APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEREK T. WILLIAMS,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

UNITED STATES POSTAL SERVICE,
Intervenor

2017-1535

Petition for review of the Merit Systems Protection Board in No. DA-0752-15-0530-M-1.

HARRIS L WINNS,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2017-1663

Petition for review of the Merit Systems Protection Board in No. SF-0752-15-015-M-1.

Decided: June 11, 2018

PAUL MICHAEL SCHOENHARD, McDermott, Will & Emery LLP, Washington, DC, argued for petitioner in 2017-1535. Also represented by REBECCA HARKER DUTTRY, NICOLE JANTZI, ELIZABETH LOUISE BURKE TETER.

HARRIS L. WINNS, San Jose, CA, pro se, in 2017-1663.

STEPHEN FUNG, Office of the General Counsel, Merit Systems Protection Board, Washington, DC, argued for respondent in 2017-1535. Also represented by BRYAN G. POLISUK, KATHERINE M. SMITH, JEFFREY A. GAUGER.

CALVIN M. MORROW, Office of the General Counsel, Merit Systems Protection Board, Washington, DC, for respondent in 2017-1663. Also represented by BRYAN G. POLISUK, KATHERINE M. SMITH.

MOLLIE LENORE FINNAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for intervenor in 2017-1535. Also represented by CHAD A. READLER, ROBERT E. KIRSCHMAN, JR., REGINALD T. BLADES, JR.; NADIA K. PLUTA, Office of General Counsel, United States Office of Personnel Management, Washington, DC; MORGAN E. REHRIG, Office of General Counsel, United States Postal Service, Washington, DC.

Before DYK, HUGHES, and STOLL, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Derek Williams and Harris Winns, both former employees of the United States Postal Service, were removed from their positions at the agency. They both separately sought review of their removals by the Merit Systems Protection Board. Only certain federal employees, as defined by statute, however, can seek review at the Board. And in this case, the Board held that neither individual qualified as an "employee" with appeal rights under 5 U.S.C. § 7511(a)(1)(B)(ii). Because we agree with the Board's interpretation of § 7511, we affirm its dismissal of Mr. Williams's and Mr. Winns's respective cases.

As an alternative basis for Board jurisdiction, Mr. Williams contends that he retained appeal rights from a prior appointment because the U.S. Postal Service did not advise him on the loss of appeal rights that would result from his reappointment to a new position. We hold that an agency's failure to advise individuals on the potential loss of their

appeal rights cannot create Board jurisdic-tion. Accordingly, we also affirm the Board's decision that Mr. Williams did not retain appeal rights from his prior appointment.

I

A

Mr. Winns is a preference-eligible veteran who worked at the Postal Service. Starting in 2011, Mr. Winns served a series of time-limited appointments, each lasting for less than a year. He was last appointed as a Postal Support Employee, which he started after a five-day break from a previous appointment. Mr. Winns was removed for alleged misconduct before he served a full year as a Postal Support Employee.

Mr. Winns appealed his termination to the Board and asserted whistleblower retaliation. The Board dismissed his appeal for lack of jurisdiction because Mr. Winns had not completed one year of "current continuous service," and so did not qualify as an "employee" under § 7511(a)(1)(B)(ii). Mr. Winns appealed the dismissal to this court, where he argued that the Board's decision contradicted *Roden v. Tennessee Valley Authority*, 25 M.S.P.R. 363 (1984). In *Roden*, the Board held that an individual who worked in a series of temporary appointments could qualify as an "employee" under § 7511 based on a "continuing employment contract" theory. *Id.* at 367–68.

In response, the Board requested remand to consider whether *Roden* was still good law. We granted the Board's request. *Winns v. Merit Sys. Prot. Bd.*,

No. 16-1206 (Fed. Cir. Apr. 25, 2016), ECF No. 25. On remand, the Board held that the Office of Personnel Management's (OPM) regulations superseded *Roden* and abrogated the "continuing employment contract" theory. *Winns v. U.S. Postal Serv.*, 124 M.S.P.R. 113, 117–21 (2017). The Board noted that 5 C.F.R. § 752.402 defines "current continuous employment" as "a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday." *Id.* at 118. After § 752.402 was promulgated, OPM explained that the rule was intended to abrogate the "continuing employment contract" theory, stating in a response to public comment that:

> T]he Board's holding in *Roden*, which characterized a series of temporary limited appointments for excepted service employees as a "continuing employment contract" and allowed brief breaks in service (as opposed to allowing no break) in computing current continuous service, was based, in large part, on OPM's earlier FPM guidance which was in effect at the time of the *Roden* decision. *This guidance was superseded by 5 C.F.R. [§] 752.402(b) which became effective on July 11, 1988. The regulation makes clear that OPM's policy governing the computation of current continuous employment allows for no break in Federal civilian employment.*

