"Employee" with Appeal Rights

The probationary or trial period in the Federal civilian service is the final stage of the assessment process under which an agency may observe the knowledge, abilities and skills of a candidate for employment and make a final selection decision in light of those observations. If used correctly, this "job tryout" can be one of the most reliable and valid assessment tools available to Federal agencies when an individual is either employed in his or her first position or moves to a new and different type of position. Proper use of this tool helps promote the merit system principle that selection should be determined solely on the basis of relative ability, knowledge, and skills.

Before the enactment of the Civil Service Reform Act (CSRA) of 1978, and therefore before the Federal Circuit's 1999 decision in *Van Wersch v. the Department of Health and Human Services*, the U.S. Code of Federal Regulations, provided that an employee "currently serving a probationary or trial period" did not have a regulatory right to appeal adverse actions to the U.S. Civil Service Commission, the Board's predecessor.

Monique Van Wersch v. the Department of Health and Human Services

197 F.3d 1144 (1999)

Case Study 1:

Monique Van Wersch, a non-preference eligible, began her employment with the Department of Health and Human Services on March 26, 1989, when she was hired in a temporary position in the competitive service. Later, she was converted to an excepted service position pursuant to 5 CFR § 213.3102(u), which allows agencies to temporarily appoint severely physically handicapped persons to excepted service positions pending conversion to the competitive service upon completion of 2 years of satisfactory service. In January of 1993, the agency promoted Ms. Van Wersch under section 213.3102(u) to the position of GS-3 Clerk-Typist. She served in that position for 2 years and eight months without being converted to the competitive service. In September 1995, the agency removed her for alleged unacceptable conduct.

Ms. Van Wersch filed an appeal with the Board, which dismissed the appeal for lack of jurisdiction upon finding that she did not qualify as an "employee" under 5 U.S.C. § 7511(a)(1)(C). The Federal Circuit, however, reversed the Board's decision. The court found that OPM had determined that an appointment made with the intent of converting the employee to an appointment in the competitive service, like the appointment given to Ms. Van Wersch, initially is served under a probationary or trial period. Thus, the court held that Ms. Van Wersch was not an "employee" under 5 U.S.C. § 7511(a)(1)(C)(i) because she was serving a probationary or trial period under an initial appointment pending conversion to the competitive

service. Nevertheless, the court found that she fit within the definition of "employee" in 5 U.S.C. § 7511(a)(1)(C)(ii) because 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. In making this finding, the court disagreed with the long-standing OPM and Board interpretation of the statute.

The court stated that based on the legislative history of the Civil Service Due Process Amendments of 1990, there was a compelling argument that Congress meant to exclude probationers and those in a trial period from having appeal rights. However, the court found that the statute as written did not contain the right words to communicate that intent. In particular, the statute used the word "or." Persons who met one condition or the other were "employees" and thus had appeal rights. The court noted that when it interprets a statute it begins with the language of the statute. Congressional intent becomes relevant only if the language is unclear. The court explained that the word "or" clearly refers to alternatives. Thus, it determined that the language was clear and Congressional intent was therefore irrelevant. The Federal Circuit stated:

> *"To adopt the reading of the statute that the government urges would require us to ignore the meaning of the word 'or' that the dictionary, common sense, and the experience of life all bring to us. There simply is no way around the fact that, in the English language, the word 'or' unambiguously signifies alternatives."*

Because Congress used the word "or" in the statute, the court reasoned that an individual would have rights if he or she met either of the two sections in that part of the statute. Thus, a person could be in a probationary or trial period and not an "employee" under 5 U.S.C. § 7511(a)(1)(C)(i), but still have appeal rights if the conditions were met for 5 U.S.C. § 7511(a)(1)(C)(ii). The court noted that Congress could amend the statute to compel a different result if it determined that individuals such as Ms. Van Wersch should not have the right to appeal adverse actions to the Board. The court noted that the remedy for any dissatisfaction with the results in particular cases lies with Congress and not the court. The court stated that "Congress may amend the statute; we may not."

