

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE**

NAPOLEON MILLUME,
Appellant,

DOCKET NUMBER
NY-315H-12-0034-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: January 11, 2012

Michelle R. Vivian, Buffalo, New York, for the appellant.

Deirdre J. Payne, Esquire, New York, New York, for the agency.

BEFORE

Maureen Briody
Administrative Judge

INITIAL DECISION

INTRODUCTION

On November 18, 2011, the appellant filed a timely appeal with the Merit Systems Protection Board (the Board) challenging his termination during probation from the position of Management and Program Assistant, GS-6, with the U.S. Department of Homeland Security, Citizenship and Immigration Services, located in Buffalo, New York, effective November 4, 2011. *See* Initial Appeal File (IAF), Tab 1.

The appellant initially requested a hearing, *see id.*, Tab 1, but later withdrew his request. *See id.*, Tab 13 (audio tape). For the reasons stated below, the removal is REVERSED.

Background

The appellant was hired as a Management and Program Assistant, which is a competitive service position, for the U.S. Department of Homeland Security (DHS), Citizenship and Immigration Services effective November 21, 2010. *See* IAF, Tab 7 at 25. The appellant was terminated from the DHS position effective November 4, 2011. *See id.* at 44. Immediately preceding the appellant's employment at DHS, the appellant was employed at the Department of Veterans Affairs (VA), VA Medical Center, in the competitive service position of Patient Services Assistant from April 25, 2010 through November 20, 2010. *See id.* at 23-24. Both of these appointments were career appointments. *See id.* at 23, 25. The appellant had worked for DHS previously from December 21, 2008 through December 22, 2009 in a Term Appointment as an Immigration Information Officer. *See id.* at 20-21. This appointment expired on December 22, 2009. *See id.* at 21.

General legal principles and burden of proof

The Board's jurisdiction is limited, not plenary; the Board has jurisdiction only granted to it by law, rule, or regulation. *See* 5 U.S.C. § 7701(a)(1) (2006); *see also* *Goines v. Merit Systems Protection Board*, 258 F.3d 1289, 1294 (Fed. Cir. 2001); *Chase-Baker v. Department of Justice*, 198 F.3d 843, 845 (Fed. Cir. 1999). Whether an individual in the competitive service has the right to appeal an adverse action depends on whether he is an "employee" under 5 U.S.C. § 7511(a)(1)(A). *See* *Williams v. Department of Defense*, 96 M.S.P.R. 335, ¶ 7 (2004). That statutory provision defines an "employee" as "an individual in the competitive service (i) who is not serving a probationary ... 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). Under *McCormick v. Department of the Air Force*, 307 F.3d 1339, 1340-41 (Fed. Cir. 2002), *pet. for reh'g en banc denied*, 329 F.3d

1354 (Fed. Cir. 2003), subsections (a)(1)(A)(i) and (a)(1)(A)(ii) are alternative avenues of jurisdiction; in other words, an individual is an “employee” with Board appeal rights if one or both of these provisions are satisfied. *See also Williams*, 96 M.S.P.R. 335, ¶ 7.

A competitive service appointee who was serving a probationary period and was terminated during the first year of service is not an “employee” under section 7511(a)(1)(A)(i). *See Pervez v. Department of the Navy*, 193 F.3d 1371, 1375 (Fed. Cir. 1999); *Williams*, 96 M.S.P.R. 335, ¶ 8. However, such an employee who is terminated for conditions arising after his appointment has a regulatory right to appeal his termination to the Board, when he raises a nonfrivolous allegation that the action was based on partisan political reasons or marital status. *See* 5 C.F.R. § 315.806(b) (2011); *see also Pierce v. Government Printing Office*, 70 F.3d 106, 108 (Fed. Cir. 1995). Thus, there are three possible ways that the Board might have direct jurisdiction over this appeal. *See Sosa v. Department of Defense*, 102 M.S.P.R. 252, ¶¶ 6-7 (2006).

