



NAVIGATING THE PROBATIONARY PERIOD

AFTER

VAN WERSCH

AND

MCCORMICK



A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES
BY THE U.S. MERIT SYSTEMS PROTECTION BOARD

THE CHAIRMAN



U.S. MERIT SYSTEMS PROTECTION BOARD

1615 M Street, NW
Washington, DC 20419-0001

September 2006

The President
President of the Senate
Speaker of the House of Representatives

Dear Sirs:

In accordance with the requirements of 5 U.S.C. 1204(a)(3), it is my honor to submit this Merit Systems Protection Board report, "Navigating the Probationary Period After *Van Wersch* and *McCormick*."

As noted in our previous report on the probationary period, "The Probationary Period: A Critical Assessment Opportunity," it is more important than ever that candidates for Federal appointments be thoroughly assessed. The probationary period can be a highly effective tool to evaluate a candidate's potential to be an asset to the Government before an appointment becomes final. However, for the probationary period to be used effectively, agencies must understand, under the current interpretation of the law, when an individual is considered to have full procedural and appeal rights, regardless of any probationary status.

This report explores how procedural and appeal rights are established under the law, and when a probationer may qualify for those rights. It also recommends steps for agencies to take to determine if an individual qualifies as an employee with such rights. We have included recommendations for the Office of Personnel Management to clarify its regulations to conform to the interpretation of the law expressed by the Board's reviewing court (U.S. Court of Appeals, Federal Circuit) in *Van Wersch v. Department of Health & Human Services* and *McCormick v. Department of the Air Force*. We have also included, for your consideration, a recommendation to review and amend the applicable statute.

I believe you will find this report useful as you consider issues affecting the Federal Government's ability to effectively manage its workforce.

Respectfully,

Neil A. G. McPhie



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EXECUTIVE SUMMARY

The probationary or trial period in the Federal civilian service is the final stage of the assessment process under which an agency may observe the knowledge, abilities and skills of a candidate for employment and make a final selection decision in light of those observations. If used correctly, this “job tryout” can be one of the most reliable and valid assessment tools available to Federal agencies when an individual is either employed in his or her first position or moves to a new and different type of position. Proper use of this tool helps promote the merit system principle that selection should be determined solely on the basis of relative ability, knowledge, and skills.

An integral part of the probationary or trial period has been the ability of agencies to swiftly terminate those probationers who have not demonstrated their fitness for continued employment. Such terminations typically have not given rise to the same level of uncertainty and additional administrative costs that accompany the removals of employees who are entitled to full procedural and appeal rights. Thus, much like applicants for employment who are not selected for a position, terminated probationers have not, until recently, been considered to be entitled to certain procedural rights before a termination is effected, as well as the right to challenge the merits of their termination before the United States Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). The Federal Circuit is the Board’s reviewing court for “non-mixed” cases, i.e., those cases in which there is no allegation of discrimination raised in connection with an appealable adverse action.

This report addresses two decisions issued by the Federal Circuit that have changed the way in which the Board has interpreted a key law that governs entitlement to procedural

and appeal rights if an individual in the Federal civilian service is subjected to an adverse action such as a removal. These cases, *Van Wersch v. Department of Health & Human Services* and *McCormick v. Department of the Air Force*, provide that some individuals who have traditionally been thought of as probationers with limited rights may actually be entitled to the same rights afforded to employees with finalized appointments. *Van Wersch* and *McCormick*, therefore, provide rights to additional categories of persons not previously considered to have had those rights. Given this change in the interpretation of the law, it is important that all stakeholders understand the Federal Circuit's decisions and some of the issues that may arise in light of those decisions. Agencies must now proceed with caution when terminating probationary employees because the cost of violating a probationer's pre-termination procedural rights can be high. Agencies may be ordered, on appeal of the action to the Board or the Federal Circuit, to treat a probationer as an employee with a finalized appointment and return the individual to his or her position with back pay and benefits.

Notably, the Federal Circuit's decisions have not been accompanied by a change in the regulations issued by the Office of Personnel Management (OPM) that relate to procedural and appeal rights for Federal employees. In addition, determining who has such procedural and appeal rights, and when those rights attach, can be a complicated undertaking. Based upon these and other concerns, we make the following recommendations:

- OPM should amend Federal regulations relating to the procedural and appeal rights of Federal employees to conform with the Federal Circuit's decisions in *Van Wersch* and *McCormick*.
- Although it is not clear whether such waivers will ultimately be found by the Board and Federal Circuit to be valid, OPM should also consider providing guidance to agencies, as well as model language, for pre-employment agreements that include waivers of procedural and appeal rights that may accrue to individuals who would have such rights under *Van Wersch* and *McCormick*.

- Agencies should educate their staff and employees as to the impact of *Van Wersch* and *McCormick* on Federal employment, and identify – upon hiring – when their probationary employees will obtain full procedural and appeal rights. This will provide agencies and employees with an understanding of how long the assessment periods will last. Agencies should terminate candidates who fail to demonstrate fitness for continued employment before they become entitled to full procedural and appeal rights.
- Agencies should specify in their policies relating to the Federal Career Intern Program and other training or intern programs that the period of the internship is a trial or probationary period for purposes of procedural and appeal rights.
- Congress should consider amending the law (set forth at 5 U.S.C. § 7511(a)(1)) to provide that if an individual is serving a probationary or trial period, the individual is not entitled to the procedural and appeal protections afforded to employees with finalized appointments, even if the individual has qualifying service lasting more than 1 or 2 years.



INTRODUCTION

The probationary or trial period is a set period of time in which an agency is responsible for assessing a candidate for a finalized appointment in the Federal civil service, and deciding either to continue or terminate the candidate’s employment.¹ Thus, the probationary period is the final stage of the assessment process under which a candidate’s ability, knowledge, and skills are observed and a final selection decision is made in light of those observations. Because this period involves the evaluation of a candidate based upon performance of the actual duties of the position, it is one of the more reliable and valid assessment tools available to Federal supervisors.² Such an assessment tool can be especially useful with respect to both new employees and employees who are appointed to new and different positions. Proper use of the probationary period promotes the merit system principle that selection “should be determined solely on the basis of relative ability, knowledge, and skills.”³ In addition, having an effective and well-understood probationary period is important because supervisors are much less likely to remove a problem employee with full appeal rights.⁴ Thus, if the Government does not have a way to quickly and easily correct mistakes that are made in the hiring process, it may be left with a situation that can negatively affect the efficiency of the organization for a long time.

¹The term “probationary period” generally applies to employees in the competitive service. “Trial period,” by contrast, generally applies to employees in the excepted service, as well as to some appointments in the competitive service, such as term appointments, which have a 1-year trial period set by OPM. A fundamental difference between the two is the length of time in which employees must serve. The probationary period is set by law to last 1 year. When the trial period is set by individual agencies, it can last up to 2 years. For ease of discussion, we will refer to probationary and trial periods as “probationary periods” in this report unless otherwise indicated.

²For a more complete discussion of why the probationary period is such an important assessment tool, please see the U.S. Merit Systems Protection Board report, “The Probationary Period: A Critical Assessment Opportunity,” August 2005.

³5 U.S.C. § 2301(b)(1).

⁴U.S. Merit Systems Protection Board, “The Probationary Period: A Critical Assessment Opportunity,” August 2005, pp. 8-9.

