




A New Day for the Civil Service

Identifying Who's Got Rights

A vertical image of the American flag, showing the stars and stripes, positioned on the left side of the slide.


Employee Appeal Rights

- Nearly all employees have certain appeal rights
 - Discrimination complaints made to EEOC
 - Violation of Prohibited Personnel Practices reported to the OSC
 - Individual Right of Action appeals filed with the MSPB
- Our focus today is on the right to appeal an agency adverse action under 5 U.S.C. 7511
 - Procedural Requirements
 - Appeal Rights



Why Identifying “Who’s Gots Rights” is Important

- Only employees covered by 5 U.S.C. § 7511 have the right to full procedural and appeal rights
- The key procedural rights are
 - 30-day advance notice
 - Opportunity for oral and written reply
 - Written decision
- The key appeal rights are
 - Review by an MSPB Administrative Judge or arbitrator
 - Evidentiary hearing with burden on agency to justify the action
 - Further review by full MSPB and Federal Circuit Court



Why Identifying “Who’s Gots Rights” Is Important

- When employee rights are not correctly assessed
 - Agency action will typically not be sustained upon review since procedural rights were not provided to covered individual
- Consequences
 - Employee restored to position with back pay
 - New action may be necessary
 - Management hesitant to try again



Be Proactive


Even prior to hiring, HR staff can properly inform supervisor:

- whether prospective employee has full procedural and appeal rights
- if full rights do not apply, to use probationary/trial period to assess fitness for job and federal service
- Make sure they understand:
 - Some probationers do have § 7511 rights
 - Some employees with many years of prior service who move to new jobs do not have § 7511 rights




What Actions Are Covered Under 7511?

- Suspensions of less than 14 days
- Reductions in grade or pay
- Removals
- Furloughs of 30 days or less



Analytical Approach

- Always use the law – 5 U.S.C. §7511 – as your source for analysis
- You will always have access to the law, even if other research/technical aids not available
- Reading and thinking through the law makes you skilled at correctly applying it
- OPM regulations at Part 752 flesh out the law
- Use case law research to help you understand how the law has been applied




5 U.S.C. § 7511(a)(1)

(A) *“An individual in the competitive service”*

(B) *“A preference eligible in the excepted service”*


(C) *“An individual in the excepted service (other than a preference eligible)”*



5 U.S.C. § 7511(a)(1)(A)

“an individual in the competitive service


- *who is not serving a probationary or trial period under an initial appointment; or*
- *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)(i)

“who is not serving a probationary or trial period under an initial appointment”

- Probationary period rules are at 5 CFR 315 Subpart H
- 1 year (no more than 22 days in nonpay status)
- Term appointees serve trial periods (5 CFR 316.304)
- “Initial appointment” does not mean first appointment; new competitive appointment = new probation
- Can apply (or “tack”) prior service to meet one year requirement if
 - Same agency
 - Same line of work and
 - No break in service of more than 30 days



5 U.S.C. § 7511(a)(1)(A)


*“(i) who is not serving a probationary or trial 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;”*

An individual serving a probationary period can still have full appeal rights if they meet (ii)



5 U.S.C. § 7511(a)(1)(A)(ii)


- ” who has completed **1 year** of current continuous service under other than a temporary appointment limited to 1 year or less”*
- One year may include extended periods in nonpay status, e.g., seasonal and intermittent employees receive credit for all time in position *Gutierrez v. Treasury*, 99 MSPR 141 (2005)
 - Unlike probation rules (part 315) where more than 22 days in nonpay status extends the 1 year period



5 U.S.C. § 7511(a)(1)(A)(ii)

*" who has completed 1 year of **current continuous** service under other than a temporary appointment limited to 1 year or less"*

- “Current continuous service” means 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(b); *Ellefson v. Army*, 98 MSPR 191 (2005)
- Unlike probation rules (Part 315) where break in service may not exceed 30 days



5 U.S.C. § 7511(a)(1)(A)(ii)

*“who has completed 1 year of **current continuous** service under other than a temporary appointment limited to 1 year or less”*

- There is no requirement that “current continuous” service be
 - In the same or similar positions – *Ellefson v. Army*, 98 MSPR 191 (2005)
 - In the same agency – *Payano v. Justice*, 100 MSPR 74 (2005)



McCormick v. Air Force

- June 1991 - appointed to career-conditional position with HHS
- Completed probation in original position
- August 1999 - received new competitive appointment, with no break in service, to position with the Air Force subject to one year probationary period
- February 2000 - removed

Is she serving a probationary period -
7511(a)(1)(A)(i)?

Is she entitled to full appeal rights under 7511?