Reduction in Grade and Removal Based on Unacceptable Performance, 54 Fed. Reg. 26,172-01, 26,174 (June 21, 1989) (emphasis added). Based on § 752.402, the Board held that the series of tempo-

rary appointments held by Mr. Winns did not qualify as "continuous employment." *Winns*, 124 M.S.P.R. at 121. The Board thus held it lacked jurisdiction over his termination appeal. *Id.*

B

Mr. Williams is also a preference-eligible veteran. He was appointed as a Rural Carrier Associate (RCA) by the U.S. Postal Service. While serving as a RCA, Mr. Williams applied, and was selected, for an appointment as a City Carrier Assistant (CCA). Both RCAs and CCAs are non-career positions. CCA positions are subject to a collective bargaining agreement. That agreement states that CCA positions are limited to "terms of 360 calendar days" and must "have a break in service of 5 days between appointments." J.A. in No. 17-1535 at 467.

Mr. Williams served as a RCA for around 22 months before he was reappointed to a CCA position. Under the collective bargaining agreement, Mr. Williams took a five-day break in service between his RCA and CCA positions. After serving three months as a CCA, Mr. Williams was involved in an automobile accident, and the Postal Service terminated his employment. Mr. Williams appealed his termination to the Board, and argued that the Postal Service violated his collective bargaining agreement and engaged in prohibited personnel practices.

The administrative judge dismissed Mr. Williams's appeal for lack of jurisdiction. Because of the five-day break in service between Mr. Williams's RCA and CCA appointments, the administrative judge determined that Mr. Williams did not complete

one year of continuous service, as required by § 7511(a)(1)(B)(ii). Accordingly, the administrative judge held that Mr. Williams was not a Postal Service employee with Board appeal rights. Mr. Williams petitioned for review of the initial decision, which the Board denied.

Mr. Williams appealed to this court. Under *Roden*, Mr. Williams argued that he was an "employee" with appeal rights because his appointment as a RCA should count towards the one year of "current continuous service" required by § 7511(a)(1)(B)(ii). As in Mr. Winns's appeal, the Board asked this court for a remand to reconsider *Roden*, and we granted the Board's request. *Williams v. Merit Sys. Prot. Bd.*, No. 16-1629 (Fed. Cir. June 22, 2016), ECF No. 19.

Because it had overruled the "continuing employment theory" in *Winns*, 124 M.S.P.R. at 117–21, the Board similarly concluded that it lacked jurisdiction over Mr. Williams's appeal. The Board also rejected Mr. Williams's argument that his five-day interruption between his RCA and CCA appointments did not constitute a "break in service" under § 752.402. In doing so, the Board relied on the ordinary meaning of "break" as "an interruption in continuity."

Alternatively, Mr. Williams argued that he retained his appeal rights from his RCA position under the *Exum* rule. In *Exum v. Department of Veterans Affairs*, the Board held that an employee could retain their appeal rights from a prior position if the agency fails to inform the employee that their

change in position might result in a loss of appeal rights. 62 M.S.P.R. 344, 349 (1994). The Board, however, found that Mr. Williams did not satisfy the requirements under *Exum*. In particular, the Board found that Mr. Williams failed to show that "he *would not have accepted* his new position with the agency if he had known of the resulting loss of appeal rights." J.A. in No. 17-1535 at 12 (emphasis added). Instead, Mr. Williams testified only that he *did not know* whether he would have accepted the CCA position had he known about the potential loss of his appeal rights. J.A. in No. 17-1535 at 13.

Mr. Williams and Mr. Winns appeal the Board's dismissal of their respective claims. We have jurisdiction over both appeals under 28 U.S.C. § 1295(a)(9).

II

We may set aside a decision of the Board if the decision is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Whether the Board has jurisdiction is a question of law that we review de novo. *See, e.g.*, *Van Wersch v. Dep't of Health & Human Servs.*, 197 F.3d 1144, 1147 (Fed. Cir. 1999).

A

We start with the Board's interpretation of "current continuous service." Section 7511 defines "employee" for the provisions that give the Board jurisdiction over appeals by federal employees. *Wilder v.*

Merit Sys. Prot. Bd., 675 F.3d 1319, 1321 (Fed. Cir. 2012). The statute states that "'employee' means . . . a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions . . . in the United States Postal Service . . . ." § 7511(a)(1)(B)(ii). OPM's regulation in turn defines "current continuous employment" as "a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday." 5 C.F.R. § 752.402.[1] We conclude that OPM's regulation is a reasonable interpretation of the statute, and that the Board correctly applied OPM's regulation.

