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

100 M.S.P.R. 447

JOSEPH F. GREENE,
Appellant,

v.

DEFENSE INTELLIGENCE AGENCY[1],
Agency.

DOCKET NUMBER
DC-315H-03-0578-I-1

DATE: November 2, 2005

John J. Rigby, Esquire, Arlington, Virginia, for the appellant.

Robert H. Schapler, Esquire, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of the January 26, 2005 initial decision that dismissed his termination appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision and REMAND for further adjudication consistent with this Opinion and Order.

[1] The appeal was initially docketed with the Department of Defense as the respondent agency.

## BACKGROUND

¶2 In October 1997, the appellant, a preference-eligible individual, received an indefinite appointment to the excepted service position of Research Technician in the Defense Attache System, Defense Intelligence Agency (DIA). Initial Appeal File (IAF), Tab 8, Exhibit 5. In November 2000, the appellant was appointed to an Intelligence Specialist position in the Office of Naval Intelligence (ONI), Department of the Navy. *Id.*, Exhibit 2. By notice dated October 15, 2001, the appellant was recalled to active duty for approximately 1 year. *Id.*, Exhibit 4. Then, in November 2002, the appellant was transferred to an indefinite status, excepted service, Administrative Officer position in the DIA. *Id.*, Exhibit 1. On May 23, 2003, the agency separated the appellant from the Administrative Officer position for alleged misconduct. *Id.*, Exhibit 12.

¶3 The appellant filed an appeal of his termination. IAF, Tab 1. The agency responded that the Board should dismiss the appeal, arguing that the appellant lacked appeal rights because he was separated during the first year of his appointment. IAF, Tab 8. The appellant argued that he was an employee with appeal rights under 5 U.S.C. § 7511(a)(1)(B), because he had completed at least 1 year of current continuous service in the same or similar positions in the Department of Defense. IAF, Tabs 1, 4. On her own motion, the administrative judge certified for interlocutory appeal the issue of whether a jurisdictional hearing was appropriate. IAF, Tab 15. The two Board members failed to reach an agreement, however, and referred the matter back to the regional office. *Greene v. Department of Defense*, 97 M.S.P.R. 446 (2004).

¶4 The administrative judge then issued a show-cause order, advising the appellant that, if his ONI and DIA positions were deemed to be in different agencies, the Board would lack jurisdiction over the appeal, as the appellant had occupied the Administrative Officer position in DIA for less than a year at the time of his termination. IAF, Tab 21. In response to the order, the appellant argued that the positions were within the same agency, and that, in any event,

service in different agencies may be combined to meet the required 1 year of current continuous service. IAF, Tab 22. The administrative judge dismissed the appeal for lack of jurisdiction, finding that ONI and DIA were different agencies, and that the appellant's service in multiple agencies could not be combined to meet the definition of an "employee" under 5 U.S.C. § 7511(a)(1)(B). IAF, Tab 26.

¶5 On petition for review, the appellant reiterates his argument that he qualifies as an "employee" under 5 U.S.C. § 7511(a)(1)(B). Petition for Review File (PFRF), Tab 1. The agency has filed a response. PFRF, Tab 5.

## ANALYSIS

¶6 An individual who meets the definition of an "employee" in 5 U.S.C. § 7511(a)(1) generally has standing to challenge his removal from the federal service by filing an appeal with the Board. *See* 5 U.S.C. §§ 7512(1), 7513(d). The definition of "employee" includes "a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions . . . in an Executive agency . . . ." 5 U.S.C. § 7511(a)(1)(B)(i).[2] It is undisputed that the appellant did not complete a full year of continuous service with the DIA following his transfer from ONI. Moreover, as the administrative judge correctly found, the ONI, which is part of the Department of the Navy, is not the same agency as the DIA. *See Pervez v. Department of the Navy*, 193 F.3d 1371, 1373 (Fed. Cir. 1999) (holding that the Department of the Army and the Department of the Navy are not the same agency). Thus, Board has jurisdiction over this appeal only if "an Executive agency" may refer to more than one agency.

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[2] Ordinarily, the definition of "employee" excludes individuals occupying positions within an intelligence component of an agency. However, this exclusion does not apply to individuals meeting the definition of "employee" under 5 U.S.C. § 7511(a)(1)(B). *See* 5 U.S.C. § 7511(b)(8).

¶7 The administrative judge found that the plain language of the statute, "an Executive agency," clearly indicates a single agency. IAF, Tab 26 at 7. However, it is well established that legislative terms that are singular in form may apply to multiple subjects or objects. *See* 2A Singer, *Statutes and Statutory Construction* § 47:34 (6th ed. 2000) ("It is most often ruled that a term introduced by 'a' or 'an' applies to multiple subjects or objects unless there is reason to find that singular application was intended or is reasonably understood."). Because the language of the statute is ambiguous, it will be necessary to consider legislative history and other extrinsic evidence of congressional intent.

