

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

2010 MSPB 197

Docket No. SF-315H-09-0967-I-1

**Richard Z. Sandoval,
Appellant,**

v.

**Department of Agriculture,
Agency.**

September 29, 2010

Lesa L. Donnelly, and Robert W. Donnelly, Anderson, California, for the appellant.

Raymond F. Montano, Albuquerque, New Mexico, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This matter comes before the Board upon the appellant's petition for review of an initial decision that dismissed his appeal for lack of jurisdiction. For the following reasons, we GRANT the petition for review under [5 C.F.R. § 1201.115](#)(d) and REVERSE the initial decision. The appellant's removal is REVERSED.

BACKGROUND

¶2 On April 27, 2008, the appellant was appointed to the position of GS-0462-03 Forestry Aid, not to exceed April 25, 2009. Initial Appeal File (IAF), Tab 4, Exhibit 4F. It was not clear when this appointment ended, but according to the record, the appellant was appointed to the GS-0462-03 Forestry Aid position again on July 6, 2008, not to exceed July 4, 2009. *Id.*, Exhibit 4E. The appellant was converted to a career-conditional appointment to a GS-0462-03 Forestry Technician on November 9, 2008, an appointment that required him to complete a one year probationary period. *See id.*, Exhibit 4D. On August 14, 2009, the agency informed the appellant that he was terminated from his Forestry Technician position, effective August 19, 2009, because he provided false information to gain approval for leave. *See id.*, Exhibits 4A, 4B. He filed this Board appeal. IAF, Tab 1.

¶3 The administrative judge issued an Acknowledgment Order, noting that the Board may not have jurisdiction over the appeal, and ordering the appellant to file evidence and argument to show that the appeal is within the Board's jurisdiction. *See* IAF, Tab 2. The appellant did not respond to the Acknowledgment Order. The administrative judge issued an Order to Show Cause-Jurisdiction, explaining that the appellant bears the burden of proving Board jurisdiction by preponderant evidence, that he was entitled to a jurisdictional hearing if he made a nonfrivolous allegation of jurisdiction and describing the standard by which jurisdiction would be determined, and he ordered the appellant to file evidence and argument to support a nonfrivolous allegation of Board jurisdiction over the termination. *See* IAF, Tab 5. In addition to explaining the jurisdictional requirements for a probationary employee under [5 C.F.R. §§ 315.805-.806](#), the administrative judge explained the requirements for establishing that the appellant was an "employee" with adverse action appeal rights under [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#), pursuant to the court's ruling in *McCormick v. Department of the Air Force*, [307 F.3d 1339](#) (Fed. Cir.

2002). IAF, Tab 5 at 2-4. In particular, the administrative judge explained that the appellant's service in the Forestry Aid position *may* count toward completion of the one-year probationary period in the Forestry Technician position if, *inter alia*, such service was in the "same line of work" under 5 C.F.R. § 315.802(b)(2). *Id.* at 2. The appellant and the agency responded to the Order to Show Cause. *See* IAF, Tabs 6, 7.

¶4 The administrative judge found that the appellant made a nonfrivolous allegation that he was an employee under [5 U.S.C. § 7511](#)(a)(1)(A)(i), IAF, Tab 11 at 1-2, and a jurisdictional videoconference hearing was held on December 18, 2009, *see* Hearing CD (HCD). The administrative judge issued an initial decision, which found that the Aid and Technician positions were not in the same line of work, that the appellant was not an employee under either subsection of [5 U.S.C. § 7511](#)(a)(1)(A), that he did not satisfy the criteria of [5 C.F.R. § 315.806](#), and that he did not have Board appeal rights to challenge his termination, and she dismissed the appeal. IAF, Tab 12.

¶5 The appellant requested, and was given, an extension of time to file a petition for review. Petition for Review (PFR) File, Tabs 1, 2. The appellant then filed a petition for review and the agency filed a response. *See* PFR File, Tabs 3, 4. On review, the appellant challenges the administrative judge's substantive conclusions, and also complains about the conduct and quality of the hearing. We do not address the appellant's arguments concerning the conduct and quality of the hearing, assuming they were preserved for review, because they are mooted by our decision herein.

ANALYSIS

¶6 We grant the petition for review because we believe that, although this is a close case, the administrative judge's ultimate conclusion was erroneous. *See* [5 C.F.R. § 1201.115](#)(d). For the following reasons, we conclude that the Forestry Aid and Forestry Technician positions were in the same line of work under

[5 C.F.R. § 315.802](#)(b)(2), and the appellant's service in the Aid position should be tacked to his service in the Technician positions, such that he is an employee under [5 U.S.C. § 7511](#)(a)(1)(A)(i).¹

The appellant is an employee under [5 U.S.C. § 7511](#)(a)(1)(A)(i).