Congress authorized OPM to "prescribe regulations to carry out the purpose of th[e] subchapter" of the Civil Service Reform Act that includes § 7511. 5 U.S.C. § 7514; *accord Wilder*, 675 F.3d at 1322. And OPM relied on notice-and-comment rulemaking to promulgate its regulation defining "current continuous service." Adverse Actions, 53 Fed. Reg. 21,619-01, 21,623 (June 9, 1988). Thus, we apply the two-step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine whether OPM's regulation is permissible. At *Chevron* step one, we consider whether Congress has directly spoken to the precise question at

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[1] The statute uses the term "service," whereas OPM's regulation uses the term "employment." Despite this difference in terminology, we have treated OPM's regulation as interpreting the statutory term "current continuous service." *Wilder*, 675 F.3d at 1321–22. Neither party argues that the difference in terminology has any legal significance here.

issue. *Id.* at 842–43. If Congress left no statutory ambiguity, then we must give effect to congressional intent. *Id.* But if the statute is silent or ambiguous, then, at step two, we determine whether the agency's regulation is permissible, and we must defer to the agency's reasonable interpretation of an ambiguous statute. *Id.* at 843.

At *Chevron* step one, we find that Congress did not speak directly to whether a series of temporary appointments, with short breaks in between, can count as "continuous service" under § 7511. There is no definition of "current continuous service" in the statute. Nor are we aware of any legislative history that tells us whether Congress intended the statute to cover an individual who was employed through a series of temporary appointments.

Nevertheless, Mr. Williams contends the statute is clear that employment is "continuous" where both parties intend the employee to continue working from position to position, even if there are short breaks in between. To support this reading of the statute, Mr. Williams cites to Board decisions finding that a series of temporary appointments counts as "continuous service" under the "continuing employment contract" theory. *See, e.g.*, *Roden*, 25 M.S.P.R. at 368; *Melvin v. U.S. Postal Serv.*, 79 M.S.P.R. 372, 379 (1998). The Board's decisions, however, do not show that *Congress* intended "continuous service" to cover a series of temporary appointments. At best, these decisions show the *Board* has changed its interpretation of § 7511. But supposedly inconsistent Board decisions are not relevant here for purposes of determining congressional in-

tent, nor was the Board charged with promulgating regulations to carry out the statute at issue. OPM is the agency so charged and it was OPM that promulgated 5 C.F.R. § 752.402, which further defined "continuous service." And it was OPM's regulatory definition that ultimately resulted in the Board's overruling of its "continuing employment contract" theory.

At *Chevron* step two, we find that OPM's interpretation of § 7511 is a permissible construction of the statute. OPM's regulation defines "current continuous employment" as "a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday." 5 C.F.R. § 752.402. As the Board noted in reviewing the regulation, the ordinary meaning of "continuous" is "uninterrupted," "unbroken," or "marked by uninterrupted extension in space, time, or sequence." *Winns*, 124 M.S.P.R. at 119. Thus, OPM's definition is consistent with the common understanding of "continuous." We are unaware of any legislative intent to depart from the plain meaning of the statutory text.

Mr. Williams further asserts that OPM's interpretation of § 7511 is not entitled to deference because it merely parrots the statute. It is true that "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). This is commonly known as the anti-parroting canon. Mr. Williams's reliance on this doc-

trine, however, is misplaced because OPM's regulation does more than paraphrase the statute. Section 7511 uses the term "continuous employment" without clarification. OPM's regulation defines the term as "without a break . . . *of a workday*." 5 C.F.R. § 752.402 (emphasis added). Mr. Williams argues the regulation is parroting because "without a break" and "continuous" are synonymous. But OPM's regulation does more than paraphrase—it also establishes the *break duration* that cuts off "continuous employment." Thus, § 752.402 clarifies an otherwise ambiguous statutory term.

The Board also did not err in applying § 752.402 to the appeals of Mr. Williams and Mr. Winns. It is undisputed that Mr. Williams took a five-day break between his RCA and CCA positions. Likewise, Mr. Winns started as a Postal Support Employee after a five-day break from a previous appointment. Neither Mr. Williams nor Mr. Winns qualified as an employee under OPM's regulation because they had a break in service of at least one workday. Thus, the Board was correct in finding that Mr. Williams and Mr. Winns did not meet the requirement of "current continuous service," as the term is defined by OPM.

B

Next, we turn to whether Mr. Williams has appeal rights before the Board under the *Exum* rule. In *Exum*, the Board held that an agency's failure to inform an employee that a voluntary change in position might lead to a loss of appeal rights could result in the retention of appeal rights. 62 M.S.P.R. at 349. Mr. Williams argues the *Exum* rule should apply to

him because the Postal Service failed to notify him that his change from a position with appeal rights (RCA) to a position without such rights (CCA) would result in a loss of appeal rights. We reject this argument and the *Exum* rule. As we held in *Carrow v. Merit Systems Protection Board*, an agency's failure to advise federal employees on the terms of their appointment "does not create appeal rights for positions as to which Congress has not given the Board appellate jurisdiction." 626 F.3d 1348, 1353 (Fed. Cir. 2010).

