

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

2011 MSPB 36

Docket No. NY-0752-10-0199-I-1

**Susan G. Roy,
Appellant,**

v.

**Department of Justice,
Agency.**

March 4, 2011

Thomas G. Roth, Esquire, Mountain Lakes, New Jersey, for the appellant.

Charles F. Smith, Esquire, Falls Church, Virginia, 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 her appeal for lack of jurisdiction. For the following reasons, we DENY the petition for review under [5 C.F.R. § 1201.115\(d\)](#) and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for a lack of jurisdiction.

BACKGROUND

¶2 Until March 1, 2008, the appellant held the position of General Attorney with the Department of Homeland Security, Immigration and Customs Enforcement. Initial Appeal File (IAF), Tab 7 at 23. Effective March 2, 2008, she received a temporary appointment, not to exceed September 1, 2009, in the excepted service as an Immigration Judge with the Department of Justice. *Id.* at 21.

¶3 Effective November 9, 2008, the appellant's appointment was converted to a permanent excepted service appointment as an Immigration Judge, subject to the completion of an initial trial period. *Id.* at 20. Because the appellant is not a preference eligible, the length of her trial period was set at two years. *Id.* Less than 18 months later, the agency terminated the appellant from her position based on alleged misconduct. *Id.* at 14-15.

¶4 The appellant appealed the agency's termination action to the New York Field Office, but the appeal was dismissed without a hearing because the administrative judge concluded that the Board lacked jurisdiction. IAF, Tab 14, Initial Decision (ID). The appellant filed a timely petition for review, to which the agency timely responded in opposition. Petition for Review (PFR) File, Tabs 1, 3.

ANALYSIS

¶5 The appellant has the burden of proving, by a preponderance of the evidence, that the Board has jurisdiction over her appeal. [5 C.F.R. § 1201.56\(a\)\(2\)\(i\)](#). The sole question before us is whether the administrative judge erred in holding that the appellant failed to show Board jurisdiction over the agency's termination action. *See* PFR File, Tab 1; ID.

¶6 An individual in the excepted service (other than a preference eligible) who is terminated will have recourse to the Board if the individual is one

- (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[.]

[5 U.S.C. § 7511\(a\)\(1\)\(C\)](#); see *Van Wersch v. Department of Health & Human Services*, [197 F.3d 1144](#), 1151 (Fed. Cir. 1999). Because it is undisputed that the appellant was serving in a trial period, she cannot meet the criteria of [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(i\)](#). See IAF, Tab 7 at 20. However, the appellant asks us to hold that she meets the criteria of section 7511(a)(1)(C)(ii) on the basis of her prior service. See PFR File, Tab 1.

¶7 We recognize that the case law pertaining to whether an individual meets the statutory definition of an employee with Board appeal rights is complex, and there are extremely fine distinctions separating those who have appeal rights from those who do not. In the competitive service, time spent in a temporary position may potentially be tacked on to time in a permanent position in order to meet the length of service requirements for Board jurisdiction. See *Enocencio v. Department of Veterans Affairs*, [79 M.S.P.R. 130](#), ¶ 5 (1998) (holding that the tacking of temporary service to permanent service is permitted if the prior service was rendered immediately preceding the appointment; it was performed in the same agency; it was performed in the same line of work; and it was completed with no more than one break in service of less than 30 days); see also [5 C.F.R. § 315.802\(b\)](#). However, the statutory language is clear that time spent in a temporary position in the excepted service does not qualify for tacking to a permanent position. [5 U.S.C. § 7511\(a\)\(1\)\(c\)\(ii\)](#). Time spent in a term position in the excepted service, however, may qualify for tacking. See *Forest v. Merit Systems Protection Board*, [47 F.3d 409](#), 411 (Fed. Cir. 1995) (tacking periods of prior service under temporary appointments to service under a permanent appointment is prohibited by the plain language of section 7511(a)(1)(C)(ii)); *McCrary v. Department of the Army*, [103 M.S.P.R. 266](#), ¶ 12 (2006) (applying the

same formula used in *Enocencio* to an excepted service employee formerly in a term position).*

¶8 The appellant acknowledges that under *Forest* we cannot tack her temporary service and her permanent service together, and she therefore asks us to overlook the time that she spent in the temporary position, and tack her permanent service in the Department of Homeland Security - which ended on March 1, 2008 - to her permanent service in the Department of Justice - which began on November 9, 2008. PFR File, Tab 1 at 13-14. However, the statute specifically requires that the appellant have “completed 2 years of current continuous service[.]” [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(ii\)](#). “Current continuous service” means service immediately prior to the action at issue without a break in service of a work day.” *Yeressian v. Department of the Army*, [112 M.S.P.R. 21](#), ¶ 10 (2009) (defining current continuous service for [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(ii\)](#)); *see Burnett v. Department of Housing and Urban Development*, [114 M.S.P.R. 1](#), ¶ 8 (2010). Because March 1st and November 9th are more than one work day apart, we cannot hold that the appellant’s service meets the criteria of section 7511(a)(1)(C)(ii). Accordingly, the Board lacks jurisdiction to review the agency’s decision to terminate the appellant.

¶9 This is the final order of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulation, section 1201.113 ([5 C.F.R. § 1201.113](#)).

* The agency asserts that the Board’s *McCrary* opinion “sheds no light” on whether the prior service that Ms. McCrary sought to tack to her current service had been in a temporary or a term position. PFR File, Tab 3 at 10. The prior service in question in *McCrary* was service in a term position. *See McCrary*, [103 M.S.P.R. 266](#), ¶¶ 2, 10.

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.ca9c.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.