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### DETERMINING THE APPEAL RIGHTS OF AN INDIVIDUAL SERVING A PROBATIONARY PERIOD

#### Purpose

The purpose of this guide is to provide Department of Defense components with useful information to enable them to determine the appeal rights of an individual serving a probationary period; whether it is an individual serving in an initial probationary period with minimal appeal rights, or an employee with full appeal rights serving in a subsequent probationary period.

#### Background

For years, the Human Resources (HR) practitioner's application of 5 USC § 7511(a)(1) meant that an individual serving a probationary or trial period did not meet the statutory definition of an employee with entitlement to due process procedures and full appeal rights. Recent court decisions have dramatically altered the traditional view of the employee as he/she relates to a probationary period. It is critical for practitioners to determine whether he/she is an individual serving in an initial probationary period with minimal appeal rights, or an employee with full appeal rights serving in any subsequent probationary period. The following discussions examine these precedent-setting cases and provide useful guidance to avoid the application of improper procedures.

#### Discussion

##### *Van Wersch v. Department of Health and Human Services*

In 1999, the U.S. Court of Appeals issued a landmark decision in *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144, which changed the way agencies must consider probationary or trial periods when terminating an employee. Ms. Van Wersch was placed in an excepted service position under 5 CFR § 213.3102 (u) (which allowed her, as a handicapped individual, to qualify for conversion to competitive status upon completion of two years of satisfactory service.) After serving in that position for two years and eight months without being converted to the competitive service, she was terminated. The agency considered Ms. Van Wersch to be a non-preference eligible serving a probationary period pending conversion to the competitive service; the notice advised Ms. Van Wersch that she had limited appeal rights to the Merit Systems Protection Board (MSPB).

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The MSPB Administrative Judge dismissed her appeal for lack of jurisdiction, as she was considered a “probationary” employee. Once it reached the full MSPB, the Board affirmed the AJ’s initial decision, however, remanded the appeal to address whether the agency should have converted Ms. Van Wersch to the competitive service. Failing to establish that she had been converted to competitive service, the initial decision was once again affirmed. On appeal to the U.S. Court of Appeals, Ms. Van Wersch only contested that she was not afforded full appeal rights under 5 U.S.C. §7513(d).

According to 5 USC § 7511(a)(1)(C), an ‘employee in the excepted service (other than a preference eligible employee), is an individual:

- (i) who is not serving in a probationary or trial period under an initial appointment pending conversion to the competitive service, **OR** (emphasis added)
- (ii) who has completed two years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to two years or less.

Prior to this decision, OPM had considered that both (i) and (ii) conditions must be met in order for an individual to be considered an “employee”, in effect defining the word “or” as meaning “and”.

The U.S. Court of Appeals decided that the word “or”, which was placed between 5 USC §7511(a) (1) (C) (i) and §7511(a) (1) (C) (ii), was plainly meant to be “or”, a disjunctive word used to indicate an alternative. Therefore, Ms. Van Wersch qualified as an “employee” since she had completed more than two years of current continuous service in the same position and should have been afforded the full due process protections of an employee in Federal service, instead of those of a probationer. This decision paved the way for several other cases to further clarify the definition of “employee” for purposes of appeal.

### *McCormick v. Department of the Air Force*

In 2002, the Federal Court of Appeals applied the interpretive changes established in the Van Wersch case to decide *McCormick v. Department of the Air Force*, 307 F. 3d 1339. Ms. McCormick completed her initial probationary period in 1992 after serving one year in a competitive service position. In 1999, Ms. McCormick transferred to a position where she was to serve a new probationary period. Her appointment was terminated six months later under provisions for a probationer.

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According to 5 USC § 7511(a)(1)(A), an “employee” in the competitive service, entitled to due process procedures and full appeal rights is an individual:

- (i) who is not serving a probationary or trial period under an initial appointment, **OR** (emphasis added)
- (ii) who has completed one year of current continuous service under other than a temporary appointment limited to 1 year or less.

The U.S. Court of Appeals reasoned that since Ms. McCormick previously completed one year of Federal service without a break in service and under an appointment other than temporary, she should have been afforded the protections of an “employee,” with advance written notice, opportunity to respond, to be represented, and a written decision with full appeal rights to the MSPB.

### *Zambito v. Department of Homeland Security*

In a decision issued December 2, 2005, *Zambito v. Department of Homeland Security*, 106 FMSR 100, the Board dismissed the appeal for lack of jurisdiction. Mr. Zambito accepted an excepted service appointment on November 2, 2003, to a position as the Deputy Assistant Federal Security Director for Passenger Screening (Deputy AFSDPS) to which he had previously served in an acting capacity.