The Board itself has limited the *Exum* rule to transfers within the same agency. *Park v. Dep't of Health & Human Servs.,* 78 M.S.P.R. 527 (1998). In *Park*, the Board explained that in intra-agency transfers, "the agency ha[s] all of the necessary information at hand to inform the appellant properly of the consequences of the acceptance of the new position." *Id.* at 534–35. By contrast, "a new employing agency may not possess and cannot be expected to have specific knowledge of the terms of the potential employee's previous employment. It should not have the same obligation to advise the employee of all possible consequences of changing positions." *Id.* at 535.

In *Carrow*, we confirmed that *Exum* does not apply to federal workers who transfer between agencies, but we relied on a different rationale than the Board. 626 F.3d at 1353–54. There, the appellant transferred from the Department of the Army to the Department of Veterans Affairs, from which he was subsequently removed. *Id.* We explained that:

> [The statute] does not give the Board jurisdiction over an appeal from a removal by a person who does not qualify as an "employee." . . . By statute, [the appellant's] position with the DVA did not carry Board appeal rights, and the DVA's failure to advise Mr. Carrow of the terms of his appointment does not create appeal rights for positions as to which Congress has not given the Board appellate jurisdiction.

Id. at 1353. Because *Carrow* did not involve a federal worker who transferred within the same agency, we declined to "approve or disapprove the Board's rule in *Exum* and its progeny" that an employee can retain appeal rights from a prior position for an intra-agency transfer. *Id.* at 1354.

Although *Carrow* involved an inter-agency transfer, its rationale is equally applicable to transfers within the same agency. Unlike the Board's decision in *Park*, our reasoning did not depend on the agency's lack of knowledge about the potential employee's previous appointment. Instead, the dispositive issue was whether an employee's position carries statutorily created appeal rights. *Id.* The agency's failure to advise an employee cannot create appellate jurisdiction for positions that do not otherwise have appeal rights. *Id.* It makes no difference whether the employee transferred within the same agency or to a different agency. Thus, we specifically disapprove the *Exum* rule, even for intra-agency transfers, and hold that an agency's failure to inform an employee of the consequences of a voluntary transfer cannot

confer appeal rights to an employee in a position which has no appeal rights by statute.

Our decision here is distinguishable from situations in which an employee with appeal rights is coerced or deceived into resigning or retiring. *Covington v. Dep't of Health & Human Servs.*, 750 F.2d 937, 942 (Fed. Cir. 1984). In those situations, our precedent makes clear that a seemingly voluntary act by an employee can be considered involuntary based on deceptive or coercive agency action. *See, e.g.*, *id.*; *Middleton v. Dep't of Def.*, 185 F.3d 1374, 1383 (Fed. Cir. 1999). And in those cases, we have held that an employee could exercise appeal rights to the Board. *Id.*

By contrast, Mr. Williams made no allegation that he was misled or coerced into taking the new CCA position. He voluntarily applied, and was selected, for the CCA position. Taking on a new position often leads to various changes in benefits. The agency has no obligation to advise its employees of all the potential changes associated with a new job. And certainly the agency's failure to advise its employee on the full range of consequences associated with a new position does not make the employee's decision to accept the position involuntary.

Conceivably, there may be situations in which an agency coerces or deceives an employee into accepting a new position. We need not consider those scenarios here. Mr. Williams alleges only that the Postal Service failed to advise him on the loss of appeal rights that would result from his reappointment as a CCA. We hold that the agency's failure to ad-

vise Mr. Williams does not allow him to retain appeal rights from a prior appointment.

C

Finally, Mr. Williams argues that the Board's decision to overturn *Roden* violated his due process rights. Specifically, Mr. Williams contends that he had a right to appeal as a federal employee based on the "continuing employment contract" theory in *Roden*. By overturning *Roden* and applying its decision retroactively, Mr. Williams asserts that the Board deprived him of his property right to appeal his termination.

We are not persuaded by Mr. Williams's due process challenge. Property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Here, the appeal rights of federal employees are statutorily defined by § 7511. Although *Roden* broadly construed the term "continuous service" under § 7511, it did not create an independent basis for appeal or a separate property right in the "continuing employment contract" theory.

Because § 7511 only creates appeal rights for employees who have served continuously for more than one year, Mr. Williams relinquished any appeal rights he may have had at the RCA position when he accepted reappointment as a CCA. Thus, we find that the Board did not deprive Mr. Williams of his appeal rights when it dismissed his appeal for lack of jurisdiction.

III

For the reasons above, we affirm the Board's dismissal of Mr. Williams's and Mr. Winns's cases for lack of jurisdiction.

AFFIRMED

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DEREK T. WILLIAMS, Appellant,	DOCKET NUMBER DA-0752-15-0530-M-1
v.	
UNITED STATES POSTAL SERVICE, Agency.	DATE: January 4, 2017

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Paul M. Schoenhard, Esquire, Washington, D.C., for the appellant.

