



# Basic Employee Relations Course

## REFERENCE GUIDE

### Determining the Procedural and Appeal Rights of an Individual Serving a Probationary Period

#### Purpose

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

#### Background

For years, the Human Resources (HR) Specialist's application of 5 U.S.C. § 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 full procedural and appeal rights. Court decisions have dramatically altered how this statute is applied. It is critical for practitioners to determine whether the probationer is an individual serving in an initial probationary period with minimal procedural rights, or an employee with full procedural 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 (December 15, 1999), 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, her appointment was terminated. The notice advised Ms. Van Wersch that she had limited procedural rights to the Merit Systems Protection Board (MSPB).

The MSPB administrative judge dismissed Ms. Van Wersch's appeal for lack of jurisdiction, as she was considered a "probationary" employee. The Board affirmed this ruling. On appeal to the U.S. Court of Appeals for the Federal Circuit, Ms. Van Wersch only sought review of the Board's decision that she did not meet the definition of "employee" under 5 U.S.C. § 7511(a)(1)(C).



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According to 5 U.S.C. § 7511(a)(1)(C), an “employee” in the excepted service (other than a preference eligible employee) entitled to full procedural and appeal rights 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 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.

The court found that it was undisputed that, at the time of her removal, Ms. Van Wersch was “serving a probationary or trial period under an initial appointment pending conversion to the competitive service.” In addition, the court found it also was undisputed that, at the time of her removal, she had “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.” The court thus held that although Ms. Van Wersch was excluded from the definition of “employee” in 5 U.S.C. § 7511(a)(1)(C)(i), she fit within the definition of “employee” in 5 U.S.C. § 7511(a)(1)(C)(ii). The court discussed that the two subsections are joined by the word “or” which indicates an alternative and that the statutory language could not be clearer. Thus, the court reversed the Board’s decision dismissing Ms. Van Wersch’s appeal for lack of jurisdiction.

### **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 (October 4, 2002). 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.

According to 5 U.S.C. § 7511(a)(1)(A), an “employee” in the competitive service entitled to full procedural and 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 1 year of current continuous service under other than a temporary appointment limited to 1 year or less.

The U.S. Court of Appeals for the Federal Circuit 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 met the definition of “employee” for this provision. The court held that given its holding in *Van Wersch v. Department of Health and Human Services*, there was no basis for a different result when construing the language of subsection 7511(a)(1)(A) of the same statute. The court went on to explain that both 5 U.S.C. § 7511(a)(1)(A) and (C) provide



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two definitions separated by the word “or.” Under *Van Wersch*, the court determined that it must treat subsection 7511(a)(1)(A) as providing alternative definitions. The court held that as a result the Board had jurisdiction over Ms. McCormick’s appeal.

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

In a decision issued December 2, 2005, *Zambito v. Department of Homeland Security*, 100 M.S.P.R. 550 (December 2, 2005), 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 AFSDPS position required completion of a new probationary period. Applying prior case law, the Board found that time spent in a position on detail or in an acting capacity may not be used toward the requirement of one year current continuous service in the same or similar position.

In addition, 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 U.S.C. § 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.

### **Gutierrez v. Department of Treasury**

In *Gutierrez v. Department of Treasury*, 99 M.S.P.R. 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.



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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 procedural and appeal rights.

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

In a Board decision issued April 7, 2006, *Steinhoff v. Department of Veterans Affairs*, 101 M.S.P.R. 443 (April 7, 2006), the appellant filed a petition for review after the MSPB administrative judge 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**

*Greene v. Defense Intelligence Agency*, 100 M.S.P.R. 447 (November 2, 2005), discussed crediting prior service toward completion of the probationary period when the prior service was rendered under conditions set forth in 5 CFR § 315.802(b).

That regulation provides that 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 the Defense Intelligence Agency (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 Mr. Greene appealed the removal, 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 U.S.C. § 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 the Department of the Navy satisfied the requirement



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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, *McCrary v. Department of the Army*, 103 M.S.P.R. 266 (August 30, 2006), the MSPB reversed the initial decision which affirmed the termination of the probationer’s appointment. The appellant asserted that she had satisfied the requirements for completion of two years of current continuous service under 5 U.S.C. § 7511(a)(1)(C). For the first time (with the exception of Veterans Readjustment Act appointments), the Board considered the issue of whether prior service in competitive service positions can be credited towards completion of a later trial period in an excepted service position if the employee shows that: (1) the prior service was performed in the same agency; (2) it was performed in the same line of work; and (3) it was completed with no more than one break in service of less than 30 days. These requirements are found at 5 CFR § 315.802(b).

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 Board applied the appellant’s previous service as a Guidance Counselor in a series of consecutive term appointments in the competitive service to her excepted service position, finding that the prior service counted toward the completion of her trial period. The Board held that she was an “employee” under 5 U.S.C. § 7511(a)(1)(C)(i) with the right to appeal her separation to the Board.

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

In this case, *James Fitzgerald v. Department of the Air Force*, 108 M.S.P.R. 620 (May 12, 2008), the MSPB ruled that prior service in the excepted service counted toward the completion of the probation period of 5 U.S.C. § 7511(a)(1)(A)(i) and the one year current continuous service requirement of 5 U.S.C. § 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





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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.

On timely appeal, the administrative judge issued a jurisdictional order noting that Mr. Fitzgerald had procedural rights of a permanent employee as defined in 5 U.S.C. § 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 U.S.C. § 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 U.S.C. § 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. Having found that the appellant met the definition of "employee" set forth at 5 U.S.C. § 7511(a)(1)(A)(ii), the Board noted that it need not address the administrative judge's ruling that the appellant also met the definition of "employee" set forth at 5 U.S.C. § 7511(a)(1)(A)(ii).

### Conclusions

It is important for HR specialists to understand current case law as it relates to 5 U.S.C. § 7511 to determine the appropriate procedural rights of an individual serving a probationary period.

Careful consideration should be given to all periods of employment before determining the appropriate procedural and appeal rights of an individual who is serving a probationary or trial period.

A few Probationary/Trial Period points to remember:

- 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 procedural 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 procedural 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 procedural rights to MSPB.



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- 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.
- Prior Federal civilian service counts toward completion of probation when the service: is in the same agency, e.g., Department of the Army; is in the same line of work; and contains or is followed by no more than a single break in service that does not exceed 30 calendar days.
- 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 the employee is fit for continued Federal employment. If a supervisor determines that a probationary employee's performance or conduct is not fit, 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 a probationer's limited procedural and appeal rights. An agency must terminate the probationary appointment by notifying the individual in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the probationer's appointment is being terminated must, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

### References

- f* 5 U.S.C. § 7511
- f* Van Wersch v. Department of Health and Human Services, 197 F.3d 1144
- f* McCormick v. Department of the Air Force, 307 F. 3d 1339
- f* Zambito v. Department of Homeland Security, 100 M.S.P.R. 550 (December 2, 2005)
- f* Gutierrez v. Department of Treasury, 99 M.S.P.R. 141 (July 12, 2005)
- f* Steinhoff v. Department of Veterans Affairs, 101 M.S.P.R. 443 (April 7, 2006)
- f* Greene v. Defense Intelligence Agency, 100 M.S.P.R. 447 (November 2, 2005)
- f* McCrary v. Department of the Army, 103 M.S.P.R. 266 (August 30, 2006)
- f* Fitzgerald v. Department of the Air Force, 108 M.S.P.R. 620 (May 12, 2008)