

UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION BOARD

In the matter of:
CLAUD CODRINGTON } Docket No.
v. } NY075299007
DEPARTMENT OF JUSTICE }

OPINION AND ORDER

Appellant was removed from his position as a Correctional Officer, Metropolitan Correctional Center, New York, New York, effective March 6, 1979, pursuant to notice dated March 2, 1979. The notice stated that the action was taken because of appellant's failure to satisfactorily complete the requirements of his probationary period. On appeal to the New York Field Office, appellant contended, *inter alia*, that he was not a probationary employee and that it was improper to remove him as one. He alleged that he had completed his probationary period while he was serving in the same position in Washington, D.C. In his decision dated May 25, 1979, the presiding official found appellant's contentions in this regard to be unrefuted. He concluded that, as a non-probationary employee, appellant was entitled to the procedures set forth in 5 U.S.C. 7513(b) if he was to be removed. Because the instant action did not follow those procedures, it was reversed as contrary to the provisions of the law. The agency was directed to cancel the separation and accomplish appellant's retroactive restoration.

On July 23, 1979, the Board issued an Order on its own motion, reopening the case and directing that the parties submit a brief "addressing the issue of whether the appellant was subject to harmful error by the alleged failure of the agency to comply with the procedures set out in 5 U.S.C. 7513." Appellant has not submitted any representations to the Board. The agency's August 10, 1979 response stated that, during the course of an internal agency review of the case, it had been determined that appellants termination should be overturned and appellant restored to duty retroactive to the date on which his appointment was terminated. Accordingly, it stated, appellant was restored retroactively to March 6, 1979, and he returned to work on April 7, 1979. The agency's submission acknowledges that this information was not provided to the presiding official in a timely manner.

Because the events transpired in the chronological order set forth above, the appellant had actually been restored to duty (and was

still employed in the position from which, earlier, he had been removed) before the date on which the presiding official issued his decision. In a case involving Federal employee, it has been held that, where the plaintiff was restored to duty with full rights to back pay, the case, which sought such relief, was moot as to him. *Gordon v. Blount*, 336 F. Supp. 1271 (D.D.C. 1971). Furthermore, the events set forth above clearly show that the termination, which was the subject of the original appeal, had been rendered moot prior to the date of the decision issued in response to that appeal.

Moreover, the agency's representations to the Board and the documentation it has submitted show that appellant is now considered a tenured employee and, therefore, is no longer subject to possible removal under 5 C.F.R. 315.804. Section 30 of the standard form documenting appellant's return to duty and the cancellation of his separation clearly reflects that appellant holds this status. This factor provides further support for the conclusion that the case is moot.

For these reasons, the decision of the presiding official is hereby vacated and the appeal is dismissed.

This is the final decision of the Merit Systems Board on this case.

The appellant is hereby notified of his right to file a civil action in the Court of Claims or a United States court of appeals within thirty (30) days of receipt of this Order.

For the Board:

ERSA H. POSTON.

January 15, 1980.

MERIT SYSTEMS PROTECTION BOARD

New York Regional Office,
New York, New York

APPEAL OF CLAUD CODRINGTON

Under Section 7513 of Title 5, United States Code

Decision Number: NY075299007

Decided on: May 25, 1979

INTRODUCTION

<i>Name of appellant:</i>	Claud Codrington
<i>Date of Appeal:</i>	March 20, 1979
<i>Department, Organization and Location:</i>	Department of Justice Federal Prison System Metropolitan Correctional Center New York, New York
<i>ActionAppealed:</i>	Termination from position of Cor- rectional Officer GS-007-06
<i>Effective Date:</i>	March 6, 1979

BOARD JURISDICTION

The Board's regulations provide that petitions of appeal shall be filed not later than 20 calendar days after the effective date of the action complained of. The appellant's petition of appeal was filed within the prescribed time limit.