Consistent with the notion that the probationary period is a part of the assessment process, probationary employees have generally had limited pre-termination procedural rights and post-termination appeal rights as compared to employees with finalized appointments. This has made it easier for agencies to act quickly, and with a greater expectation of finality, if the employee does not demonstrate his or her fitness or qualifications for continued employment. However, two Federal Circuit decisions, *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144 (Fed. Cir. 1999), and *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), *pet. for reh'g en banc denied*, 329 F.3d 1354 (Fed. Cir. 2003), provide that some individuals who have traditionally been thought of as probationers with limited rights may actually be entitled to the same rights afforded to employees with finalized appointments. Such rights include having: (1) An action taken against them only for such cause as will promote the efficiency of the service; (2) at least 30 days' advance written notice of the reasons for the proposed action; (3) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits or other documentary evidence; (4) the right to be represented by an attorney or other representative; (5) a written decision, and the specific reasons for the action, at the earliest practicable date; and (6) the right to appeal the action to the Merit Systems Protection Board (MSPB or the Board).⁵ These Federal Circuit decisions have made it more challenging for agencies to terminate probationers, or to take other appealable adverse actions, swiftly and with the same expectation of finality as before.

In light of these two Federal Circuit decisions, agencies must now proceed with caution when terminating a probationary employee because the cost of violating an employee's pre-termination procedural rights, even inadvertently, may be quite high. Agencies may ultimately be ordered, if an appeal is filed with the Board or the Federal Circuit, to treat them as employees with finalized appointments and return them to their positions with back pay and benefits. In order for the probationary period to continue to serve as an effective

⁵U.S.C. § 7513.

assessment tool in the hiring process, the Board has prepared this report to help Federal agencies: (1) Understand how the law now defines individuals who have full pre-termination procedural and post-termination appeal rights; (2) use that understanding to calculate when their probationers will become entitled to such rights; (3) assess their probationers within the proper time period; and (4) terminate those probationers with performance or conduct deficiencies before they obtain such rights.

This report includes three major sections. The first section discusses how the statutory definition of an employee with full procedural and appeal rights has been interpreted differently in recent years to include probationers who, in the past, would have had only limited procedural and appeal rights. It also addresses several Board decisions that explain how to determine whether a probationary employee has such procedural and appeal rights. The second section discusses additional probationary-period issues that OPM and other agencies may encounter. These include the need to update Federal regulations, potential problems that may arise if agency policies do not establish a trial period for certain employees in the excepted service, and the risks involved in waivers of appeal rights for new hires. This section also addresses the potential impact of the Federal Circuit's decisions on merit-based hiring. Finally, our third section contains recommendations for OPM, Federal agencies, and Congress in addressing some of the challenges presented by the court's decisions in *Van Wersch* and *McCormick*.



INTERPRETING THE LAW

The question of who has limited pre-termination procedural and post-termination appeal rights to the Board is resolved by applying a statute as interpreted by the courts. The law states that a person who meets the definition of an “employee” is entitled to a multi-step process before an adverse action is taken, and is permitted to appeal the adverse action to the Board. An employee is defined in 5 U.S.C. § 7511(a) as follows:

- (1) “Employee” means—
 - (A) an individual in the competitive service—
 - (i) who is not serving a probationary or trial period under an initial appointment; or
 - (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;
 - (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—
 - (i) in an Executive agency; or
 - (ii) in the United States Postal Service or Postal Rate Commission; and
 - (C) an individual in the excepted service (other than a preference eligible)—
 - (i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
 - (ii) 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.

The above definition distinguishes between the “competitive” and the “excepted” service. The executive branch of Government that is governed by Title 5 of the United States Code is composed of the competitive service, the excepted service, and the Senior Executive Service.⁶ Most of the executive branch’s civilian positions are part of the competitive civil service. Such positions are filled through competition among applicants under competitive examining procedures administered by OPM. The competitive examining process is characterized by rating and ranking applicants and referring to selecting officials only the top ranked or high-quality applicants. Qualified applicants who have been rated and ranked are placed on a list known as a register. Under the competitive examining process, either the top three candidates under the “Rule of Three,” or all candidates in the highest quality category under the Category Rating procedures, are referred for selection. Positions filled through the competitive examining process are referred to as the competitive service.

On the other hand, there are some positions in the Federal civil service that are excepted from OPM’s competitive examining procedures. In addition, there are positions that would ordinarily be in the competitive service but are in the excepted service while occupied by individuals who are appointed under an excepted appointing authority or programs established by law, the President, or OPM. Individuals appointed through these latter authorities or programs are trainees who can be converted to the competitive service upon successful completion of the program.⁷ For excepted service positions, agencies develop and establish their own examining procedures within the guidelines of the merit system principles and veterans’ preference rules. These positions are collectively referred to as the excepted service.

The above definition of the term “employee” also distinguishes between preference eligibles and individuals who are not preference eligibles. A “preference eligible” generally refers to a veteran who has served on active duty during certain identifiable periods of time and who has been separated from the armed forces under honorable conditions. It also includes, among others, certain disabled veterans and unmarried widows and widowers of veterans.⁸

⁶The Senior Executive Service is composed of positions occupied by the Government’s corps of executives selected for their leadership qualifications. OPM manages the overall executive personnel program.

⁷Training programs include the Student Career Employment Program, Federal Career Intern Program (FCIP), Presidential Management Fellows Program, and the Veterans Recruitment Authority.

⁸5 U.S.C. § 2108(3).

This section will discuss the original interpretation of section 7511(a) following its passage in 1978, and the new interpretation since 1999, when the Federal Circuit issued its decision in *Van Wersch v. Department of Health & Human Services*.

Before *Van Wersch*

Before the enactment of the Civil Service Reform Act of 1978 (CSRA), and therefore before the Federal Circuit’s 1999 decision in *Van Wersch*, the U.S. Code of Federal Regulations, which is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government, provided that an employee “currently serving a probationary or trial period” did not have a regulatory right to appeal adverse actions to the Civil Service Commission, the Board’s predecessor.⁹

In enacting the CSRA, Congress appears to have intended to incorporate the rule set forth in the above regulation. When Congress passes a law, it may provide a record that expresses what it intended the words of the law to mean. The Senate report¹⁰ discusses the thinking behind an earlier version of the definition of “employee” that is very similar to the version in effect today.¹¹ It states:

Section 7511. Definitions; application.

Subsection (a) provides a statutory basis for the procedural protections and appeal rights now granted employees in the competitive service who are serving under career, career-conditional, or certain other non-temporary appointments, **and who have completed a probationary or trial period**. Protections against arbitrary or capricious actions have become established by practice and Executive Order – but not by statute – as a basic right of competitive service employees. It is appropriate that the rights extended to nonpreference eligibles be made statutory rights. It also continues the present coverage of employees serving under certain other appointments, for which there is no probationary or trial period,

⁹5 C.F.R. § 752.103(a)(5) (1978).

¹⁰The Senate version of the CSRA was the one that passed.

¹¹Under the CSRA, section 7511(a)(1)(A) defined the term “employee” as an individual who had completed 1 year of current continuous employment. As part of the Civil Service Due Process Amendments of 1990, the language of section 7511(a)(1)(A) defines “employee” as an individual with 1 year of current continuous service.

after they complete one year of current continuous employment. The changes in the wording of this subsection from existing law provide coverage to employees serving under several kinds of appointments not in existence at the time the present law was enacted.¹² [emphasis added]

This language, which is consistent with the 1978 regulation, contemplates two groups of people in the competitive service who have procedural and appeal rights. The first group includes people on non-temporary appointments who have completed their probationary period. The second group includes those on appointments for which there is no probationary period. For the second group, appeal rights would be granted upon finishing a period of service similar in length to the probationary period. The Senate report explains that Congress was trying to provide procedural protections and appeal rights to individuals whose appointments did not carry a probationary period after they had served a similar length of time.

