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

**2011 MSPB 72**

Docket No. SF-315H-08-0709-B-2

**Eric Smart,**

**Appellant,**

**v.**

**Department of Justice,**

**Agency.**

August 3, 2011

Eric Smart, Los Angeles, California, pro se.

Joe Lazar, Esquire, Alexandria, Virginia, for the agency.

**BEFORE**

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

## OPINION AND ORDER

¶1 The agency petitions for review of the administrative judge's second remand decision that granted the appellant's appeal of his termination during his probationary period. For the reasons set forth below, we GRANT the agency's petition, VACATE the remand decision, and DISMISS the appeal for lack of jurisdiction.

## 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. *See* Initial Appeal File (IAF), Tab 1 at 71; *id.*, Tab 4, Ex. 4F at 1. By letter dated August 30, 1991, the appellant was notified that he would be terminated during his probationary period, effective September 20, 1991, due to unacceptable performance and conduct. *Id.*, 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 4-5, 9. On December 6, 1994, the Equal Employment Opportunity Commission (EEOC) affirmed the agency's final decision on the appellant's discrimination complaint, finding that the appellant failed to prove his race discrimination claim. *Id.*, Tab 4, Ex. 4E at 8. Nearly 14 years later, on September 1, 2008, the appellant filed an appeal with the Board. *Id.*, 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. *Id.*, Tab 1 at 1, 5-6.

¶4 The administrative judge issued an acknowledgment order advising the appellant of his jurisdictional burden for appealing a probationary termination and ordering him to file evidence and argument proving that the appeal was 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, noting that the appellant did not assert that his probationary termination was based on either partisan political reasons or marital status. *Id.*, Tab 5, Initial Decision (ID) 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, asserting that the administrative judge failed to consider his previous federal employment in

dismissing his appeal for lack of jurisdiction due to his probationary status. *See* Petition for Review File 1 (PFR File 1), Tab 1 at 1. On review, the Board vacated the ID, finding that the administrative judge failed to provide the appellant with explicit information as to how he could show that his prior service can be "tacked" to his probationary period or that he meets the definition of an employee under 5 U.S.C. § 7511(a)(1)(A)(ii). *See Smart v. Department of Justice (Smart I)*, 111 M.S.P.R. 147, ¶ 10 (2009). The Board also found that the record was not sufficiently developed to address these issues, and thus the Board remanded the appeal for the issuance of an appropriate jurisdictional order and determinations as to 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, and whether the appellant's prior service can be "tacked" to his probationary period. *Id*., ¶¶ 10-11. The Board instructed the administrative judge to also determine the timeliness of the appeal if he found that the appeal is within the Board's jurisdiction. *Id*., ¶ 11.

¶6 On remand, the administrative judge issued a jurisdictional order and later, in response to the agency's assertion that the appeal was untimely, issued an order on timeliness as well. Remand Appeal File 1 (RAF 1), Tab 3; id., Tab 6 at 2; id., Tab 7. The appellant responded to both orders. *See* RAF 1, Tabs 5, 9. The administrative judge dismissed the appeal as untimely filed. *Id*., Tab 11, Remand Decision 1 (RD 1) at 1. He noted that the August 30, 1991 notice of termination informed the appellant that he had the right to appeal the termination action to the Board if he alleged marital discrimination or partisan political discrimination or that, alternatively, he could file an EEO complaint of discrimination. *Id*. at 2, 4. He further found that, even if the appellant did not receive the notice at the time of his termination, he should have been aware of his Board appeal rights by June 2, 1993, when the admissibility of the termination notice was stipulated without objection prior to the appellant's EEOC hearing. *Id*. at 4. The administrative

judge found that the appellant failed to show excusable neglect or demonstrate that there were circumstances beyond his control that affected his ability to comply with the time limits. *Id*. at 4-5. He thus found that the appellant failed to establish good cause for waiving the Board's filing deadline. *Id*. at 5.

¶7 The appellant filed a timely petition for review of the remand decision, Petition for Review File 2 (PFR File 2), Tab 1, and the agency filed a response in opposition, *id*., Tab 3. On review, the Board vacated Remand Decision 1 because the issues of timeliness and jurisdiction are inextricably intertwined and the appeal should not have been disposed of on timeliness grounds without first addressing jurisdiction. We again remanded the appeal to the administrative judge to determine whether, during the year immediately preceding the appellant's separation on September 20, 1991, he was without a break in service of a workday and was under other than a temporary appointment limited to 1 year or less so as to qualify as an employee under 5 U.S.C. § 7511(a)(1)(A)(ii). *See Smart v. Department of Justice (Smart II)*, 113 M.S.P.R. 393, ¶¶ 11, 15 (2010).