McCormick v. Air Force

Yes – she is serving a probationary period and furthermore she cannot tack prior service because it was not in the same agency as required by Part 315 rules - she is not covered under (i)

Yes – notwithstanding status as probationer, she has completed 1 year of current continuous service under other than a temporary appointment limited to one year or less - she is covered under (ii)

Individual is a covered “employee” when either (i) or (ii) is met

307 F.3d 1339 (Fed. Cir. 2002)




No Absurd Result

- *Johnson v. DVA*, 99 MSPR 362 (2005) – receives temporary appointment but removed after 5 months - does he meet (i)?
- While he arguably meets literal definition of employee in § 7511(a)(1)(A)(i), he was not in an appointment subject to a “probationary or trial period”
- He does not meet (ii) since he lacks one year of current continuous service
- Board holds that a temporary employee who lacks requisite length of service to satisfy (ii) does not have adverse action appeal rights merely because he or she meets the literal terms of (i). To hold otherwise would produce an absurd result -- a temporary employee having rights on day one.



SCENARIO for (A)

- January 1, 2001 - temporary appointment NTE 1 year
 - Terminated June 1, 2001 – gots rights?
- June 15, 2001 – career conditional appointment in same agency and position
 - Terminated February 1, 2002 – gots rights?
- February 2, 2002 – new competitive appointment (subject to new probationary period) in new agency and different position
 - Terminated August 1, 2002 – gots rights?




5 U.S.C. § 7511(a)(1)(B)

*“a **preference eligible** in the excepted service who has completed 1 year of current continuous service in the same or similar positions*

- (i) in an Executive agency; or*
- (ii) In the United States Postal Service or Postal Regulatory Commission”*

Not every person with prior military service meets the definition of preference eligible – see 5 USC 2108


- Even military retirees who retired at rank of major or above are preference eligibles for purposes of 7511 even though otherwise not preference eligible for purposes of staffing – see 5 USC 2108(4)
- VRA (Veterans Recruitment Appointment) appointees need not not meet the definition of preference eligible (5 CFR Part 307)



5 U.S.C. § 7511(a)(1)(B)

*“a preference eligible in the excepted service who has completed 1 year of **current continuous service** in the same or similar positions –*


- (i) in an Executive agency; or*
 - (ii) In the United States Postal Service or Postal Regulatory Commission”*
- “Current continuous service” means 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(b)
 - Unlike probation rules (part 315) where break in service may not exceed 30 days



5 U.S.C. § 7511(a)(1)(B)


*“a preference eligible in the excepted service who has completed 1 year of **current continuous service** in the same or similar positions –*

- (i) in an Executive agency; or*
 - (ii) In the United States Postal Service or Postal Regulatory Commission”*
- Service in two or more temporary NTE 1 year appointments - even if in different agencies – meets this definition if they total more than one year and there is no break in service between appointments




5 U.S.C. § 7511(a)(1)(B)

- “a preference eligible in the excepted service who has completed 1 year of current continuous service in the **same or similar positions** –*
- (i) in an Executive agency; or*
 - (ii) In the United States Postal Service or Postal Regulatory Commission”*
- “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 interruption to the work” 5 CFR 752.402



5 U.S.C. § 7511(a)(1)(B)

- Same or similar = same line of work (315 term)
Mathis v USPS 865 F.2d 232 (1988)
 - Special Messenger = Distribution Clerk
 - Both positions involve “the handling of the mail”
- Positions were similar since “skills and fundamental character of both positions were closely related.” *Coradeschi v DHS* 439 F2d 1329 (2006)
 - Immigration Inspector (GS-1801) with INS = Air Marshal (GS-1801) with TSA
 - Both positions required firearm proficiency and ability to enforce laws and apprehend criminals



5 U.S.C. § 7511(a)(1)(B)

“a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions

*(i) in **an Executive agency**; or*

(ii) In the United States Postal Service or Postal Regulatory Commission”

Greene v DIA 100 MSPR 447 (2005)


- October 1997 excepted appointment in DIA
- November 2000 new appointment in Navy (no break in service)
- November 2002 new appointment in DIA (no break in service)
- May 2003 separated

Board holds 7511(a)(1) (B) provides appeal rights regardless of whether entire service was in the same agency from which employee was separated



SCENARIO for (B)


- January 1, 2001 – retired Army colonel receives temporary appointment NTE 3 months with OPM as attorney GS-13
 - Terminated March 1, 2001 – gets rights?
- March 2, 2001 – receives new temporary appointment NTE 1 year with DHS as attorney GS-13 specializing in MSPB caselaw
 - Terminated December 1, 2001 – gets rights?
- December 2, 2002 – receives new temporary appointment NTE 3 months with Interior as attorney GS-13 specializing in MSPB caselaw
 - Terminated January 15, 2002 – gets rights?



5 U.S.C. § 7511(a)(1)(C)

“an individual in the excepted service (other than a preference eligible)


- “who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
- 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;”



5 U.S.C. § 7511(a)(1)(C)(i)

“who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service”


- Federal Career Interns (FCIP)
- Presidential Management Fellows (PMF)
- Student Career Experience Program (SCEP)
- Veterans Recruitment Appointments (VRA)
- Appointments under Schedule A 213.3102(u) - for persons with mental retardation, severe physical disabilities, or psychiatric disabilities



5 U.S.C. § 7511(a)(1)(C)(i)

*“(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; **or** (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 2 years or less”*

- General rule but with big exception: While serving in these appointments pending conversion, 7511(a)(1)(C)(i) excludes these employees from coverage
- Exception - an individual serving a probationary or trial period under one of these appointments can still have full appeal rights if they meet (ii)