The Board interpreted the statute in a manner consistent with Congress' apparent intent. In a 1982 case involving the appeal rights of a probationary employee, the Board stated that there were two classes of individuals in the competitive service who would have appeal rights in the case of an adverse action: (1) Non-probationers; and (2) those *for whom a probationary period was not applicable*, provided that 1 year had been served in current, continuous employment. An individual who was *currently* a probationer did not have appeal rights, even if the individual had 1 year of current continuous employment. The Board explained:

As the requirement that an individual serve a probationary period extends to all individuals appointed from a register, it is immaterial whether such appointment is the individual's initial appointment to the Federal service or a subsequent appointment. Similarly, merely because an individual has served one continuous year, has in itself no bearing upon probationary status. This interpretation is reasonable in light of the fact that[,] for example, an individual could enter the Federal service in a clerical position and later be picked from a register as an Air Traffic Controller. As the appellant was picked

¹²Senate Report No. 95-969, at 48 (1978), reprinted in 1978 U.S. Code Congressional and Administrative News (U.S.C.C.A.N.) 2723, 2770.

up from a register and was therefore serving a probationary period, he was clearly not an employee covered by § 7511(a), as set forth above.¹³

OPM shared this belief that there were two separate classes of individuals eligible for appeal rights in the competitive service, and expressed that view in its regulations. In each Code of Federal Regulations from 1989 to the present, § 752.401 states:

(c) Employees covered. This subpart covers:

- (1) An employee in the competitive service who has completed a probationary or trial period;
- (2) An employee in the competitive service serving in an appointment **that requires no probationary or trial period**, and who has completed 1 year of current continuous employment [or “service,” beginning in 1993] in the same or similar positions under other than a temporary appointment limited to 1 year or less....¹⁴ [emphasis added]

In a 1988 Federal Register notice implementing the above language, OPM stated, with respect to its regulations implementing a comparable law relating to suspensions for 14 days or less:

OPM realizes that the law providing coverage for employees in the competitive service is somewhat confusing and not self-explanatory. The confusion arises because there are employees in the competitive service who serve in two types of appointments. The majority serve under career, career-conditional, or certain other nontemporary appointments which require a probationary or trial period of service. Of this group, only those employees who have yet to complete the necessary probationary or trial period . . . are excluded from Part

¹³*Rochniak v. Department of the Navy*, 10 Merit Systems Protection Board Reporter (M.S.P.R.) 603 (1982), *modified by Long v. Department of the Navy*, 32 M.S.P.R. 438 (1987). The Board in *Long* noted that although not discussed in *Rochniak*, prior Federal service could be counted toward the completion of a new probationary period in the competitive service if the prior service were: (1) Rendered immediately preceding the career or career-conditional appointment or conversion; (2) in the same line of work; (3) in the same agency; and (4) with no more than one break of less than 30 days during that service.

¹⁴In the current regulation, there are nine categories of employees that are covered under the subpart, with the word “and” located between items 8 and 9.

752 protections.... A much smaller group of competitive service employees serve in appointments (such as temporary appointments pending establishment of a register (TAPER), *status quo*, or special tenure appointments) which require no probationary or trial period.... The law (5 U.S.C. 7501) intended to provide for coverage of this second group once the employees have completed one year of current continuous employment in the same or similar positions.¹⁵

In its regulation and Federal Register notice, then, OPM set forth the commonly-held position that the procedural and appeal rights granted to individuals in the competitive service after 1 year of current continuous employment (or service) in the same or similar positions, applied only to those situations where there was no probationary period. According to the regulation, if the individual was terminated during a probationary period, there was no entitlement to such rights.

In 1990, Congress amended 5 U.S.C. § 7511(a)(1) to provide procedural protections and appeal rights to some non-preference eligible individuals in the excepted service. Accordingly, OPM modified 5 C.F.R. § 752.401 in 1993 to add to the list of covered employees:

(c)(5) An employee in the excepted service who is a nonpreference eligible in an Executive agency as defined at section 105 of title, 5, United States Code, **and** who has completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less.¹⁶
[emphasis added]

OPM also made an addition to the section that addressed exclusions.

“(d) Employees excluded. This subpart does not apply to...

(11) A nonpreference eligible employee **serving a probationary or trial period** under an initial appointment in the excepted service pending conversion to the competitive service....”¹⁷
[emphasis added]

¹⁵53 Federal Register (Fed. Reg.) 21,619 (June 9, 1988).

¹⁶58 Fed. Reg. 13,191, 13,193 (Mar. 10, 1993).

¹⁷58 Fed. Reg. 13,191, 13,193 (Mar. 10, 1993).

These regulatory changes were consistent with OPM's earlier regulations relating to the competitive service, and appeared to have been accepted and applied in decisions of both the MSPB and the Federal Circuit.¹⁸ Then, on December 15, 1999, the Federal Circuit issued its decision in *Van Wersch v. Department of Health & Human Services*. Because the Board is bound by the decisions of the Federal Circuit, the court's decision in *Van Wersch* changed the way in which 5 U.S.C. § 7511(a)(1)(C) would be interpreted for Federal employees in the excepted service – and ultimately in the competitive service as well.

Van Wersch and McCormick

Monique Van Wersch, a non-preference eligible, began her employment with the Department of Health and Human Services on March 26, 1989, when she was hired in a temporary position in the competitive service. Later, she was converted to an excepted service position pursuant to 5 C.F.R. § 213.3102(u), which allows agencies to temporarily appoint severely physically handicapped persons to excepted service positions pending conversion to the competitive service upon completion of 2 years of satisfactory service. In January of 1993, the agency promoted Ms. Van Wersch under section 213.3102(u) to the position of GS-3 Clerk-Typist. She served in that position for 2 years and eight months without being converted to the competitive service. In September 1995, the agency removed her for alleged unacceptable conduct.

Ms. Van Wersch filed an appeal with the Board, which dismissed the appeal for lack of jurisdiction upon finding that she did not qualify as an “employee” under 5 U.S.C. § 7511(a)(1)(C). The Federal Circuit, however, reversed the Board's decision.

The court found that OPM had determined that an appointment made with the intent of converting the employee to an appointment in the competitive service, like the appointment given to Ms. Van Wersch, initially is served under a probationary or trial period. Thus, the court held that Ms. Van Wersch was not an “employee” under 5 U.S.C. § 7511(a)(1)(C)(i)

¹⁸See *Pervez v. Department of the Navy*, 193 F.3d 1371 (Fed. Cir. 1999).

because she was serving a probationary or trial period under an initial appointment pending conversion to the competitive service. Nevertheless, the court found that she fit within the definition of “employee” in 5 U.S.C. § 7511(a)(1)(C)(ii) because she had 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. In making this finding, the court disagreed with the long-standing OPM and Board interpretation of the statute.