¶8 On remand for the second time, the administrative judge found that the appellant established Board jurisdiction over his appeal, finding that the appellant submitted sufficient evidence to establish that he had no break in service and that he otherwise met the definition of "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii). Remand Appeal File 2 (RAF 2), Tab 20, Remand Decision 2 (RD 2) at 2. The administrative judge also found that the agency provided the appellant only with notice of the limited appeal rights afforded to probationary employees and that therefore the appellant showed good cause for waiving the deadline for filing his appeal with the Board. *Id.* The administrative judge further found that the agency did not provide the appellant, an employee entitled to minimum due process regarding his removal under 5 U.S.C. § 7513, with any procedural protections prior to terminating him, including any form of advance written notice or an opportunity to respond to that notice. *Id.* at 4. The administrative judge therefore found that the agency's action violated the

appellant's right to minimum due process and that it cannot be sustained.[1] *Id.* The administrative judge ordered the agency to cancel the appellant's removal and to retroactively restore him effective September 21, 1991, with back pay. *Id.* at 5.

¶9 The agency has now filed a timely petition for review of Remand Decision 2. Petition for Review File 3 (PFR File 3), Tab 1. The appellant has not filed a response.

## ANALYSIS

¶10 In its petition for review, the agency asserts that the Board erred in applying *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002),[2] retroactively to the instant appeal in *Smart I* and *Smart II*. PFR File 3, Tab 1. The agency asserts that at the time of the appellant's 1991 termination it acted in accordance with established law in treating the appellant as a probationer and affording him limited probationary appeal rights to the Board. *Id.* at 13. The agency also argues that the Board misinterpreted the law of retroactivity because, although *McCormick* applies to cases then pending when the *McCormick* decision was issued, even if they involved predecisional events, it does not apply to all

---

[1] The administrative judge held an evidentiary hearing on the merits of the appellant's removal but did not address the merits of the removal in RD 2.

[2] In *McCormick*, 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). *McCormick*, 307 F.3d at 1342-43. Prior to *McCormick*, subsections (A)(i) and (A)(ii) had been interpreted to be mutually exclusive methods for individuals in the competitive service to meet the definition of being an "employee" with Board appeal rights. *See Ellefson v. Department of the Army*, 98 M.S.P.R. 191, ¶ 13 (2005). Thus, at the time of his termination, the appellant would have been required to meet the requirements under subsection (A)(i) to establish that he was an "employee" with Board appeal rights because he had been appointed to a position subject to a 1-year probationary period.

cases involving predecisional events. *Id.* at 18-19. In particular, retroactivity should not be applied to cases that have already become final. *Id.*

¶11 After giving careful consideration to the agency's arguments on this issue, we now agree that our prior decisions in *Smart I* and *Smart II* erred in interpreting the retroactive application of *McCormick* to this appeal. In *Porter v. Department of Defense*, 98 M.S.P.R. 461, ¶¶ 11-14 (2005), the Board reviewed Supreme Court case law on the topic of retroactivity and determined that *McCormick* must be retroactively applied to all cases pending at the time of that decision. Specifically, the Board noted that the Supreme Court abandoned the balancing test established in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993). *Porter*, 98 M.S.P.R. 461, ¶ 13. Instead, in *Harper,* the Court articulated a new standard for determining retroactivity in civil cases:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule

*Harper,* 509 U.S. at 97. Following *Harper,* the Supreme Court further explained the process for consideration of retroactivity in *Reynoldsville Casket Co.*, stating that:

> [W]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) 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.

*Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995). However, the Court clarified in this case that new legal principles, even when applied retroactively, do not apply to cases that are already closed. *Id.* at 758.

¶12 In the instant appeal, the appellant's appeal before the Board was not pending on direct review at the time the court issued *McCormick.* Rather, it appears from the record that the appellant had already received a final decision on

his EEO case when the *McCormick* decision was issued. Therefore, at the time the appellant filed this appeal his termination from federal service was a closed case, and the new rule of law announced in *McCormick* did not apply to this appeal. *See Reynoldsville Casket Co.*, 514 U.S. at 758. Accordingly, we overrule our prior decisions in *Smart I* and *Smart II*, finding that the appellant was entitled to the opportunity to show that his prior service could be "tacked" to his probationary period or that he met the definition of an employee under 5 U.S.C. § 7511(a)(1)(A)(ii) under the standards announced in *McCormick*.

¶13 We further vacate Remand Decision 2, and dismiss this appeal for lack of jurisdiction. On remand, the appellant was advised of his jurisdictional burden for proving that he met the definition of an "employee" under 5 U.S.C. § 7511(a)(1)(A)(i). RAF 1, Tab 3. The term "employee" as defined by subsection (A)(i) means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment. Further, an appellant who has not served a full year under his appointment can show that he has completed the probationary period, and so is no longer a probationer, by tacking on prior service if: (1) the prior service was rendered immediately preceding the probationary 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. *Ellefson*, 98 M.S.P.R. 191, ¶ 16. In this case, the appellant has acknowledged throughout this appeal that he had not served a full year under his probationary appointment to a Deputy U.S. Marshal position, that his prior service was with a different agency, and that his prior service was in a different line of work. Therefore, the appellant did not satisfy the requirements for being an employee under subsection (A)(i). Furthermore, as the administrative judge found in the original ID, the appellant has not asserted that his probationary termination was based on either partisan political reasons or marital status. Therefore, the Board does not have

jurisdiction over this action. Accordingly, this appeal is dismissed for lack of jurisdiction.

## ORDER

¶14 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 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.