab 1 at 9. The appellant was subsequently informed that she was being converted to a permanent position with a 2-year trial period beginning on August 2, 2009. IAF, Tab 1 at 8, Tab 32 at 5. The SF-50 documenting her conversion stated that during her 2-year trial period she could be removed without cause and had no right to appeal. IAF, Tab 1 at 8, Tab 32 at 5. Prior to the expiration of the 2-year period, the agency terminated the appellant's appointment on July 29, 2011, without providing her with notice or an opportunity to respond. IAF, Tab 32 at 5, Tab 26 at 1.

The appellant filed an appeal of her termination, and the administrative judge found that a nonpreference eligible in the excepted service, such as the appellant, may appeal an adverse action if she satisfies the definition of "employee" under [5 U.S.C. § 7511](#)(a)(1)(C). IAF, Tab 33, Initial Decision (ID) at 3. The administrative judge further found that the subsection pertinent to this appeal, (C)(ii), provides that an "employee" is an individual "who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less." ID at 3. The administrative judge then found that the dispositive issue in this appeal was whether the appellant fulfilled the last requirement of the statute, whether her service was "under other than a temporary appointment limited to 2 years or less." ID at 4. The administrative judge concluded that the appellant failed to show that she completed two years in an excepted service position while serving in other than a temporary appointment and that her temporary service

could not be tacked to her permanent service for purposes of meeting the 2-year period required under [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(ii\)](#). ID at 8.

On review, the appellant reasserts her argument that she qualifies as an “employee” with appeal rights to the Board because she was a “term” employee under the December 21, 2008 appointment and, therefore, was serving in other than a temporary appointment. Petition for Review (PFR) File, Tab 1 at 4-13. According to the appellant, her December 21, 2008 appointment was a “term” appointment because, under [5 C.F.R. § 213.104\(a\)\(1\)](#), “temporary appointments” are defined as “appointments for a period not to exceed 1 year” and her appointment was for 18 months. PFR File, Tab 1 at 6-7.

As the administrative judge found, while not dispositive, the agency here characterized the appellant’s December 21, 2008 appointment as temporary. ID at 6; IAF, Tab 1 at 9. More significantly, the U.S. Court of Appeals for the Federal Circuit held in *Forest v. Merit Systems Protection Board*, [47 F.3d 409](#), 411 (Fed. Cir. 1995), that “it appears that Congress intended what the language of the statute states, that excepted service employees have a right to appeal only after completing a prescribed period of continuous service under a *permanent* excepted service position.” (emphasis added). The court also stated that “[b]y the plain terms of § 7511(a)(1)(C)(ii), the two years of current continuous service must be served ‘under other than a temporary appointment,’ i.e., under a *permanent* appointment.” *Forest*, 47 F.3d at 411 (emphasis added). More recently, the Federal Circuit reinforced this interpretation of [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(ii\)](#) in *Roy v. Merit Systems Protection Board*, [672 F.3d 1378](#), 1381 (Fed. Cir. 2012). In *Roy*, which involved an individual serving in a temporary appointment not-to-exceed 18 months, the Federal Circuit found that, because the appellant in that case “had served less than two years in a *permanent* position, she [was] not an employee as § 7511(a)(1)(C)(ii) defines that term.” *Roy*, 672 F.3d at 1381 (emphasis in original). The court further found that the language of the statute “leaves no room to doubt that the two-year continuity

requirement must be satisfied by service in the same or similar *permanent* positions.” *Id.* (emphasis in original).

The appellant argues that the administrative judge erred in relying on the Federal Circuit’s decisions in *Forest* and *Roy* to conclude that she failed to qualify as an “employee” under [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(ii\)](#). PFR File, Tab 1 at 13-15. Specifically, she contends that the 18-month appointment was not a temporary appointment because, under [5 C.F.R. § 213.104\(a\)\(1\)](#), a temporary appointment is one that is limited to 1 year or less. She contends that she therefore held a “term” appointment and that her service should be tacked. The appellant also filed several supplements to her petition for review, among other things, citing two decisions issued by the Federal Circuit after the submission of the appellant’s petition for review.³ PFR File, Tabs 3-4, 6-7. None of the material cited by the appellant demonstrates that the Federal Circuit has reversed or otherwise modified its decisions in *Forest* and *Roy*, and the appellant has not shown why those decisions are not controlling precedent in the instant case. Thus, despite the appellant’s protestations to the contrary, we are bound by the Federal Circuit decisions, and we find no reason to disturb the initial decision.⁴