The court stated that based on the legislative history of the Civil Service Due Process Amendments of 1990, there was a compelling argument that Congress meant to exclude probationers and those in a trial period from having appeal rights. However, the court found that the statute as written did not contain the right words to communicate that intent. In particular, the statute used the word “or.” Persons who met one condition or the other were “employees” and thus had appeal rights. The court noted that when it interprets a statute, it begins with the language of the statute. Congressional intent becomes relevant only if the language is unclear. The court explained that the word “or” clearly refers to alternatives. Thus, it determined that the language was clear and Congressional intent was therefore irrelevant. The Federal Circuit stated:

To adopt the reading of the statute that the government urges would require us to ignore the meaning of the word ‘or’ that the dictionary, common sense, and the experience of life all bring to us. There simply is no way around the fact that, in the English language, the word ‘or’ unambiguously signifies alternatives.¹⁹

Because Congress used the word “or” in the statute, the court reasoned that an individual would have rights if he or she met *either* of the two sections in that part of the statute. Thus, a person could be in a probationary or trial period and not an “employee” under 5 U.S.C. § 7511(a)(1)(C)(i), but still have appeal rights if the conditions were met for 5 U.S.C. § 7511(a)(1)(C)(ii). The court noted that Congress could amend the statute to compel a different result if it determined that individuals such as Ms. Van Wersch should not have the right to appeal adverse actions to the Board. The court noted that the remedy for

¹⁹*Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144, 1151 (Fed. Cir. 1999).

any dissatisfaction with the results in particular cases lies with Congress and not the court. The court stated that “Congress may amend the statute; we may not.”²⁰

While *Van Wersch* addressed the definition of “employee” for purposes of non-preference eligibles in the excepted service, a few years later *McCormick* addressed the meaning of “employee” for purposes of the competitive service. Ann McCormick entered the Federal competitive service on June 2, 1991, as a career conditional employee of the Department of Health and Human Services. Her appointment was subject to the completion of a 1-year probationary period, which she completed. On August 30, 1999, Ms. McCormick requested a voluntary change of appointment to the position of contract negotiator with the Department of the Air Force. The request for a change of appointment was accompanied by a Request for Personnel Action (Form 52) dated August 29, 1999, which referred to the action as a “termination/transfer out.” She was appointed to the position of contract negotiator effective August 29, 1999. As part of her appointment to that position, the Department of the Air Force issued a Notification of Personnel Action referring to Ms. McCormick as a conditional employee subject to a 1-year probationary period beginning August 29, 1999. On February 22, 2000, the Air Force terminated Ms. McCormick’s employment. The Notice of Personnel Action (Form 50) issued by the Air Force stated that the termination was during her probationary period.

On appeal to the Board, the Board dismissed the appeal for lack of jurisdiction, finding that Ms. McCormick was a probationary employee and, as such, had only limited appeal rights as provided under 5 C.F.R. § 315.806. The Federal Circuit initially affirmed the Board’s decision. On petition for rehearing, however, a majority of the Federal Circuit’s three-judge panel vacated the prior decision, found that the Board had jurisdiction over the appeal, and remanded for further proceedings. The court found that although Ms. McCormick was serving a probationary period when she was terminated, she was an “employee” with appeal rights because she had completed more than 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. The Federal Circuit found

²⁰*Id.* at 1152.

that under its holding in *Van Wersch*, there was no basis for a different result given that both subsections provide two definitions for the word “employee” that are separated by the word “or.”²¹

These decisions have complicated the task of determining whether an individual serving a probationary or trial period has pre-termination procedural and post-termination appeal rights. No longer may an agency assume that an employee does not have such rights simply because the employee is serving a probationary or trial period. Instead, in assessing when a probationer will acquire such rights, agencies must take into account such factors as whether: (1) The prior service is “current continuous service;” (2) the current continuous service is in the “same or similar positions” for purposes of non-preference eligibles in the excepted service; and (3) the total amount of such service meets the 1 or 2-year requirement.

The Board has addressed the meaning of the some of the above statutory terms in a way that may assist agencies in making these determinations. “Current continuous service,” for example, is a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday.²² In addition, “current continuous service” under sections 7511(a)(1)(A)(ii) or 7511(a)(1)(C)(ii) includes periods of nonpay status consistent with the terms of intermittent or seasonal employment,²³ and periods of extended leave without pay not associated with an appointment type that includes furlough periods as a condition of employment.²⁴ Positions are “similar” when they are in “the same line of work,” a criterion that has been interpreted as involving related or comparable work that requires the same or similar knowledge, skills, and abilities.²⁵ Prior service meets the “current continuous service” requirement even if it was performed in a different Federal agency.²⁶

²¹*McCormick v. Department of the Air Force*, 307 F.3d 1339, 1342-43 (Fed. Cir. 2002), *pet. for reh'g en banc denied*, 329 F.3d 1354 (Fed. Cir. 2003).

²²*Dade v. Department of Veterans Affairs*, 101 M.S.P.R. 43, ¶ 10 (2005).

²³*Jolivette v. Department of the Navy*, 100 M.S.P.R. 216, ¶ 10 (2005).

²⁴*Gadsden v. Department of State*, 102 M.S.P.R. 79, ¶¶ 11-15 (2006).

²⁵*Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1333 (Fed. Cir. 2006); *Mathis v. U.S. Postal Service*, 865 F.2d 232, 234 (1988); *Burrell v. U.S. Postal Service*, 76 M.S.P.R. 204, 209 (1997).

²⁶*Dade*, 101 M.S.P.R. 43, ¶¶ 11-12 (finding that current continuous service need not be performed in the same agency under sections 7511(a)(1)(A) or 7511(a)(1)(B)).

The Board has also held that individuals who meet the literal definition of “employee” under 5 U.S.C. § 7511(a)(1)(A)(i), as temporary employees in the competitive service, but who do not have the requisite 1 year of service to satisfy section 7511(a)(1)(A)(ii), are not “employees” with procedural and appeal rights.²⁷ The Board reasoned that a temporary appointee does not have the type of appointment referred to in 5 U.S.C. § 7511(a)(1)(A)(i) because a temporary appointee is not required to serve a probationary or trial period. In addition, the Board held that treating a temporary appointee as an “employee” would produce an unreasonable result because every temporary appointee would have the right to be removed only for cause, and a corresponding right of appeal, on the first day of work. The Board held that “the appeal rights of an individual serving under an appointment that does not require completion of a probationary or trial period are governed exclusively by subsection (A)(ii).” The Federal Circuit has yet to address this situation.

²⁷*Johnson v. Department of Veterans Affairs*, 99 M.S.P.R. 362, ¶¶ 6-7, review dismissed, 161 F. App’x 945 (Fed. Cir. 2005).



ISSUES ARISING FROM THE FEDERAL CIRCUIT'S DECISION

The Federal Circuit's interpretation of 5 U.S.C. § 7511(a)(1) has created a number of potential issues and challenges for Federal agencies. For one, agencies are still learning about the impact of *Van Wersch* and *McCormick* on assessing and terminating probationers. In addition, Federal regulations are not currently consistent with the decisions of the Federal Circuit in this area. Other concerns include the effect of the court's decisions on the rights of certain individuals in the excepted service who may not be serving under a formal trial period, risks associated with constructing waivers of appeal rights for new hires, and the impact of the court's decisions on merit-based hiring in the Federal civil service. The following is a brief discussion of some of the issues agencies should be aware of as a result of the decisions in *Van Wersch* and *McCormick*.