¶7 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). The appellant bears the burden of proving jurisdiction by preponderant evidence. [5 C.F.R. § 1201.56](#)(a)(2)(i). An individual who meets the definition of an "employee" in [5 U.S.C. § 7511](#)(a)(1)(A) may 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 an individual in the competitive service who is not serving a probationary or trial period under an initial appointment, or who has completed one year of current continuous service under other than a temporary appointment limited to one year or less. [5 U.S.C. § 7511](#)(a)(1)(A)(i), (ii). An appellant has Board appeal rights if he satisfies either prong of this standard. *See McCormick*, 307 F.3d at 1341-42 (an individual who does not meet one prong of the definition of "employee" under 5 U.S.C. § 7511(a)(1) has appeal rights if she meets the other prong).

¶8 The dispositive issue in this appeal is whether the appellant can tack his service in the Aid position to count towards completion of the probationary period for the Technician position so that he meets the requirements of

¹ We discern no error with the administrative judge's conclusion that the appellant was not an employee under [5 U.S.C. § 7511](#)(a)(1)(A)(ii) because his service in the Forestry Aid position included two temporary appointments limited to one year or less, and he did not have one year of current continuous service without those temporary appointments. IAF, Tab 12 at 5; *see* IAF, Tab 4, Exhibits 4E, 4F. Because the appellant does not appear to challenge this conclusion on review, we need not consider it further. In light of our disposition, we need not consider whether the appellant had Board appeal rights pursuant to [5 C.F.R. § 315.806](#)(b), (c).

7511(a)(1)(A)(i). Pursuant to [5 C.F.R. § 315.802\(b\)](#), prior federal civilian service counts toward completion of the probationary period when the prior service: 1) is in the same agency; 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. The administrative judge found that conditions (1) and (3) were satisfied, *see* IAF, Tab 12 at 6, and neither party disputes this conclusion on review. The Board has explained that positions are in the same line of work if they “involve work that is so similar that the positions require the same qualifications, and the nature of the work would place them in the same competitive level for reduction in force purposes” or if they “involve related or comparable work that requires the same or similar knowledge, skills, and abilities.” *McCrary v. Department of the Army*, [103 M.S.P.R. 266](#), ¶ 14 (2006) (internal citations omitted); *see McAteer v. U.S. Postal Service*, [34 M.S.P.R. 684](#), 686 (1987) (internal citations omitted).

¶9 The initial decision contained a comprehensive review of the evidence in the record. IAF, Tab 12. The administrative judge described the relevant vacancy announcements and position descriptions (PDs), and she noted that both positions involved “(arduous) physical demands” and “(hazardous) work environments,” that both positions required incumbents to pass a work capacity test for arduous positions, that the minimum qualifications were identical, and that the duties described in the vacancy announcements were “nearly identical.” *Id.* at 7-8. She also acknowledged that the appellant testified that he performed the same duties in the Technician position that he performed in the Aid position, that his primary duty, from July 6, 2008, to August 19, 2009, was to “cut line,” meaning cut a line around the fire to contain it, that both positions required the same knowledge, skills and abilities, and that, when he became a Technician, he was credited for 880 hours of prior experience. *Id.* at 11.

¶10 While there were many similarities between these positions, the administrative judge also identified some important differences. For instance, the

administrative judge noted that the Technician PD “includes more specialized duties and reflects a higher skill level than the crewmember duties described in the Aid PD,” that the appellant’s appointment to the Technician position was pursuant to the National Interagency Wildland Firefighter Apprenticeship Program, that the appellant was required, as a condition of employment, to complete National Apprenticeship Standards, maintain a valid state driver’s license and/or a commercial driver’s license, and sign an agreement certifying his acceptance of such conditions as well as a Program Registration and Apprenticeship Agreement. *See id.* at 9-10; *see also* IAF, Tab 6, Exhibits 3 (vacancy announcement for the Technician position, documenting the employment conditions), 4 (official job confirmation letter, including Employee Agreement), 6 (Wildland Firefighter Apprenticeship Program), 7 (National Apprenticeship Standards). For these reasons, the administrative judge concluded that he was not an employee under [5 U.S.C. § 7511](#)(a)(1)(A)(i), because the positions were not in the same line of work, and thus, he lacked Board appeal rights to challenge his termination. IAF, Tab 12 at 12-13.

¶11 In analyzing this appeal, we have considered the purpose of the probationary period and the Federal Circuit’s decisions in *Mathis v. U.S. Postal Service*, [865 F.2d 232](#) (Fed. Cir. 1988), and *Coradeschi v. Department of Homeland Security*, [439 F.3d 1329](#) (Fed. Cir. 2006). The regulation at [5 C.F.R. § 315.803](#)(a) encourages agencies to utilize the probationary period “to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.” *See Angell v. Department of the Navy*, [4 M.S.P.R. 266](#), 268 (1980). In our 2005 Report, *The Probationary Period: A Critical Assessment Opportunity*, we explained that the purpose of the probationary period “is to provide the Government with an opportunity to evaluate an individual’s conduct and performance on the job to determine if an appointment to the civil service should become final.” *Id.* at i. Thus, by the time the agency terminated the appellant in

August 2009, it had over 15 months to evaluate his fitness for continued federal employment.