By letter dated March 26, 1979, the agency was notified of the petition of appeal and directed to respond thereto by April 10, 1979. When no response was received, the agency was notified by letter dated April 11, 1979 to respond to the request for information, and that failure to respond within ten days following receipt of this second notice may result in a ruling for the appellant. This notice was delivered to the agency on April 16, 1979. In the absence of a reply, a third request was made on the agency of May 10, 1979, which was received by them on May 11, 1979. A reply was again requested within a ten day time limit. Since no reply has been received, this decision is based upon the evidence of record, as submitted by the appellant as provided for in Section 1203.43 of the Board's regulations.

The Board's appellate jurisdiction in respect to agency removal actions is contained in Chapter 75 of Title 5, United States Code, Subchapter II. For purposes of this subchapter, employee is defined as

(A) An individual in the competitive service who is not serving a probationary or trial period under an initial appointment (Section 7511)

As evidenced by a copy of the Notice of Termination, furnished by the appellant with his petition of appeal, the agency took this action acting on the premise that the latter was serving in a probationary status.

In subpart H of Part 315, Title 5 Code of Federal Regulations, there is a provision that employees who are serving in a probationary or trial period may be separated for unsatisfactory performance or conduct by notification to the employee in writing as to why he or she is being separated and the effective date of the action. (See 5 CFR-315.804)

In his petition of appeal the appellant contends, without refutation that he was improperly terminated as a probationary employee, since he had completed his probationary period of employment while working in the Department of Justice, in the same capacity, in Washington, D.C.

As proof of this statement, he notes that he entered on duty as a Correctional Officer in August 1977, and transferred to the Metropolitan Correctional Center some time after July 1978, at which time he was told it was necessary to complete a new probationary period of employment.

Office of Personnel Management regulations provide that an agency may appoint by transfer a career conditional employee of another agency (5 CFR 315.501) and that if it does so, the employee acquires competitive status on completion of probation. (5 CFR 315.503). In addition, OPM regulations provide that the first year of service—is a probationary period of employment, and that this applies to individuals transferred under § 315.501. (See 5CFR 315.801 and 315.802) Finally, in appendix A of Chapter 315, Federal Personnel Manual, the Office of Personnel Management has stated that in counting service which must be counted toward completion of a probationary period, prior service in the same agency which was in the same line of work; wherein there was no more than one break of less than 30 days in this period of service and which was rendered immediately prior to the appointment (or transfer) is credited in completing the 1 year period. Since on the basis of appellant's petition of appeal, all of the above factors apply to the appellant's case, we conclude that the appellant has established by a preponderance of the evidence that he had completed his probationary period of employment, and was entitled to be treated as a career employee in the competitive service who was not serving in probation.

Accordingly, Section 7513 (b) of the code of federal regulations applies to the action in that case and mandates an advance notice of

30 days; an opportunity to reply orally and in writing; and a written decision in the matter.

Since appellant did not receive the mandated advance notice, etc., as stated above, we find that his removal, as a probationary employee was contrary to the provision of the law.

DECISION

The agency is hereby directed to cancel the removal action in this case and to restore the appellant to an appropriate pay and duty status retroactive to date of his removal.

The appropriate agency administrative officer is requested to furnish this office, no later than 10 days after this decision becomes final (see below), a copy of the official notification of personnel action (SF-50 or equivalent) documenting compliance with the cancellation order. The agency's report should be addressed to the New York Field Office, Merit Systems Protection Board, 26 Federal Plaza, New York, New York 10007.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on June 27, 1979 unless a petition for review is filed with the Board within thirty (30) calendar days after the petitioner's receipt of this decision.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulations.

The petition for review must be received by the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419, no later than thirty (30) calendar days after receipt of this decision. A copy of the petition must be served on all parties and intervenors to this appeal.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the decision of the presiding official was issued; or

(2) The decision of the presiding official is based upon an erroneous interpretation of law, rule, or regulation, or a misapplication of established policy; or

(3) The decision of the presiding official is of a precedential nature involving new or unreviewed policy considerations that may have a substantial impact on a civil service law, rule, or regulation, or a more Government-wide policy directive.

Under 5 U.S.C. 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United

States Court of Claims to review any *final* decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

JOHN E. SELBMAN,
Presiding Official.

May 25, 1979.