Charles E. Booth, Esquire, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman

Mark A. Robbins, Member

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See 5 C.F.R. § 1201.117(c).

FINAL ORDER

This appeal is before the Board after the U.S. Court of Appeals for the Federal Circuit granted the Board's request to remand the case to the Board for further consideration. Except as expressly MODIFIED by this Final Order to supplement the administrative judge's jurisdictional analysis, we AFFIRM the initial decision, issued in MSPB Docket No. DA-0752-15-0530-I-1, dismissing the appeal for lack of jurisdiction.

BACKGROUND

Effective June 15, 2013, the agency appointed the preference-eligible appellant to a Rural Carrier Associate (RCA) position. *Williams v. U.S. Postal Service*, MSPB Docket No. DA-0752-15-0530-I-1, Initial Appeal File (IAF), Tab 1 at 1, Tab 11 at 4-6, Tab 12 at 20, Tab 17 at 4. More than 18 months later, while he was employed as an RCA, the appellant applied and was selected for a temporary, time-limited appointment as a City Carrier Assistant (CCA) with the agency. *Williams v. U.S. Postal Service*, MSPB Docket No. DA-0752-15-0530-M-1, Remand File (RF), Tab 5 at 78-87, 92. Pursuant to applicable collective bargaining agreements, a 5-day break in service is required when an individual moves from an RCA position to a temporary, time-limited CCA position with the agency.[2] *Id.* at 43, 73. Accordingly, approximately 22 months after he was appointed to the RCA position, on April 2, 2015, the appellant

[2] We note that the appellant does not contend that a collectively bargained provision requiring a break in service is unlawful or otherwise unenforceable, and we do not reach that issue here.

was separated from that position due to the required break in service.[3] IAF, Tab 12 at 21. Effective April 8, 2015, following a 5-day break in service, the agency appointed the appellant to the CCA position.[4] *Id.* at 22.

Approximately 3 months after the appellant was appointed to the CCA position, the agency terminated his employment after he was involved in a motor vehicle accident while on duty. *Id.* at 23-24. The appellant filed a timely Board appeal challenging his termination. IAF, Tabs 1-2. Without holding the appellant's requested hearing, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 23, Initial Decision (ID); IAF, Tab 1 at 2. In pertinent part, she found that the appellant failed to raise a nonfrivolous allegation that he was a U.S. Postal Service employee with Board appeal rights because he had a break in service of more than 1 day between the RCA and CCA positions, and therefore, he had not completed 1 year of current continuous service at the time that he was terminated, as required by 5 U.S.C. § 7511(a)(1)(B)(ii).[5] ID at 5-6.

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[3] Although the appellant was separated from the RCA position effective April 2, 2015, the notification of personnel action reflecting his separation was not processed until April 16, 2015. IAF, Tab 12 at 21.

[4] Although the appellant was appointed to the CCA position effective April 8, 2015, the notification of personnel action reflecting his appointment was not processed until April 16, 2015. IAF, Tab 12 at 22.

[5] The administrative judge further found that, absent an otherwise appealable action, the Board lacked jurisdiction over the

The appellant filed a petition for review of the initial decision. *Williams v. U.S. Postal Service*, MSPB Docket No. DA-0752-15-0530-I-1, Petition for Review (PFR) File, Tab 1. In a February 9, 2016 Final Order, the Board denied the appellant's petition for review. *Williams v. U.S. Postal Service*, MSPB Docket No. DA-0752-15-0530-I-1, Final Order (Feb. 9, 2016); PFR File, Tab 8.

The appellant appealed the Board's decision to the Federal Circuit. *Williams v. Merit Systems Protection Board*, MSPB Docket No. DA-0752-15-0530-L-1, Litigation File (LF), Tab 5. Before the Federal Circuit, the appellant, who was represented by counsel for the first time in the appeal, argued for the first time that, despite the required break in service, he was nevertheless an employee with Board appeal rights under the "continuing employment contract" theory in *Roden v. Tennessee Valley Authority*, 25 M.S.P.R. 363, 367-68 (1984). LF, Tab 5 at 12-13, 25-47. Alternatively, the appellant argued that, because the agency did not inform him that he would lose his appeal rights when he moved from the RCA position to the CCA position, he retained his Board appeal rights from the former position under the theory set forth in *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344 (1994). LF, Tab 5 at 47-54.