¶12 In *Mathis*, 865 F.2d at 234, the Federal Circuit concluded that, to satisfy the “similar positions” test under [5 U.S.C. § 7511\(a\)\(1\)\(B\)](#),² an employee “must occupy positions that involve related or comparable work that requires the same or similar skills.” Utilizing this standard, the court reversed the initial decision and held that the special delivery messenger and distribution clerk positions were similar positions because the “duties of each position involved the handling of the mail, and the skills required to perform the work were closely related.” *Id.* at 235. Notably, in *Mathis*, the court warned against a narrow interpretation of the relevant statutory provisions. *Id.* at 233.

¶13 Similarly, in *Coradeschi*, the court considered whether the appellant’s Immigration & Naturalization Service (INS) agent and Federal Air Marshal (FAM) positions were the same or similar under [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(ii\)](#).³ In that appeal, the administrative judge determined that these positions were not similar, noting that an INS agent enforces immigration laws at his office and other establishments and a FAM deters criminal activity on aircraft; only a FAM must undergo specialized training and obtain a top security clearance; and only a FAM “must be physically capable of ‘long, arduous hours of international air

² An individual is an “employee” under section 7511(a)(1)(B) if he is 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 or in the United States Postal Service or Postal Regulatory Commission. Our reviewing court explained that “‘the same line of work’ language [found in [5 C.F.R. § 315.802\(b\)](#)] is akin to [the] ‘similar positions’” language found in section 7511(a)(1)(B). *Davis v. Merit Systems Protection Board*, 340 F. App’x 660, 663 (Fed. Cir. 2009), citing *Mathis*, 865 F.2d at 234. Therefore, we may rely on cases discussing whether positions are “the same or similar” under section 7511(a)(1)(B) in our analysis.

³ An individual is an employee under section 7511(a)(1)(C)(ii) if he is an individual in the excepted service (other than a preference eligible), “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.”

travel.’” *Coradeschi*, 439 F.3d at 1331. The court, however, concluded that the appellant made a nonfrivolous allegation that his work as an INS agent was the same or similar to his FAM work:

From the limited evidence presented without even a hearing, it appears that both positions required Coradeschi to apprehend and subdue criminals, carry and be proficient with a firearm, and investigate criminal activity. Moreover, both positions carried an 1801 occupation code, a fact that seems important in both the TSA Bulletin in effect when Coradeschi was hired and the TSA Directive in effect when he was terminated.

Id. at 1334. Significantly, in *Coradeschi*, the Federal Circuit cautioned against placing too much emphasis on job description dissimilarities, explaining instead that the focus should be on the skills and fundamental character of the positions in question. *Id.*

¶14 Consistent with the Federal Circuit’s approach, which focuses on the skills and fundamental character of the relevant positions, and the purpose of the probationary period - to allow agencies an opportunity to evaluate an employee’s fitness for continued employment - we conclude that the Forestry Aid and Forestry Technician positions are sufficiently similar, such that these positions are in the same line of work under [5 C.F.R. § 315.802\(b\)\(2\)](#).⁴ For these reasons, the appellant may tack his service as an Aid to his service as a Technician, he has completed his one-year probationary period, and thus, he is properly considered an “employee” under [5 U.S.C. § 7511\(a\)\(1\)\(A\)\(i\)](#).

¶15 In light of these conclusions, we also find the agency’s action violated the appellant’s constitutional right to minimum due process. An agency’s failure to provide a tenured public employee with an opportunity to present a response, either in person or in writing, to an appealable agency action that deprives him of his property right in his employment constitutes an abridgement of his

⁴ Like in *Coradeschi*, the Aid and Technician positions share the same 0462 occupational code. See IAF, Tab 4, Exhibits 4D, 4E, 4F.

constitutional right to minimum due process of law, i.e., prior notice and an opportunity to respond. *Cleveland Board of Education v. Loudermill*, [470 U.S. 532](#), 546 (1985). The record shows that the appellant was informed on August 14, 2009, that his termination would be effective five days later, on August 19, 2009, and he was not given an opportunity to respond to the notice. See IAF, Tab 4, Exhibit 4B. Since the agency's procedures for effecting the appellant's removal did not comport with his constitutional right to minimum due process, the agency's action must be reversed. See *Gadsden v. Department of State*, [102 M.S.P.R. 79](#), ¶¶ 16-17 (2006).

ORDER

¶16 We ORDER the agency to cancel the appellant's termination and to restore him, effective August 19, 2009. See *Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶17 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶18 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. See [5 C.F.R. § 1201.181](#)(b).

¶19 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).

¶20 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶21 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.