³ We note that the Board has held that it will consider supplemental filings identifying newly available authority, such as those made by the appellant, when they are relevant to the pending case. *Brown v. Department of Health & Human Services*, [42 M.S.P.R. 291](#), 295 n.4 (1989); see Fed. R. App. P. 28(j). Thus, we have considered the appellant’s references to the Federal Circuit’s decisions in *Wilder v. Merit Systems Protection Board*, [675 F.3d 1319](#) (Fed. Cir. 2012), and *Strader v. Department of Agriculture*, 475 F. App’x 316 (Fed. Cir. 2012).

⁴ In her petition for review, the appellant separately argues that the administrative judge misapplied the tacking doctrine and the Board’s decision in *McCrary v. Department of the Army*, [103 M.S.P.R. 266](#) (2006), PFR File, Tab 1 at 15-19, but we find that the administrative judge correctly applied the Federal Circuit’s precedent in *Forest* and *Roy*, ID at 6-8; see *Roy*, 672 F.3d at 1381-82; *Forest*, 47 F.3d at 411. In *Roy*, the court specifically stated that “[b]ecause at the time of removal, Ms. Roy had served less than two years in a *permanent* position, she is not an employee as § 7511(a)(1)(C)(ii) defines that term,” and that “in order to be an employee within the meaning of [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(ii\)](#), the individual must have served continuously for at least two years

See *Hoover v. Department of the Navy*, [57 M.S.P.R. 545](#), 552 (1993); *Fairall v. Veterans Administration*, [33 M.S.P.R. 33](#), *aff'd*, [844 F.2d 775](#) (Fed. Cir. 1987).

In addition, we note that [5 U.S.C. § 7511](#)(a)(1)(C)(ii) refers to the completion of 2 years of service under other than a “temporary appointment limited to 2 years or less.” Thus, contrary to the appellant’s suggestion, the plain language of the statute itself contemplates “temporary” appointments that can last more than 1 year but less than 2 years. Further, the Board held in *Warren v. Department of Transportation*, [116 M.S.P.R. 554](#), ¶ 12 (2011), that “term” appointments under 5 C.F.R. part 316 apply exclusively to the competitive service. The appellant’s claim, therefore, that her 18-month appointment was a “term” appointment and not a temporary appointment is incorrect because her AUSA position was in the excepted service. Moreover, in *Weidel v. Department of Justice*, [230 F.3d 1380](#) (Fed. Cir. 2000) (Table), an unpublished decision, the court held that the 2-year period of continuous service does not include time spent in a temporary appointment, such as a 14-month appointment to an AUSA position pending a background investigation, similar to the appellant’s 18-month appointment in this case. The court in *Weidel* rejected the appellant’s argument that her appointment was a “provisional” appointment and not a temporary appointment. We find the court’s reasoning in *Weidel* persuasive. See *Worley v. Office of Personnel Management*, [86 M.S.P.R. 237](#), ¶ 8 (2000) (the Board may follow unpublished Federal Circuit decisions that it finds persuasive).

Finally, the Federal Register notices promulgating [5 C.F.R. § 213.104](#), see 59 Fed. Reg. 4601 (Feb. 1, 1994) (proposed regulation); 59 Fed. Reg. 46,895 (Sept. 13, 1994) (final regulation), indicate that the purpose of the regulation was to revise the Office of Personnel Management’s (OPM’s) regulations governing the use of temporary appointments to set a uniform service limit for such

in the same or similar *permanent* positions.” *Roy*, 672 F.3d at 1381-82 (emphasis added).

appointments and thereby ensure that temporary appointments, under which employees receive no benefits, are used to meet truly short-term needs. There is no indication that OPM intended to define the word “temporary” in section 213.104 for purposes of [5 U.S.C. § 7511](#)(a)(1)(C)(ii) and Board appeal rights. The authority cited by OPM for section 213.104 is [5 U.S.C. §§ 3161](#), 3301, and 3302, which deal more generally with the President’s authority to set rules for the civil service, not 5 U.S.C. chapter 75. In fact, OPM’s regulations at 5 C.F.R. part 752 define several terms, but not the word “temporary.” [5 C.F.R. § 752.402](#).

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.