The Board requested that the Federal Circuit remand the appeal to the Board so that we could consider whether *Roden* was still good law, and if so, whether it would alter the Board's determination

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appellant's claims of prohibited personnel practices and harmful error in effectuating his termination. ID at 2, 6.

that it lacks jurisdiction over the appeal. LF, Tab 6 at 1-5. Previously, the Federal Circuit granted a similar remand request in *Winns v. Merit Systems Protection Board*, MSPB Docket No. SF-0752-15-0165-L-2, another appeal in which an appellant alleged that the Board had jurisdiction over the appeal under the theory in *Roden*. *Winns v. Merit Systems Protection Board*, Fed. Cir. No. 2016-1206, slip op. (Fed. Cir. Apr. 25, 2016). The Board also granted the Board's remand request in the instant appeal. *Williams v. Merit Systems Protection Board*, No. 2016-1629, slip op. (Fed. Cir. June 22, 2016); LF, Tabs 7-8.

On remand, the Board issued a show cause order directing the parties to submit evidence and argument regarding several issues raised in the appellant's brief before the Federal Circuit. RF, Tab 2. Both parties responded to the show cause order. RF File, Tabs 5-8.

DISCUSSION OF ARGUMENTS ON REVIEW

The Board's jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). An appellant who makes a nonfrivolous allegation of jurisdiction is entitled to a hearing at which he then must prove jurisdiction by a preponderance of the evidence. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc); *see* 5 C.F.R. § 1201.56(b)(2)(i)(A). For the following reasons, we find that the appellant failed to raise a nonfrivolous allegation of Board jurisdiction over the instant appeal.

The appellant failed to raise a nonfrivolous allegation that he was an employee with Board appeal rights based on his service in the CCA position.

Only an "employee," as defined under 5 U.S.C. chapter 75, can appeal an adverse action to the Board. *See* 5 U.S.C. §§ 7511(a)(1), 7513(d); *Mathis v. U.S. Postal Service*, 865 F.2d 232 (Fed. Cir. 1988). Pursuant to 5 U.S.C. § 7511(a)(1)(B), the definition of an employee with the right to appeal to the Board includes a preference-eligible U.S. Postal Service employee who has completed "1 year of current, continuous service" in the same or similar positions.[6] 5 U.S.C. § 7511(a)(1)(B); *see* 5 U.S.C. §§ 7511(b)(8), 7513(d); *Mathis*, 865 F.2d at 232-33. An implementing regulation promulgated by the Office of Personnel Management (OPM), 5 C.F.R. § 752.402, defines current continuous service as "a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday."[7]

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[6] Employees of the U.S. Postal Service also may appeal adverse actions to the Board under 5 U.S.C. chapter 75 if they are management or supervisory employees, or employees engaged in personnel work in other than a purely nonconfidential clerical capacity. 5 U.S.C. § 7511(b)(8); 39 U.S.C. § 1005(a)(4)(A)(ii)(I); *Toomey v. U.S. Postal Service*, 71 M.S.P.R. 10, 12 (1996). The appellant has not alleged, and the record does not reflect, that he was employed in any of these capacities. IAF, Tabs 1-2, Tab 12 at 17-22.

[7] Although 5 C.F.R. § 752.402 refers to "current continuous employment," rather than "current continuous service," the appellant does not dispute that the regulation was enacted to implement 5 U.S.C. chapter 75, and applies to the definition of "current continuous service" in 5 U.S.C. § 7511(a)(1)(B). LF,

The appellant does not dispute that he was terminated from the CCA position approximately 3 months after his appointment to that position, and that there was a 5-day period between the end of his RCA appointment and the effective date of his CCA appointment. IAF, Tab 12 at 22-24; LF, Tab 5; RF, Tabs 6, 8. Nevertheless, he argues that he was an employee with Board appeal rights under section 7511(a)(1)(B) at the time he was terminated from the CCA position. LF, Tab 5; RF, Tabs 6 at 8-21, Tab 8 at 7-10. For the reasons discussed below, we disagree.

The appellant cannot establish Board jurisdiction under a "continuing employment contract" theory.

First, the appellant contends that he is an employee with Board appeal rights under the "continuing employment contract theory" set forth in *Roden*. LF, Tab 5 at 12-13, 25-47; RF, Tab 6 at 8-21, Tab 8 at 7-9. In *Roden*, the Board found that a preference-eligible employee who held a series of five temporary appointments to the same position, separated by short breaks in service, established jurisdiction over his termination appeal, even though he held the appointment from which he was terminated for less than a year. 25 M.S.P.R. at 367-68. The Board found that, even assuming that section 7511(a)(1)(B)

Tab 5; RF, Tabs 6, 8; *see Wilder v. Merit Systems Protection Board*, 675 F.3d 1319, 1322 n.1 (Fed. Cir. 2012) (finding that "there is no suggestion" that the definition of current continuous employment in 5 C.F.R. § 752.402 does not apply to section 7511(a)(1)).

generally excludes service that is interrupted by a break in service of a workday, it was obligated to "look beyond the form of statutory and other provisions, and to determine the purpose which these provisions were intended to serve. " *Id.* at 367. Under the circumstances at issue, the Board found that the agency had "effectively entered into a continuing employment contract" with the employee, and therefore, despite several breaks, his service was "continuous" within the meaning of section 7511(a)(1)(B). *Id.* at 368.