¶8 We find that legislative history strongly supports the view that service in multiple agencies may be combined to satisfy the definition of "employee" set forth in 5 U.S.C. § 7511(a)(1)(B). In its original form, the Civil Service Reform Act of 1978 provided that an individual was entitled to appeal his separation if he was "a preference eligible in an Executive agency in the excepted service, [or] a preference eligible in the United States Postal Service or the Postal Rate Commission, who ha[d] completed 1 year of current continuous service in the same or similar positions . . . ." 5 U.S.C. § 7511(a)(1)(B) (1978). In this context, it is clear that the term "an Executive agency" refers only to the type of position occupied by the preference-eligible individual at the time of his separation. Nothing in the language of the original statute requires that the year of current continuous service be performed in a single agency. Thus, in *Shobe v. U.S. Postal Service*, 5 M.S.P.R. 466 (1981), we held that the appellant's previous service with the Department of Housing and Urban Development (HUD) should count towards completion of the year of current continuous service required under 5 U.S.C. § 7511(a)(1)(B), provided that his service in HUD was in a position the same as, or similar to, the Postal Service position from which he was separated. *Id*. at 470-71.

¶9 In 1990, the language of 5 U.S.C. § 7511(a)(1)(B) was changed to its current form as a result of the Civil Service Due Process Amendments, Pub. L.

No. 101-376, § 2, 1990 U.S.C.C.A.N. (104 Stat.) 461. The stated purpose of this legislation was "to extend to certain employees in the excepted service who are not preference eligibles the same administrative notice and appeal procedures currently provided employees in the competitive service and preference eligible employees in the excepted service." H.R. Rep. 101-328, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 695. Thus, the intent of Congress was solely to broaden the appeal rights of non-preference eligibles in the excepted service, not to eliminate appeal rights for any other class of employee. To enact legislation excluding employees such as the appellant would have put an end to appeal rights that for decades had been recognized without any limitation regarding the number of agencies in which the required year of service was performed. *See, e.g.*, 5 C.F.R. § 752.201(a)(3) (1971) (providing adverse action appeal rights to "[a]ny preference eligible employee who has completed 1 year of current continuous employment in a position outside the competitive service"); Federal Personnel Manual Supplement 752-1, S2-3a(3) (1972) (providing that "[c]urrent continuous employment in a position outside the competitive service" could consist of "employment in more than one position *in the same line of work* without a break of a workday" (emphasis in the original)).

¶10 We further note that the Office of Personnel Management (OPM) has promulgated regulations providing further support for the proposition that service in multiple agencies may be combined to meet the required 1 year of current continuous service. In particular, 5 C.F.R. § 752.401(c)(3) provides that adverse action appeal rights apply to "[a]n employee in the excepted service who is a preference eligible in an executive agency . . ., the U.S. Postal Service, or the Postal Rate Commission and who has completed 1 year of current continuous service in the same or similar positions." This regulation in no way suggests that the employee's 1 year of current continuous service must be performed entirely in the agency from which the employee is separated. We further note that Congress has expressly delegated to the OPM the authority to promulgate regulations on

this subject. *See* 5 U.S.C. § 7514. Consequently, such regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *See Stearn v. Department of the Navy*, 280 F.3d 1376, 1382 (Fed. Cir. 2002) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). Far from being "arbitrary, capricious, or manifestly contrary to the statute," the regulations prescribed by OPM on this subject are consistent with the absence of any congressional intent to eliminate appeal rights that had previously been granted to preference eligible employees in the excepted service.

¶11 Finally, we reject the argument that granting appeal rights to an employee who had not worked a full year with his current agency would be "an absurd result." *See* IAF, Tab 26 at 8-9. In *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), our reviewing court considered the case of an individual who served 8 years in the Department of Health and Human Services, transferred to a competitive service position in the Department of the Air Force, and was terminated 6 months later. Although the appellant was serving a probationary period at the time of her separation, the court found that she qualified as an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii), because she had completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. *McCormick*, 307 F.3d at 1342-43. As the appellant had served only 6 months with the Air Force, it follows that her full year of current continuous service included service in multiple agencies.

¶12 For the reasons stated above, we find that 5 U.S.C. § 7511(a)(1)(B) provides appeal rights to a preference-eligible employee in the excepted service who has completed 1 year of current continuous service in the same or similar positions, regardless of whether the entire year of service was performed in the same agency from which the employee was separated. Accordingly, the appellant in the instant case is entitled to appeal his separation if the position he held in ONI prior to his transfer to DIA was the same as, or similar to, the position from

which he was separated. The appellant has made a non-frivolous allegation that these positions were similar. While the agency has submitted documentary evidence to the contrary, this issue must be resolved at a hearing. *See Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

## ORDER

¶13 We therefore remand this appeal to the Washington Regional Office for further adjudication, including a jurisdictional hearing.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.