

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

2009 MSPB 61

Docket No. SF-315H-08-0709-I-1

**Eric Smart,
Appellant,**

v.

**Department of Justice,
Agency.**

April 21, 2009

Eric Smart, Los Angeles, California, pro se.

Joe Lazar, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant timely petitioned for review of an initial decision that dismissed his appeal of his termination during his probationary period for lack of Board jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the appeal for further proceedings.

BACKGROUND

¶2 The appellant received a career appointment in the competitive service as a Deputy U.S. Marshal on June 9, 1991, subject to completion of a 1-year probationary period. Initial Appeal File (IAF), Tab 1 at 71; Tab 4, Ex. 4F at 1.

By letter dated August 30, 1991, the appellant was terminated during his probationary period, effective September 20, 1991, due to unacceptable performance and conduct. IAF, Tab 4, Ex. 4F at 1. The termination letter advised the appellant of his limited right to appeal to the Board as a probationary employee and his right to file an Equal Employment Opportunity (EEO) complaint. *Id.* at 1-2.

¶3 The appellant filed an EEO complaint on January 30, 1992, alleging that he was discriminated against because of his race when he was terminated from his position. IAF, Tab 1 at 9. On December 6, 1994, the Equal Employment Opportunity Commission (EEOC) affirmed the agency's decision, finding that the appellant failed to prove that he was discriminated against on the basis of race. IAF, Tab 4, Ex. 4E at 8. On September 1, 2008, the appellant filed an appeal with the Board. IAF, Tab 1. He alleged that he began his federal service in July 1979, that he was not given the option of appealing to the Board at the time of his dismissal, and that his dismissal was improper. IAF, Tab 1 at 1, 5-6, 71. The appellant did not request a hearing.

¶4 The administrative judge issued an Acknowledgement Order providing the appellant with his jurisdictional burden for appealing a probationary termination and ordering him to file evidence and argument proving that the appeal is within the Board's jurisdiction. IAF, Tab 2 at 2. After considering the appellant's response and the agency file, the administrative judge dismissed the appeal for lack of Board jurisdiction without holding a hearing, noting that the appellant did not assert that his probationary termination was based on either partisan political reasons or marital status. IAF, Tab 5 at 2. Given his decision on the jurisdictional issue, the administrative judge did not address the timeliness of the appeal. *Id.* at 2 n.1.

¶5 The appellant filed a timely petition for review. Petition for Review File (PFRF), Tab 1. The agency did not file a response.

ANALYSIS

¶6 The appellant asserts on review that the administrative judge failed to consider his “previous Federal Employment” in dismissing his appeal for lack of Board jurisdiction due to his probationary status. *See* PFRF, Tab 1 at 1. He notes that he began his federal career in July 1979 and that he is a former Internal Revenue Service employee. *Id.* at 6; IAF, Tab 1 at 1-2, 71. An individual is entitled to appeal to the Board under [5 U.S.C. § 7513](#)(d) if he is an “employee” as that term is defined at 5 U.S.C. § 7511(a), which provides, in pertinent part,

(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.

[5 U.S.C. § 7511](#)(a)(1)(A).

¶7 In *McCormick v. Department of the Air Force*, [307 F.3d 1339](#), 1342-43 (Fed. Cir. 2002), the Federal Circuit held that an individual who is excluded from “employee” status under [5 U.S.C. § 7511](#)(a)(1)(A)(i) is nevertheless an “employee” if the individual meets the definition provided at [5 U.S.C. § 7511](#)(a)(1)(A)(ii). In other words, a competitive service employee serving a probationary period is nevertheless entitled to appeal to the Board if he “has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less.” *See McCormick*, 307 F.3d at 1342-43. The Board has held that current continuous service need not be in the same or similar positions in order for an individual in the competitive service to qualify as an “employee” under [5 U.S.C. § 7511](#)(a)(1)(A)(ii). *See Ellefson v. Department of the Army*, [98 M.S.P.R. 191](#), ¶ 14 (2005); *see also Samble v. Department of Defense*, [98 M.S.P.R. 502](#), ¶ 9 n.1 (2005). The Board has also held that, for

competitive service employees, “current continuous service” means a period of employment or service immediately preceding an adverse action without a break in federal civilian employment of a workday. *See Ellefson*, [98 M.S.P.R. 191](#), ¶ 14; *Samble*, [98 M.S.P.R. 502](#), ¶ 9; *see also* [5 C.F.R. § 752.402\(b\)](#).