Federal Regulations are Inconsistent with *Van Wersch* and *McCormick*

Federal regulations provide that employees with statutory procedural and appeal rights include an employee in the competitive service “who has completed a probationary or trial period,” and an employee in the competitive service “serving in an appointment that requires no probationary or trial period, and who has completed 1 year of current continuous service in the same or similar positions under other than a temporary appointment limited to 1 year or less.” These regulations also provide that a “nonpreference eligible employee serving a probationary or trial period under an initial appointment in the excepted service pending conversion to the competitive service” does not have such rights.

The above regulations either conflict with the principles set forth in *Van Wersch* and *McCormick*, or may be found in the future to conflict with the statutory language. First,

the regulations provide that employees in the competitive service who have *completed* a probationary or trial period have procedural and appeal rights, even though the statute arguably provides such rights to a broader group of individuals, namely, those who are not serving such a period under an initial appointment. In other words, the language of 5 U.S.C. § 7511(a)(1)(A)(i), if interpreted literally by the Federal Circuit, could cover not only those individuals who have completed a probationary or trial period, but those appointees, such as temporary appointees, who are not serving a probationary or trial period because they are not required to do so. Second, the regulations provide procedural and appeal rights to employees in the competitive service who have completed 1 year of qualifying service *only if* they serve in appointments that do not require probationary or trial periods. This regulation is inconsistent with *McCormick*, where the court found that Ms. McCormick was an “employee” with appeal rights because she completed more than 1 year of current continuous service under 5 U.S.C. § 7511(a)(1)(A)(ii), even though she happened to be serving a probationary period when the agency terminated her.

Finally, the regulations continue to provide that nonpreference eligibles serving a probationary or trial period under an initial appointment in the excepted service pending conversion to the competitive service do not have appeal rights. However, the court in *Van Wersch* held that an individual is an “employee” if the individual is either not serving a probationary or trial period under an initial appointment pending conversion to the competitive service, or 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. The court in *Van Wersch* noted that “to the extent that OPM’s regulations are contrary to the proposition that an individual is an ‘employee’ if he or she meets the requirements of either 5 U.S.C. § 7511(a)(1)(C)(i) or (ii), they are invalid.”²⁸

Despite these Federal Circuit cases, OPM has not amended or proposed the amendment of 5 C.F.R. § 752.401. At least one Federal agency has identified and addressed this

²⁸ *Van Wersch*, 197 F.3d at 1151 n.7.

inconsistency between the regulations and the court cases. On its Civilian Personnel On-Line website, the Department of the Army explains the Federal Circuit's decision in *McCormick* and tells its human resources specialists that “[s]ince 5 CFR 752.401 and 5 U.S.C. 7511 are inconsistent, we advise that you follow the recent Federal Circuit decision in the *McCormick* case and apply the court’s (A)(i) or (A)(ii) conclusion for your actions, until either the statute or OPM regulations change.”²⁹

Retaining out-of-date information in a Government regulation can confuse agencies, managers, and employees and produce unintended outcomes. Human resources specialists or managers who are not experts in employee discipline may inadvertently rely on these particular regulations. Agencies may fail to use proper procedures and fail to notify employees of appeal rights. Terminations may be reversed. In addition, many adverse action notices inform the individual that the action has been taken pursuant to 5 C.F.R. Part 752. A terminated probationer who consults section 752.401 may be misled into believing that he or she does not have appeal rights to the Board when, in fact, the individual may have such appeal rights under *Van Wersch* and *McCormick*.³⁰ For these reasons, we urge OPM to amend its regulations at 5 C.F.R. Part 752 in order to prevent any misunderstanding by the agencies or individuals who may be affected by those regulations. In the absence of such a change in the regulations, Federal agencies should issue a notice to managers and human resources specialists, much like the notice included on the Department of the Army’s website, explaining the *Van Wersch* and *McCormick* cases and recommending that managers apply the principles set forth in those cases in calculating when new hires will obtain procedural and appeal rights, and in terminating probationary employees.

²⁹U.S. Army CPOL, Appeal Rights During the Probationary Period, <http://cpol.army.mil/library/permis/5a121.html> (last visited September 7, 2006).

³⁰*Porter v. Department of Defense*, 98 M.S.P.R. 461, ¶¶ 20-22 (2005), illustrates the unintended and likely unforeseen consequences that can arise after *McCormick*. In *Porter*, the agency informed the appellant that she would be terminated and would have no appeal rights to the Board because she was a probationer. Her appeal following her resignation led to a determination by the Board that the resignation was involuntary because, following the rule of *McCormick*, the appellant did have appeal rights. Thus, the Board ordered her restored to duty.

Trial Periods in Certain Excepted Service Positions

The Federal Circuit's decisions in *Van Wersch* and *McCormick* can play an increasingly important role in agency determinations with respect to the procedural and appeal rights of individuals with appointments in the excepted service pending conversion to the competitive service. Such appointments may include those in the Student Career Employment Program, FCIP, Presidential Management Fellows Program, and the Veterans Recruitment Authority.

For example, as noted in our report, *Building a High-Quality Workforce: The Federal Career Intern Program*, the FCIP is an increasingly popular method of hiring individuals into the excepted service pending a conversion to the competitive service. The FCIP hiring authority was created by Executive Order 13162, which provides that a successful candidate shall be appointed to a position in Schedule B of the excepted service, with the appointment generally not exceeding 2 years. Continuation in the FCIP is contingent upon satisfactory performance throughout the internship period. Service as a career intern confers no rights to further Federal employment in either the competitive or excepted service upon the expiration of the internship period. However, competitive civil service status may be granted to a career intern who satisfactorily completes the internship and meets all other requirements prescribed by OPM. The Executive order states that OPM has the responsibility to "prescribe such regulations as it determines necessary to carry out the purpose of this order," and to "provide oversight of the Program."³¹

Because the FCIP allows agencies flexibility in evaluating applicants' qualifications, many interns may not have been rigorously evaluated. This makes the trial period during the internship critical because it can compensate for weak prior assessments. Unfortunately, the importance of the "trial period," at least in the FCIP, appears to be inadequately emphasized or not well understood. These potential problems may be exacerbated by the fact that the Executive order establishing the FCIP and OPM's implementing regulations³² do not explicitly refer to a probationary or trial period for career interns. In the excepted service,

³¹Exec. Order No. 13,162, 3 C.F.R. 283 (2001).

³²5 C.F.R. § 213.3202(o).

unlike the competitive service, there is no statutory requirement that there be a probationary or trial period for appointments. Based on the Executive order and OPM's regulations, therefore, it would appear to be unclear whether the appointment period under a program such as the FCIP is a "probationary or trial period" within the meaning of 5 U.S.C. § 7511(a)(1)(C)(i).

Nevertheless, in a 1992 Federal Register notice implementing the Civil Service Due Process Amendments of 1990, OPM stated that nonpreference eligible employees in excepted service appointments pending conversion to the competitive service, such as at that time the Presidential Management Intern Program, the Student Work-Study Program, and Veterans Readjustment Appointments, have no procedural or appeal rights. OPM noted that such appointments provide noncompetitive conversion eligibility if the employee has demonstrated satisfactory performance or training, and that these requirements "constitute the 'probationary or trial period' referred to in 5 U.S.C. § 7511(a)(1)(C)(i)." 57 Fed. Reg. 20041 (May 11, 1992). The court in *Van Wersch*, 197 F.3d at 1150 n.6, relied upon this language in the Federal Register notice to find that Ms. Van Wersch, who was appointed under the authority of 5 C.F.R. § 213.3102(u), relating to severely physically handicapped persons who may qualify for conversion to competitive status upon completion of 2 years of satisfactory service, was serving a probationary or trial period under an initial appointment pending conversion to the competitive service and was not, therefore, an employee under 5 U.S.C. § 7511(a)(1)(C)(i).