On August 25, 2004, Mr. Zambito was removed during his trial period for misconduct. While he had previously completed a supervisory probationary period as a Screening Manager, appointment to the Deputy AFSCPS position required completion of a new probationary period. The Board found that the two positions in question (Screening Manager and Deputy AFSDPS) had different job descriptions and qualifications, and that Mr. Zambito’s acting in the position prior to accepting the job permanently did not count towards completing his probationary period in the same or similar positions prior to his removal. Therefore, he did not satisfy the “current continuous service” requirement under 5 USC § 7511(a)(1)(B) to meet the definition of employee. Current continuous service is defined as a period of employment or service immediately preceding an adverse action in the same or similar position without a break in Federal civilian employment of a workday.

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### *Gutierrez v. Department of Treasury*

In *Gutierrez v. Department of Treasury*, 99 MSPR 141 (July 12, 2005), the Board reversed the agency's termination because the agency failed to provide the appellant with her due process rights since she met the statutory definition of "employee." Diana Gutierrez was hired under a career-conditional appointment, as a seasonal employee on November 26, 2002. Her seasonal status allowed the agency to release her to a non-pay status and recall her to duty to meet workload requirements. The agency released Ms. Gutierrez to a non-pay status from September 6, 2003, until November 17, 2003. In accordance with Office of Personnel Management's Guide to Processing Personnel Actions any non-pay time in excess of 22 workdays extends the probationary period by that number of days. Ms. Gutierrez was in a non-pay status for approximately 2 months and 9 days. According to the referenced guide, her probationary period should have extended beyond January 3, 2004, the effective date of her termination. However, the Board determined that Ms. Gutierrez met the requirements of an employee under 5 U.S.C. § 7511(a) (1) (ii), as she served 1 year of current continuous service from November 26, 2002 through November 25, 2003, including the period of non-pay status. Although she was in a non-pay status, she was on the rolls of the agency as an employed individual. As such, she should have been afforded due process rights.

### *Steinhoff v. Department of Veterans Affairs*

In a Board decision issued April 7, 2006, *Steinhoff v. Department of Veterans Affairs*, 2006 MSPB 72, the appellant, Summie Steinhoff, filed a PFR after the initial MSPB AJ dismissed his appeal for lack of jurisdiction based on his probationary status. Mr. Steinhoff claimed that he had completed his probationary period, and requested a hearing. On June 1, 2004, Mr. Steinhoff was appointed to a career-conditional appointment, subject to a one-year probationary period. He was terminated effective close of business May 31, 2005. The Board found that the agency did not effect his separation until the end of the appellant's tour of duty on his last day of probation, essentially allowing him to complete his probationary period. The agency's decision was reversed and the appellant was restored to duty.

### *Greene v. Defense Intelligence Agency*

*Joseph F. Greene v. Defense Intelligence Agency*, 100 MSPR 447 (November 2, 2005), discussed the issue of "tacking on", which is crediting prior service toward completion of

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the probationary period when the prior service was rendered under conditions set forth in 5 CFR § 315.802(b), stating:

Prior Federal civilian service (including nonappropriated fund 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.

Mr. Greene, a preference eligible individual, received an indefinite appointment to an excepted service position with DIA in October 1997. In November 2000, he was appointed to a position in the Navy Department. Between October 2001 and November 2002, Mr. Greene served on active duty. Once he returned, he was transferred to an indefinite, excepted service position with DIA. On May 23, 2003, he was separated from DIA for alleged misconduct.

When appealed, the AJ dismissed the appeal for lack of jurisdiction, stating that service in different agencies could not be combined to meet the definition of “employee” under 5 USC § 7511(a)(1)(B).

The Board, in reversing the AJ’s initial decision, accepted Mr. Greene’s argument that combining his employment at DIA and Navy satisfied the requirement for prior employment. MSPB determined that the language in 315.802(b)(1), “in the same agency” (also known as an Executive agency) could consist of employment in more than one agency to satisfy the requirements for “employee” designation. The Board arrived at this conclusion after reviewing legislative history and the evolution of regulation changes from OPM.

### *McCrary v. Department of the Army*

In this case, *Julie A. McCrary v. Department of the Army, 2006 MSPB 261 (August 30, 2006)*, the MSPB reversed an initial decision to terminate an employee during probation. The appellant submitted that she had satisfied the requirements for completion of two years of current continuous service under 5 USC § 7511(a)(1)(C). The Board held that the requirements contained in 5 CFR § 315.802(b) that apply to competitive service would also apply to excepted service cases.

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Ms. McCrary was terminated during her probationary period on March 4, 2005 from her Guidance Counselor position. She was appointed to this position on July 26, 2004. The position was an excepted service appointment pending conversion to the competitive service upon successful completion of a 2 year trial period. Prior to this appointment, Ms. McCrary had served in several competitive service term appointments as a guidance counselor in the Department of the Army.

The administrative judge dismissed her appeal for lack of jurisdiction because she did not fulfill the requirements of 5 USC § 7511(a)(1)(C). The AJ determined that the employee was serving in a probationary period under an initial appointment (to the excepted service) pending conversion to the competitive service, therefore not meeting the requirements of 7511(a)(1)(C)(i). The AJ also determined that Ms. McCrary did not meet the requirements of “current continuous service” in 7511 (a)(1)(C)(ii) because she had a break in service of three weeks.