5 U.S.C. § 7511(a)(1)(C)(ii)

*” (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 2 years or less”*

Two years may include extended periods in nonpay status, e.g., seasonal and intermittent employees receive credit for all time in position


Jolivette v Navy, 100 MSPR 216 (2005)



5 U.S.C. § 7511(a)(1)(C)(ii)

*“ (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 2 years or less”*


- “Current continuous service” means 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(b)
- Service can be under either competitive or excepted appointment



5 U.S.C. § 7511(a)(1)(C)(ii)

*“ (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 2 years or less”*


- “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 interruption to the work” 5 CFR 752.402
- See *Mathis v USPS* and *Coradeschi v MSPB* cases cited earlier



5 U.S.C. § 7511(a)(1)(C)(ii)

*“ (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 2 years or less”*

- Service can be in more than a single agency – same as in 7511(a)(1)(B)
- See *Greene v DIA* decision discussed earlier where MSPB holds 7511(a)(1)(B) provides appeal rights regardless of whether entire year of service was performed in the same agency from which employee was separated



5 U.S.C. § 7511(a)(1)(C)(ii)

*“ (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 2 years or less**”*

- Service in a temporary appointment NTE one year does not count toward completion of two years required
- So a series of NTE one year appointments cannot be combined – even if current continuous



Van Wersch v HHS

- 1989 - excepted service appointment under Schedule A – 213.3102(u) which authorized appointment of severely disabled persons and provided that after 2 years of satisfactory service, appointees could be noncompetitively converted to competitive appointment
- 1995 – removed for unacceptable conduct (never converted)

Is she serving a trial period under an appointment pending conversion to the competitive service - 5 USC 7511(C)(i)?

Does she have full appeal rights - 5 USC 7511(C)(ii)?



Van Wersch v HHS

- Yes – she is serving a trial period pending conversion so not covered under 5 USC 7511(C)(i)
- Yes – notwithstanding fact that she is serving “a probationary or trial period pending conversion,” she has completed 2 years of current continuous service under other than a temporary appointment limited to one year or less - she is covered under (ii)

Individual is a covered “employee” when either (i) or (ii) is met

A vertical strip of an American flag is positioned on the left side of the slide. It shows the blue field with white stars and the red and white stripes.

McCrary v. Army

- June 2002 to July 2004, series of consecutive term appointments in the competitive service as a Guidance Counselor
- Appointment terminated July 3, 2004
- July 26, 2004, received FCIP appointment as a Guidance Counselor (same grade and duties)
- Terminated March 2005

Does she have appeal rights under 7511(a)(1)(C)?



McCrary v. Army

- Not covered under 7511(a)(1)(C)(ii) because 3 week break between appointments in July 2004 means she does not have 2 years of current continuous service
- As to 7511(a)(1)(C)(i), Board adopts Part 315 rules in determining whether she can tack prior service for purpose of completing 2 year FCIP trial period.
- She meets Part 315 rule in that prior service was in same agency, same line of work, and no more than 30 day break in service
- Board holds that prior service can be tacked towards completion of a probationary period in the excepted service
103 M.S.P.R. 266 (2006)




No Absurd Result - II

- *Forest v. MSPB*, 47 F.3rd 409 (1995) – nonpreference eligible completes 15 months of service under 2 consecutive NTE one year temporary appointments as an attorney with FDIC and then is given (with no break), a permanent appointment as an attorney with FDIC. He is removed 1 year later - does he meet (ii)?
- No – all but the last year of his service was under temporary appointments and cannot be tacked on to current service
- If this decision was decided after *McCrary* rather than 11 years before, could he have argued that he has completed his probationary/trial period (same agency/same line of work, no break) and thus meets (i)?
- Probably not since MSPB holds here that (i) only covers employees serving under an appointment “pending conversion to the competitive service.”



SCENARIO for (C)

- January 1, 2001, nonpreference eligible is appointed as a supply assistant GS-301 in the Foreign Service (Department of State) in Paris, France.
 - Terminated February 1, 2002 – gets rights?
- February 2, 2002 – receives excepted service appointment as GS-301 supply assistant under 5 CFR 213.3102 (u) which has no time limit and permits conversion to competitive service after 2 years under that appointment.
 - Terminated February 1, 2003 – gets rights?



Recent Part 752 Amendments

The last change in OPM's Part 752 regulations was effective March 10, 2008 [73 FR 7187, 2/7/08]

- 5 CFR 752.401 amended to conform with the Federal Circuits interpretation of 5 USC 7511 as reflected in *McCormick* and *Van Wersch* decisions
- 5 CFR 752.401 and 752.402 amended to delete “same or similar” from definition of “current continuous service,” consistent with Board’s decision in *Payano*.



Key Lessons Going Forward

1. Always turn to the statute and regulations
2. Keep current on case law
3. Be proactive – give counsel to supervisors so that they can:
 - Make an informed decision when reviewing the certificate of eligibles
 - Recognize that some probationers have full procedural and appeal rights
 - If selectee does not have full procedural and appeal rights, use the probationary/trial period to assess fitness for job and federal service