In our recent Opinion and Order in *Winns v. U.S. Postal Service*, 2017 MSPB 1, ¶¶ 9-18 (2016), we overruled *Roden* and subsequent decisions finding that an appellant may establish "current continuous service" for purposes of section 7511(a)(1)(B) under a "continuing employment contract" theory, despite a break in service of a workday. We held that the ordinary meaning of "current continuous service" in section 7511(a)(1)(B) appears to preclude breaks in service, and even assuming that the statute was silent or ambiguous, OPM's implementing regulation at 5 C.F.R. § 752.402 is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). *Winns*, 2017 MSPB 1, ¶¶ 9-18.

We have considered the appellant's arguments in the instant appeal regarding why *Roden* should remain good law, and find that they were either addressed in our Opinion and Order in *Winns*, or do not form a basis to revisit our precedential decision overruling *Roden*. RF, Tab 6 at 8-21, Tab 8 at 7-9. For example, the appellant's argument that *Roden*

benefits preference-eligible veterans does not allow us to extend the Board's jurisdiction beyond that provided by statute and regulation. RF, Tab 6 at 17; *see Hartman v. Merit Systems Protection Board*, 77 F.3d 1378, 1380 (Fed. Cir. 1996) (finding that the Board's jurisdiction under 5 U.S.C. chapter 75 only encompasses appeals by "employees" as defined in section 7511(a)(1)). Similarly, the fact that *Roden* has been precedent for many years, RF, Tab 6 at 8, 15, and subsequent decisions have relied on it, *id.* at 18, does not prevent us from overruling the decision when, as here, after further consideration, we determine that it was incorrectly decided, *see, e.g.*, *Agoranos v. Department of Justice*, 119 M.S.P.R. 498, ¶ 16 (2013) (overruling a prior Board decision that had been effect for approximately 15 years when we determined that it was incorrectly decided).

The appellant also contends that any decision overruling *Roden* should not apply to cases involving matters that transpired before *Roden* was overruled. RF, Tab 6 at 15 n.11. However, under general principles of law, judicial decisions are given retroactive effect to pending cases, whether or not those cases involve pre-decision events. *Heartland By-Products, Inc. v. U.S.*, 568 F.3d 1360, 1365 (Fed. Cir. 2009); *Porter v. Department of Defense*, 98 M.S.P.R. 461, ¶¶ 13-14 (2005). Moreover, by definition, a jurisdictional ruling can never be prospective only. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981) (finding that a court lacks jurisdiction to consider the merits of a case over which it is without jurisdiction and thus a jurisdictional ruling may never be prospective only); *Williams v. Department of De-*

fense, 53 M.S.P.R. 23, 26 (1992) (same). Therefore, because we overruled *Roden* and subsequent decisions relying on *Roden* in *Winns*, the "continuing employment contract" does not provide a basis for finding that the Board has jurisdiction over the instant appeal.

The appellant failed to otherwise raise a nonfrivolous allegation that his service was "continuous" within the meaning of section 7511(a)(1)(B).

Alternatively, the appellant argues that, regardless of whether Roden is good law, he is an employee with Board appeal rights because he did not undergo a break in service. RF, Tab 6 at 14-15. Specifically, he contends that 5 C.F.R. § 752.402 does not define the term "break," and that the term should not apply when, as here, he was selected for the CCA position before his RCA appointment ended. *Id.* We find this argument unpersuasive.

Although 5 C.F.R. § 752.402 does not define "break," when construing a regulation, we first examine the regulatory language itself to determine its plain meaning, and if the language is clear and unambiguous, the inquiry ends with the plain meaning. *See Roberto v. Department of the Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006). The Board may refer to dictionary definitions to determine the ordinary meaning of an undefined regulatory term. *American Express Co. v. U.S.*, 262 F.3d 1376, 1381 n.5 (Fed. Cir. 2001). The Merriam Webster Collegiate Dictionary defines "break" as "an interruption in continuity." Merriam Webster Collegiate Dictionary 140 (10th ed. 2002). Similarly, Webster's II New River-

side University Dictionary defines "break" as "a disruption in continuity or regularity." Webster's II New Riverside University Dictionary 199 (1984). Thus, the ordinary meaning of the term "break" in 5 C.F.R. § 752.402 clearly encompasses the 5-day interruption in the appellant's employment with the agency pursuant to the "required break" under the applicable collective bargaining agreements. IAF, Tab 12 at 21-22; RF, Tab 5 at 43, 73.

Accordingly, for this reason, and the reasons discussed above, the appellant failed to raise a nonfrivolous allegation that he completed "1 year of current continuous service" at the time that he was terminated, as required by 5 U.S.C. § 7511(a)(1)(B)(ii), and therefore, the Board lacks jurisdiction over the appeal based on the appellant's service in the CCA position.[8]

The appellant failed to raise a nonfrivolous allegation that he retained his appeal rights from his former CCA position under the theory set forth in *Exum*.