The Board allowed her previous employment as a guidance counselor to count toward completion of her probationary period, and in applying the standards of 5 CFR § 315.802(b), the three week break in service was within the 30 day period allowed. This decision acknowledged Ms. McCrary as an “employee” for purposes of due process rights for adverse actions and appeals.

### *Fitzgerald v. Department of the Air Force*

In this case, *James Fitzgerald v. Department of the Air Force, 2008 MSPB 102 (May 12, 2008)*, the MSPB ruled that prior service in the excepted service counted toward the completion of the probation period of 5 USC § 7511(a)(1)(A)(i) and the one year current continuous service requirement of 5 USC § 7511(a)(1)(A)(ii) for individuals in the competitive service.

Mr. Fitzgerald was employed in an excepted service position of WG-8852-10, Aircraft Mechanic with the National Guard at Andrews Air Force Base, Maryland from August 7, 2005, to August 4, 2007. On August 5, 2007, Mr. Fitzgerald received a career-conditional appointment to a WG-8852-10, Aircraft Mechanic position in the competitive service. The appointment in the competitive service was subject to the completion of a one year probationary period. On November 14, 2007, the agency terminated Mr. Fitzgerald during his probationary/trial period.

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On timely appeal, the administrative judge issued a jurisdictional order noting that Mr. Fitzgerald had appeal rights of a permanent employee as defined in 5 USC § 7511(a)(1)(A)(i) or (ii) because his National Guard experience counted toward the completion of his probation in his competitive service position, and also counted toward the one year current continuous service requirement.

The agency filed an interlocutory appeal to the Board on the administrative judge's ruling during the proceeding. The Board found that the term "current continuous service" in 5 USC § 7511 meant service, in either the competitive or excepted service, that immediately preceded an adverse action without a break in federal civilian employment of a workday. The Board noted that this interpretation of 5 USC § 7511(a)(1)(A)(ii) is consistent with 5 CFR § 752.402(b), which does not define current continuous employment as a period of service confined to either the competitive or excepted service.

### Conclusions

It is important for HR practitioners to understand current case law as it relates to 5 USC § 7511 to determine the appropriate appeal rights of an individual serving a probationary period.

Case law has been moving in the direction of more literal interpretation of the Statute, and application of competitive service rules to the excepted service. It is no longer accepted to simply identify an individual as a "probationary" employee and assume that the individual does not have full due process and appeal rights. Careful consideration should be given to all periods of employment before determining the appropriate appeal rights while serving a probationary period.

Probationary / Trial period points to remember:

- An individual in the competitive service who is terminated during the first year of his/her initial probationary period will have limited appeal rights.
- A preference eligible individual in the excepted service who is terminated during the first year of his/her initial trial period will have limited appeal rights.
- A non-preference eligible individual in the excepted service who is terminated during the two years of his/her initial trial period will have limited appeal rights.

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- An individual serving a probationary period in the competitive service who has completed one year of current continuous service under other than a temporary appointment limited to one year or less will have full appeal rights to the MSPB.
- A preference eligible individual in the excepted service who has completed one year of current continuous service in the same or similar position under other than a temporary appointment will have full appeal rights to MSPB.
- A non-preference eligible individual in the excepted service who has completed two years of current continuous service in the same or similar position under other than a temporary appointment will have full appeal rights to MSPB.
- Similar service from different agencies with a break in service of 30 calendar days or less may be combined to satisfy a probationary period requirement.
- Employment in the excepted service and competitive service may be combined in certain circumstances to satisfy a probationary requirement.

The agency must observe the individual's work performance and conduct to make sure both are sufficiently satisfactory to qualify him/her for continued Federal employment. If a supervisor determines that a probationary employee's performance or conduct is unsatisfactory, there is no requirement for a supervisor to wait until the individual is near the end of their probationary period. The individual may be terminated at any time during the probationary period, however, the termination must be effective on the day *prior* to the last day of the probationary period, or at the very least, at a specific time of day *before the end* of the employee's scheduled tour of duty on the last day of the probationary period. Additionally, the agency must observe the appropriate procedures regarding due process and appeal rights.

### References

- 5 USC § 7511
- Van Wersch v. Department of Health and Human Services, 197 F.3d 1144
- McCormick v. Department of the Air Force, 307 F. 3d 1339
- Zambito v. Department of Homeland Security, 106 FMSR 100
- Gutierrez v. Department of Treasury, 99 MSPR 141

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- Steinhoff v. Department of Veterans Affairs, 2006 MSPB 72
- Greene v. Defense Intelligence Agency, 100 MSPR 447
- McCrary v. Department of the Army, 2006 MSPB 261
- Fitzgerald v. Department of the Air Force, 2008 MSPB 102