The Board has reached similar conclusions. For example, the Board has held that for individuals serving under appointments in the Student Work-Study Programs pending conversion to the competitive service, the time spent prior to conversion is a probationary or trial period, and such employees do not gain adverse action appeal rights until they are converted into the competitive service.³³ The Board has also held that when an agency

³³*Taylor v. Department of the Navy*, 63 M.S.P.R. 99, 102 (1994), *overruled on other grounds by Van Wersch*, 197 F.3d at 1151.

terminated an individual from her position in the Student Educational Employment Program before her conversion to the competitive service, she was still serving a probationary or trial period pending conversion to the competitive service when the agency terminated her, and did not have appeal rights to challenge the agency's action.³⁴ More recently, the Board has held that an individual appointed to a position in the excepted service pursuant to the FCIP met the definition of "employee" under 5 U.S.C. § 7511(a)(1)(C)(i) because her prior service, in a competitive service position in the same line of work with the same agency and with no more than one break of service of less than 30 days, could be "tacked" toward the completion of her 2-year "probationary period."³⁵ While the above decisions may provide some support for a finding by the Board or the Federal Circuit that individuals such as FCIP interns do not have appeal rights immediately upon appointment, we nevertheless recommend that OPM and Federal agencies make it clear in the regulations and policies relating to training and development programs that the internship period and any extensions are probationary or trial periods.³⁶

Waivers of Appeal Rights in Exchange for a New Appointment

A waiver of appeal rights is a mechanism that would relieve agencies of the procedural and legal burdens associated with terminating an employee, thereby permitting agencies to use probationary or trial periods as intended to expeditiously terminate new employees whose performance and conduct is not satisfactory. An issue that arises in light of the court's decisions in *Van Wersch* and *McCormick* is whether an individual who meets the definitions of "employee" under 5 U.S.C. §§ 7511(a)(1)(A)(ii) or 7511(a)(1)(C)(ii) can waive appeal rights under those sections in exchange for accepting a new appointment. If so, what must such a waiver agreement include so that it is legally enforceable?

³⁴*Lopez v. Department of the Navy*, 103 M.S.P.R. 55, ¶ 11 (2006).

³⁵*McCrory v. Department of the Army*, 103 M.S.P.R. 266, ¶¶ 9-12 (2006).

³⁶Agencies that have incorporated such language into their FCIPs include the Department of Energy, <http://humancapital.doe.gov/pers/cip/manager/CIPBrief.ppt#274,14>, Federal Career Intern Program Authority (FCIPA), the Department of the Interior's Bureau of Reclamation, <http://www.usbr.gov/recman/hrm/hrm-p04.pdf>, and the Department of the Interior's U.S. Fish & Wildlife Service, <http://www.fws.gov/policy/223fw10.html>.

A contract is enforceable if it is based on “bargained-for consideration,” i.e., an exchange of benefits by the parties to the agreement.³⁷ This means that any probationary period agreement that waives procedural and appeal rights must generally be signed *before* the individual enters on duty. If the agreement is signed after the individual has been appointed, the agreement would not be enforceable because the employee likely received no benefit in exchange for signing the agreement.³⁸ Merely informing an individual that she will be required to serve a new probationary period is not the same as a knowing and voluntary agreement on the part of that individual to serve a new probationary period or waive an appeal right.³⁹

Additional difficulties in determining what constitutes an enforceable waiver of appeal rights arose in the case of *Ramos v. Department of Justice*, a non-precedential decision issued by the Federal Circuit.⁴⁰ Mr. Ramos began his Federal service in March 1998 as a Border Patrol Agent, then applied for and was appointed to a Deportation Officer position effective March 11, 2001. The Standard Form 50 documenting his appointment indicated that he was subject to a 1-year probationary period in his new position. In addition, Mr. Ramos signed a Probationary Period Agreement stating that “rights . . . for adverse and disciplinary actions will be processed in accordance with . . . the code of Federal Regulations Part 315-Career and Career-Conditional Employment.” The agency removed Mr. Ramos before the 1-year probationary period expired, and the Board dismissed Mr. Ramos’ appeal of the removal for lack of jurisdiction, finding that although Mr. Ramos satisfied the requirements of 5 U.S.C. § 7511(a)(1)(A)(ii), he waived those rights by signing the Probationary Period Agreement. On appeal before the Federal Circuit, the Department of Justice rejected the contract waiver theory set forth by the Board in its decision, “confesse[d] error on behalf of the Board,” and conceded that Mr. Ramos qualified as an “employee” under *McCormick*, and

³⁷*Hughes v. Social Security Administration*, 99 M.S.P.R. 67, ¶ 7 (2005).

³⁸*Hughes*, 99 M.S.P.R. 67, ¶ 7; see *Thompson v. Department of the Treasury*, 100 M.S.P.R. 545, ¶ 9 (2005) (a waiver provision in a Notification of Probationary Period Document was not enforceable in this case because the individual already occupied a position with the agency when she signed it, and there was no evidence that she knew before starting her position that she was waiving her appeal rights).

³⁹*Porter v. Department of Defense*, 98 M.S.P.R. 461, ¶¶ 15-16 (2005).

⁴⁰*Ramos v. Department of Justice*, No. 04-3186, 2005 WL 1316981 (Fed. Cir. May 18, 2005) (non-precedential).

did not make a knowing, intentional waiver of those rights when he signed the Probationary Period Agreement. The court agreed that the Board erred as a matter of law in failing to apply *McCormick*, found that Mr. Ramos established Board jurisdiction over his appeal, and remanded the case for further proceedings. Despite its non-precedential nature, the court's decision in *Ramos* provides insight into the Federal Circuit's thinking, which appears to be that Mr. Ramos could not have knowingly waived his right to appeal under 5 U.S.C. § 7511(a)(1)(A)(ii) and *McCormick* because *McCormick* was issued in 2002, after the Probationary Period Agreement had been signed in 2001.

The purpose of having a probationary period with limited rights is to simplify matters for an agency so that it can act with a reduced administrative burden. The more ambiguity there is in the system, the harder it becomes to use the probationary period effectively. Furthermore, as reported in our study, *The Probationary Period: A Critical Assessment Opportunity*, agencies are not acting as often as they should to remove probationers who do not demonstrate their fitness for continued employment. Anything that makes the process more difficult can be expected to delay or deter the termination of such probationers, and comments from some supervisors we have surveyed suggested that the complexity of the process has done precisely that. Determining whether a waiver of appeal rights is knowing and voluntary, or is otherwise enforceable, can be just as complicated as determining whether a probationary employee has appeal rights because such a determination is based on the facts in each case. Because relying on a waiver of appeal rights can therefore be unpredictable in terms of enforceability, agencies should proceed cautiously if they decide to ask new appointees to agree to serve a new probationary period and/or waive appeal rights under sections 7511(a)(1)(A)(ii) or 7511(a)(1)(C)(ii).