¶8 Prior to the rule announced in *McCormick*, it was well established that a probationary employee in the competitive service had no statutory right of appeal to the Board. *See, e.g., Porter v. Department of Defense*, [98 M.S.P.R. 461](#), ¶ 14 (2005); *Von Deneen v. Department of Transportation*, [33 M.S.P.R. 420](#), 422, *aff'd*, 837 F.2d 1098 (Fed. Cir. 1987) (Table). The Board has recognized, however, that the rule announced in *McCormick* applies retroactively to cases involving pre-*McCormick* events, such as this appeal. *See Samble*, [98 M.S.P.R. 502](#), ¶ 10; *Porter*, [98 M.S.P.R. 461](#), ¶ 14 (applying *McCormick* to a case in which the appellant separated before, but filed an appeal with the Board after, *McCormick* was issued); *see also Reynoldsville Casket Co. v. Hyde*, [514 U.S. 749](#), 752 (1995) (when a court decides a case and applies a new legal rule of that case to the parties before it, then it and other courts must treat that same new legal rule as “retroactive,” applying it, for example, to all pending cases, whether or not those cases involve predecision events).

¶9 The appellant here was terminated during his probationary period on September 20, 1991, following his appointment on June 9, 1991. *See* IAF, Tab 1 at 71; Tab 4, Ex. 4F at 1. He claims that he had 13 years of prior federal service with the Internal Revenue Service, and his service computation date is listed as July 16, 1979, on the Standard Form (SF) 50 effecting his termination. IAF, Tab 1 at 1-2, 71; PFRF, Tab 1 at 2. We are unable to determine from the record whether the appellant has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. The record is devoid of any evidence demonstrating whether the appellant ever had a break in his federal service or whether the appellant had completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or

less. The appellant submitted only the SF-50 from his probationary termination, and the agency submitted little in the nature of personnel records, noting that “[d]ue to the age of this case, the Agency no longer maintains Appellant’s Official Personnel Folder or the case file regarding his termination.” See IAF, Tab 1 at 71; Tab 4, Ex. 1 at 1. It is thus not clear from the record whether the appellant has prior service that meets the current continuous service requirement of section 7511(a)(1)(A)(ii). Moreover, even if the appellant had a break in service, he may be an “employee” under subsection (i) of section 7511(a)(1)(A) if his prior service can be “tacked” to his probationary period.* See *Ellefson*, [98 M.S.P.R. 191](#), ¶ 16.

¶10 However, the appellant did not receive explicit information from the administrative judge as to how he could show that his prior service can be “tacked” to his probationary period. Nor did he receive explicit information as to how he could show that he meets the definition of an employee under [5 U.S.C. § 7511\(a\)\(1\)\(A\)\(ii\)](#). See *Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985). Moreover, the record is not sufficiently developed for us to address these issues without a remand. The appeal must therefore be remanded for the administrative judge to determine whether, during the year immediately preceding his separation, the appellant’s service was without a break in service of a workday and was under other than a temporary appointment limited to 1 year or less. The administrative judge must additionally determine whether the appellant’s prior service can be “tacked” to his probationary period. If the appellant meets either of these requirements, the Board would have jurisdiction over his appeal. See *Ellefson*, [98 M.S.P.R. 191](#), ¶¶ 15-16.

* Prior service in competitive service positions can be credited towards completion of a later probationary or trial period in a competitive service position if the employee shows that: (1) The prior service was rendered immediately preceding the appointment; (2) it was performed in the same agency; (3) it was performed in the same line of work; and (4) it was completed with no more than one break in service of less than 30 days. See *Ellefson*, [98 M.S.P.R. 191](#), ¶ 16; [5 C.F.R. § 315.802\(b\)](#).

ORDER

¶11 Accordingly, we vacate the initial decision and remand the appeal for further adjudication, a determination of the timeliness of the appeal if the administrative judge finds that the appeal is within the Board's jurisdiction, and the issuance of a new initial decision. Upon remand, the administrative judge shall inform the appellant how he may show that he has prior service that meets the current continuous service requirement of section 7511(a)(1)(A)(ii) and how he may show that his prior service should be “tacked” to his probationary period.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.