Ann McCormick v. the Department of the Air Force

307 F3d 1339 (2002)

Case Study 2:

While *Van Wersch* addressed the definition of "employee" for purposes of non-preference eligibles in the excepted service, a few years later *McCormick* addressed the meaning of "employee" for purposes of the competitive service. Ann McCormick, a non-preference eligible, entered the Federal competitive service on June 2, 1991, as a career conditional employee of

the Department of Health and Human Services. Her appointment was subject to the completion of a 1-year probationary period, which she completed. On August 30, 1999, Ms. McCormick requested a voluntary change of appointment to the position of contract negotiator with the Department of the Air Force. The request for a change of appointment was accompanied by a Request for Personnel Action (Form 52) dated August 29, 1999, which referred to the action as a "termination/transfer out." She was appointed to the position of contract negotiator effective August 29, 1999. As part of her appointment to that position, the Department of the Air Force issued a Notification of Personnel Action referring to Ms. McCormick as a conditional employee subject to a 1-year probationary period beginning August 29, 1999. On February 22, 2000, the Air Force terminated Ms. McCormick's employment. The Notice of Personnel Action (Form 50) issued by the Air Force stated that the termination was during her probationary period.

On appeal to the Board, the Board dismissed the appeal for lack of jurisdiction, finding that Ms. McCormick was a probationary employee and, as such, had only limited appeal rights as provided under 5 CFR § 315.806. The Federal Circuit initially affirmed the Board's decision. On petition for rehearing, however, a majority of the Federal Circuit's three-judge panel vacated the prior decision, found that the Board had jurisdiction over the appeal, and remanded for further proceedings. The court found that although Ms. McCormick was serving a probationary period when she was terminated, she was an "employee" with appeal rights because she had completed more than 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. The Federal Circuit found that under its holding in *Van Wersch,* there was no basis for a different result for the competitive service given that the respective subsections for the competitive service and non-preference eligibles in the excepted service provide two definitions for the word "employee" that are separated by the word "or."

These decisions have complicated the task of determining whether an individual serving a probationary or trial period has pre-termination procedural and post-termination appeal rights. No longer may an agency assume that an employee does not have such rights simply because the employee is serving a probationary or trial period. Instead, in assessing when a probationer will acquire such rights, agencies must take into account such factors as whether: (1) any prior service is "current continuous service;" (2) the current continuous service is in the "same or similar positions" for purposes of non-preference eligibles in the excepted service; and (3) the total amount of such service meets the 1 or 2-year requirement.

OPM regulations and MSPB case law has addressed the meaning of the some of the above statutory terms in a way that may assist agencies in making these determinations. "Current continuous service," for example, is a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday. (5 CFR 752.402) In addition, "current continuous service" under sections 7511(a)(1)(A)(ii) or 7511(a)(1)(C)(ii) includes periods of non-pay status consistent with the terms of intermittent or seasonal employment, and periods of extended leave without pay not associated with an appointment type that includes furlough periods as a condition of employment. "Similar positions" means

positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications so that the incumbent could be interchanged between the positions without significant training or undue interruptions to the work." (5 CFR 752.402) Further, MSPB case law has defined "similar positions" as those which are in "the same line of work," a criterion that has been interpreted as involving related or comparable work that requires the same or similar knowledge, skills, and abilities. Also, MSPB case law has held that prior service meets the "current continuous service" requirement even if it was performed in a different Federal agency.

The MSPB has also held that individuals who meet the literal definition of "employee" under 5 U.S.C. § 7511(a)(1)(A)(i), as temporary employees in the competitive service, but who do not have the requisite 1 year of service to satisfy section 7511(a)(1)(A)(ii), are not "employees" with procedural and appeal rights. MSPB reasoned that a temporary appointee does not have the type of appointment referred to in 5 U.S.C. § 7511(a)(1)(A)(i) because a temporary appointee is not required to serve a probationary or trial period. In addition, MSPB held that treating a temporary appointee as an "employee" would produce an unreasonable result because every temporary appointee would have the right to be removed only for cause, and a corresponding right of appeal, on the first day of work. The Board held that "the appeal rights of an individual serving under an appointment that does not require completion of a probationary or trial period are governed exclusively by subsection (A)(ii)."

Even though an employee is serving a probationary or trial period, he may still be entitled to full pre-termination procedural and post-termination procedural rights if he has the requisite type and amount of prior service. Keep in mind, though, that these cases are not typical of probationary employees.