In fact, it is not clear whether agencies can routinely condition job offers on applicants' willingness to sign such waivers, thereby effectively divesting the Board of jurisdiction over appeals from an ever-increasing number of "new" employees. The Board and Federal Circuit have not directly decided whether routine waivers of procedural and appeal rights by new employees, regardless of the wording, would be valid. Courts, including the U.S. Supreme Court and the Federal Circuit, have recognized that a relevant principle in cases involving

the enforceability of waivers is that a waiver is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement. In determining whether to enforce routine waivers of appeal rights by employees accepting new positions, the Board and the Federal Circuit might have to conduct such a balancing test.

In light of the uncertainty regarding the enforceability of any particular waiver of procedural and appeal rights, OPM should consider providing guidance to agencies in this area, including a list of the criteria thought to be necessary for a valid waiver of appeal rights, and perhaps a model waiver agreement.⁴¹ This can help ensure that the process is both fair and clear. By providing such guidance, OPM may better assist agencies and employees in formulating written agreements that will have a greater likelihood of: (1) Being upheld by the Board and the Federal Circuit; and (2) creating an environment where employees are treated fairly by being given the ability to make educated decisions about their employment and appeal rights. Such guidance could also help agencies to operate more efficiently by helping them avoid complex internal debates as to whether language in a particular waiver agreement would be viewed as enforceable.

Any guidance developed by OPM could be structured in a way that is similar to the criteria set forth in the Older Workers Benefit Protection Act of 1990 for determining if a waiver of an age discrimination claim is knowing and voluntary.⁴² Some of the requirements that could be incorporated into such a list include: (1) Notification of the individual's current procedural and appeal rights; (2) notification of the procedural and appeal rights the individual will have after signing the waiver agreement (such as the rights of probationary employees set forth at 5 C.F.R. Part 315, Subpart H); (3) an explanation of what is being offered to the individual in exchange for the waiver; and (4) an explanation of any right to return to a prior position, or the lack of such a right.⁴³ In any event, agencies should

⁴¹OPM has set forth model language in other areas, such as recommended language for court orders awarding former spouse survivor annuities. 5 C.F.R. Part 838, Subpart I, Appendix A.

⁴²29 U.S.C. § 626(f).

⁴³The FCIP and the supervisory probationary period are examples under which an agency may be required to return a probationer to the previous position if the probationer is unsuccessful in the new one.

standardize their policies on when waivers will be used to ensure fair competition and avoid even the perception of a prohibited personnel practice.

Possible Impact on Merit-Based Hiring

The first merit system principle provides, in relevant part, that selection should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition. Probationary and trial periods are instrumental in observing this principle because pre-employment assessments are incomplete and imperfect. Even agencies that conduct thorough, valid assessments of their applicants cannot assure that every new hire will be satisfactory. Enabling agencies to assess and easily terminate unsatisfactory new employees recognizes this reality, and promotes two other merit system principles: Using the Federal work force efficiently and effectively; and retaining employees on the basis of the adequacy of their performance. Studies have shown that “job tryouts,” if used appropriately – i.e., for observing and evaluating performance on the job and terminating those not meeting previously established standards for satisfactory performance – have substantial value in predicting future performance.⁴⁴

The court’s decisions in *Van Wersch* and *McCormick*, however, may effectively preclude the use of such tryouts for some applicants based solely on their prior experience. That is, even though an agency may intend that all applicants, if hired, be required to serve a probationary or trial period, some applicants will be subject to no period, or an abbreviated period, in which an agency can evaluate their performance and fitness for the job before those applicants acquire procedural and appeal rights under 5 U.S.C. Chapter 75. This scenario may have several unintended and undesirable consequences. First, it could encourage agencies to consider the possible presence or absence of a “job tryout” period – i.e., a factor other than demonstrated ability or performance – when making hiring decisions. Second, it may discourage agencies from hiring candidates who would have appeal rights upon, or shortly after, appointment because such candidates would be “riskier” hires. Such an outcome

⁴⁴Frank L. Schmidt and John E. Hunter, “The Validity and Utility of Selection Methods in Personnel Psychology: Practical and Theoretical Implications of 85 Years of Research Findings,” *Psychological Bulletin*, The American Psychological Association, Inc., Vol. 124, No. 2, 1998, pp. 262-274.

would not be fair to the candidate with prior qualifying service, and may result in a loss to the Government of an employee who may ultimately be the best candidate for the position. This result may be most perverse with respect to applicants for excepted service positions, because only those with prior service that is the same or similar will qualify as “employees,” and it is just these individuals who may be viewed as among the best candidates with the most relevant job experience.

When an agency wants to hire an applicant who would have appeal rights shortly after appointment, it must balance the desirability of hiring that applicant based on the assessments already made against the risk that the agency, if it later decided to terminate the applicant, would have to provide the procedural and appeal rights set forth in 5 U.S.C. Chapter 75. An agency could consider asking such an individual to sign an agreement that would constitute a knowing and voluntary waiver of his or her rights to appeal under 5 U.S.C. §§ 7511(a)(1)(A)(ii) or 7511(a)(1)(C)(ii). However, as set forth above, this approach presents a risk that the waiver will be found unenforceable. This option presents the additional risk that a prospective employee will not agree to such a waiver, and will turn down an employment offer if signing such an agreement is required. Requiring a waiver of appeal rights may also add a legalistic and unattractive step to the hiring process that could undermine agency efforts to market their missions and their jobs. The decisions in *Van Wersch* and *McCormick* could also create an incentive for agencies to offer more temporary appointments in the competitive service and temporary appointments limited to 2 years or less in the excepted service. The benefits available to persons serving in such appointments would be limited, and that fact, combined with the temporary nature of the appointment, may leave the agency with a less qualified group of applicants than it would get if the position were permanent. Still, they would be without appeal rights, even post-*Van Wersch* and *McCormick*. In short, the court’s decisions in *Van Wersch* and *McCormick* appear to leave agencies in a difficult position with no apparent satisfactory solutions.



CONCLUSIONS AND RECOMMENDATIONS

As set forth in this and other MSPB reports, the probationary or trial period, if used correctly, can be one of the most valuable assessment tools available to Federal agencies when hiring employees. Proper use of this tool helps promote the merit system principle that selection should be determined solely on the basis of relative ability, knowledge, and skills. An integral part of the effectiveness of the probationary or trial period as an assessment tool is the ability to terminate those probationers with performance or conduct problems swiftly and without the uncertainty and additional administrative costs that accompany removals of employees who are entitled to appeal the merits of agency actions to the Board and the Federal Circuit.

The court's decisions in *Van Wersch* and *McCormick*, however, have changed the way in which Federal agencies have traditionally determined whether an employee has full procedural and appeal rights. Therefore, action can and should be taken by the stakeholders affected by those decisions. With this in mind, the Board offers the following recommendations:

1. OPM Should Amend its Regulations to Conform with Current Law

Federal regulations do not accurately reflect the current state of the law as set forth in the *Van Wersch* and *McCormick* decisions. OPM should update these regulations to reflect those Federal Circuit decisions. Agencies that rely on inaccurate regulations may be misled as to who is, and who is not, entitled to full procedural and appeal rights. This, in turn, may impair the effectiveness of the probationary or trial period

as an assessment tool in hiring. In addition, probationary employees who have been terminated, and who rely on the current regulations, could mistakenly believe that they do not have such procedural and appeal rights when, in fact, they do. Amending these regulations through notice and comment rulemaking would highlight and educate those affected by the *Van Wersch* and *McCormick* decisions.