The appellant has the burden of establishing, by preponderant evidence* that the Board has jurisdiction over his appeal. *See* 5 C.F.R. § 1201.56(a)(2)(i) (2011); *see also Hogan v. Department of the Navy*, 218 F.3d 1361, 1364 (Fed. Cir. 2000); *Covington v. Department of the Army*, 85 M.S.P.R. 612, ¶ 9 (2000). As a result, I notified the appellant in the November 18, 2011 Acknowledgment Order of the specific jurisdictional issues which were raised in this appeal and of his burden of proof. *See* IAF, Tab 2. He was ordered to submit argument and/or evidence establishing Board jurisdiction. *See id.* The appellant did not submit any evidence to support a nonfrivolous allegation that the action was based on partisan political reasons or marital status. *See id.*, Tabs 1, 6 and 10. Instead, the

* Preponderant evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2) (2011).

appellant argued that he already satisfied his probationary period, and as such, he should have been provided with 30 days advance notice prior to being terminated from his position. *See id.*, Tabs 1 and 10.

The appellant has established that the Board has jurisdiction over his appeal pursuant to 5 U.S.C. § 7511(a)(1)(A)(ii).

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. *See Hurston v. Department of the Army*, 113 M.S.P.R. 34, ¶ 9 (2010). In the instant appeal, the appellant has not established that his prior service at DHS should be tacked on to his current service since the prior service was not rendered immediately preceding the probationary appointment, was not performed in the same line of work, and was not completed with no more than one break in service of less than 30 days. *See Hurston*, 113 M.S.P.R. 34, ¶ 10.

Alternatively, an employee can show that, while he may be a probationer, he is an “employee” with chapter 75 appeal rights because, immediately preceding the adverse action, he had completed at least 1 year of current continuous service in the competitive service without a break in federal civilian employment of a workday. *See id.*; *see also Samble v. Department of Defense*, 98 M.S.P.R. 502, ¶ 3 (2005); *Ellefson v. Department of the Army*, 98 M.S.P.R. 191, ¶ 14 (2005). The Board has held that for competitive service appointments, current continuous service need not be in the same or similar positions for an employee to establish jurisdiction under Section 7511(a)(1)(A)(ii). *See Ellefson*, 98 M.S.P.R. 191, ¶ 14. The appellant has shown that he was appointed to a career appointment with the VA immediately preceding his employment with DHS with

no break in service. The appellant served in the VA position from April 25, 2010 through November 20, 2010. *See* IAF, Tab 7 at 23-24. The appellant subsequently worked in the DHS position from November 21, 2010 through November 4, 2011. *See id.* at 25, 44. Thus, the appellant completed more than 1 year of current continuous service immediately preceding his termination without a break in federal employment of a workday. *See Dade v. Department of Veterans Affairs*, 101 M.S.P.R. 43, ¶ 11 (2005); *see also Samble*, 98 M.S.P.R. 502, ¶ 11; *Ellefson*, 98 M.S.P.R. 191, ¶ 15. As such, I find that the appellant is an “employee” as defined by 5 U.S.C. § 7511(a)(1)(A)(ii).

The agency’s procedures for effecting the removal did not comport with the appellant’s right to minimum due process of law since he was not provided with an opportunity to respond, thus, the action must be reversed. *See Samble*, 98 M.S.P.R. 502, ¶ 14; *Ellefson*, 98 M.S.P.R. 191, ¶ 17.

DECISION

The agency’s action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **November 4, 2011**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

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. I **ORDER** the agency 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.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

As part of interim relief, I **ORDER** the agency to effect the appellant's appointment to the position of Management and Program Assistant, GS-344-06. The appellant shall receive the pay and benefits of this position while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace would be unduly disruptive.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD:

_____/S/_____
 Maureen Briody
 Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on **February 15, 2012**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative,

whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt.

You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

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

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.



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.