In addition, as mentioned above, OPM indicated in a 1992 Federal Register notice that for nonpreference eligible employees in excepted service appointments pending conversion to the competitive service, the eligibility requirements for conversion constituted the “probationary or trial period” under 5 U.S.C. § 7511(a)(1)(C)(i). OPM noted that employees under those types of appointments gain procedural and appeal rights upon conversion to the competitive service. Although the Federal Circuit and the Board have issued decisions that appear to support OPM’s position, the above interpretation should be set forth in OPM’s regulations, which are entitled to more deference from the Board and the courts than a statement in a Federal Register notice.

Although the Board and Federal Circuit have not directly determined whether waivers of procedural and appeal rights by new employees, regardless of the wording, are valid, OPM should also consider providing guidance, and possibly even model language, for agencies in drafting waivers of procedural and appeal rights that may accrue to individuals who would have such rights under 5 U.S.C. § 7511(a)(1)(A)(ii) or 5 U.S.C. § 7511(a)(1)(C)(ii), even though they may be serving a probationary or trial period. In light of *Van Wersch* and *McCormick*, a waiver of such rights may be one way in which agencies can level the assessment “playing field” between candidates with different experience, and resist the temptation to base a hiring decision on the extent to which a candidate presents the agency with assessment opportunities.

2. Agencies Should:

A. Educate Staff and Quickly Identify when Probationers Will Obtain Full Rights

In a post-*Van Wersch* and *McCormick* world, agencies need to understand that even though an individual is serving a probationary or trial period, the individual may still be entitled to full pre-termination procedural and post-termination appeal rights if he or she has the requisite type and amount of prior service. This understanding should be communicated to all personnel who have a role in the assessment and termination of new employees.

To ensure that the probationary or trial period continues to serve its intended purpose as an effective assessment tool, agencies must identify – before or soon after an individual is hired – the type and amount of prior Federal service the individual has performed. This information can be used to calculate when the individual will obtain full procedural and appeal rights, and how long the assessment period will last. Managers and new employees should then be informed of the projected date upon which the employee will obtain full procedural and appeal rights.

To make this determination, agencies should begin with any prior Federal employment history included on an appointee’s resume or application. The accuracy of such information should have been verified through a reference check.⁴⁵ Each appointee should also complete a Standard Form 144, statement of Prior Federal Service, which requests a list of all prior Federal service, including dates and type of appointment. Agencies should be proactive in obtaining information relating to prior service. If the individual is being appointed without a break in service from another Federal agency and the Official Personnel File has not been received, agencies may obtain information by using Standard Form 75, Request for Preliminary Employment Data. This form requests such information as the

⁴⁵For a full discussion of why reference checks are a key component of the hiring process, and an identification of best practices in this area, please see our report, “Reference Checking in Federal Hiring: Making the Call,” September 2005.

employee's position and occupational code with his current employer, as well as the nature, date, and authority for the prior service appointment, and probation information. After obtaining this information, agencies can attempt to accurately compute the length of time they have to assess a candidate and, if necessary, terminate the candidate before he or she becomes entitled to full procedural and appeal rights.

In addition, the history of the *McCormick* case after the court's decision offers an example of how the likelihood that a terminated probationer will be returned to the rolls with full back pay and benefits may be minimized. Specifically, in *McCormick v. Department of the Air Force*, 98 M.S.P.R. 201 (2005), the Board found that the appellant's termination under 5 C.F.R. § 315.804 comported with her constitutional right to minimum due process of law because she received notice of the action against her, an explanation of the reasons for the action, and an opportunity to present her response, albeit in an abbreviated format and time frame. The question therefore became one of procedural error, i.e., whether the appellant could prove that taking the action as the agency did likely caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The Board remanded the appeal for adjudication of that issue, as well as the merits if harmless error were found. Under the circumstances, the agency was ordered to provide as corrective action retroactive back pay for only the additional 19 days of the 30-day advance notice period to which she was entitled (she had received 11 days of prior notice). Thus, providing notice and an opportunity to respond when taking an action against a probationer can enhance the likelihood that an agency's action will stand, albeit only after the merits of the termination are adjudicated on appeal.

B. Specify that the Period of an Internship is a Trial or Probationary Period

OPM's regulations do not specify that, for nonpreference eligible employees in excepted service appointments pending conversion to the competitive service, the period of service prior to any such conversion constitutes the "probationary or trial period" under 5 U.S.C. § 7511(a)(1)(C)(i). Out of an abundance of caution, agencies should consider stating in their internal policies that the period prior to such a conversion is a probationary or trial period.

3. Congress Should Consider Amending 5 U.S.C. § 7511(a)(1)

The Federal Circuit acknowledged in *Van Wersch* that Congress likely intended to exclude from the definition of "employee" an individual who did not meet the requirements of subsection 7511(a)(1)(C)(i), even if he or she did meet the requirements of subsection 7511(a)(1)(C)(ii). The court noted that the Government's arguments had "force," and that the Government would have a compelling case for its reading of the statute if the statute could fairly be read as ambiguous. If Congress's use of the word "or" in the statute was actually inadvertent or misplaced, then Congress should amend the statute to effectuate its original intent with respect to probationary periods, as suggested by the court. Such an amendment could indicate that if an individual is in a probationary status, the individual is not entitled to the protections granted to Federal employees, even if the individual has been in service for more than 1 year. This change could help expand to a greater number of new employees one of the more effective assessment tools available to agency managers. It could also help avoid situations in which agencies would be tempted to base hiring decisions, at least in part, on a non-merit factor such as whether it could swiftly, and with a sense of finality, terminate an employee if necessary.

In making this recommendation, we note that a return to the law as it existed before *Van Wersch* and *McCormick* would not mean that all new hires would automatically become subject to a probationary period with limited procedural and appeal rights. Under existing OPM regulations, the first year of service of an employee in the competitive service who is given a career or career-conditional appointment is a probationary period when the employee was either appointed from a competitive list of eligibles or was reinstated, unless the reinstated employee previously completed a probationary period or served with competitive status under an appointment that did not require a probationary period.⁴⁶ A person who is transferred, promoted, demoted, or reassigned before completing probation must complete the probationary period in the new position.⁴⁷ Moreover, prior Federal civilian service counts toward completion of probation when the prior service: (1) Is in the same agency, e.g., Department of the Army; (2) is in the same line of work (determined by the employee's actual duties and responsibilities); and (3) contains or is followed by no more than a single break in service that does not exceed 30 calendar days.⁴⁸

Congress has amended statutes in the past when a court has interpreted a law in a way that Congress did not intend. For example, in a 1994 amendment to the Whistleblower Protection Act, Congress established a knowledge/timing test that allows an employee to demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence.⁴⁹ The Senate Report noted that the amendment “reverses the holding of *Clark v. Department of the Army*,” which was decided by the Federal Circuit.⁵⁰ We encourage Congress to compare the Federal Circuit's interpretation of the applicable statutory language relating to procedural and appeal rights with the legislative history, recognize the issues facing agencies with respect to probationary periods, and amend the statute if the court's interpretation does not comport with what Congress believes is the best policy for managing the Federal workforce.

⁴⁶5 C.F.R. § 315.801(a).

⁴⁷5 C.F.R. § 315.801(b).

⁴⁸5 C.F.R. § 315.802(b).

⁴⁹5 U.S.C. § 1221(e)(1).

⁵⁰Senate Report No. 103-358, at 7 (1994), reprinted in 1994 U.S.C.C.A.N. 3549, 3555.

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