The appellant alternatively argues that, even if he did not have Board appeal rights based on his service in the CCA position, he nevertheless retained his appeal rights from his former RCA position under the theory set forth in *Exum*. LF, Tab 5 at 47-

[8] We make no finding as to whether the RCA and CCA positions are the same or similar, having found that the Board lacks jurisdiction over the appeal on the ground that the appellant did not have 1 year of current continuous service. See 5 U.S.C. § 7511(a)(1)(B) (requiring that the current continuous service be "in the same or similar positions").

51; RF, Tab 6 at 21-24, Tab 8 at 11-12. The appellant raised this argument for the first time on appeal before the Federal Circuit, and the Federal Circuit could have properly found that the argument was waived. *See Bosley v. Merit Systems Protection Board*, 162 F.3d 665, 668 (Fed. Cir. 1998) (finding that a party in a Board proceeding "must raise an issue before the administrative judge if the issue is to be preserved for review" before the Federal Circuit). However, the Federal Circuit has remanded the appeal to the Board, and because the appellant alleges that his new argument implicates the Board's jurisdiction over the appeal, and the issue of jurisdiction is always before the Board and may be raised by any party or sua sponte by the Board at any time during a Board proceeding, we will consider it. *See Lovoy v. Department of Health & Human Services*, 94 M.S.P.R. 571, ¶ 30 (2003).

In *Exum*, the Board found that when an individual moved from a full-time position with Board appeal rights to a part-time position without Board appeal rights within the same agency, and the agency should have known that she was acting under the erroneous impression that her appeal rights would not be affected by the change, the agency was obligated to inform her of the effect that the change in position would have on her Board appeal rights. 62 M.S.P.R. at 345-49. The Board remanded the appeal to, among other things, determine whether the individual would have accepted the new position if she had known of the effect on her Board appeal rights. *Id.* at 350.

Subsequent Board decisions have relied on *Exum* to find that: (1) when an employee moves between positions within the same agency, and forfeits his appeal rights as a result of accepting the new appointment, the agency must inform the employee of the effect the move will have on his appeal rights; and (2) if the employee was unaware of the loss of Board appeal rights that would result from accepting the new position and he would not have accepted the new position had he known of the loss of appeal rights, he is deemed not to have accepted the new appointment and to have retained the rights incident to his former appointment. *Boudreault v. Department of Homeland Security*, 120 M.S.P.R. 372, ¶¶ 4, 11 (2013); *Yeressian v. Department of the Army*, 112 M.S.P.R. 21, ¶ 12 (2009); *Lopez v. Department of the Navy*, 103 M.S.P.R. 55, ¶¶ 12, 16 (2006), *overruled in part on other grounds by Nelson v. Department of Health & Human Services*, 119 M.S.P.R. 276 (2013).

On remand, the agency requests that we overrule *Exum* and subsequent decisions relying on *Exum*.[9] RF, Tab 5 at 19-21. We decline to do so here.

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[9] In requesting that we overrule *Exum*, the agency erroneously asserts that the Federal Circuit "criticized *Exum* and its progeny" in *Rice v. Merit Systems Protection Board*, 522 F.3d 1311 (Fed. Cir. 2008). RF, Tab 5 at 19-20. In *Rice*, the Federal Circuit declined to decide whether it would adopt the rule set forth in *Exum*, but instead found that regardless, the rule could not be applied to the facts at issue, where statutory amendments to section 7511 enacted after the appellant accepted her new position would have denied her Board appeal rights in that position. *Id.* at 1319-20. Subsequently, in *Carrow v. Merit Systems Protection Board*, 626 F.3d 1348, 1354 (Fed. Cir. 2010), the Federal Circuit again declined to either approve or disapprove

Alternatively, the agency requests that we narrow the application of *Exum* to circumstances where the agency has reason to know that an employee erroneously believes that he will retain his appeal rights despite a change in position. RF, Tab 5 at 10-12, Tab 8 at 11-12. However, at this time, we decline to overrule or narrow subsequent Board decisions applying an agency's duty to advise an employee of the loss of Board appeal rights regardless of whether there was evidence that the agency knew or should have known that the employee was operating under a misapprehension regarding the effect of moving to a new position with the agency. *See Clarke v. Department of Defense*, 102 M.S.P.R. 559, ¶ 11 (2006); *Edwards v. Department of Justice*, 86 M.S.P.R. 404, ¶¶ 6-10 (2000); *see also Rice*, 522 F.3d at 1318-19 (finding that the Board's decisions do not limit the application of *Exum* to circumstances when an agency knew or should have known that the employee was operating under a misapprehension regarding the effect of a change in position on the loss of appeal rights).

Accordingly, we must determine whether, under the circumstances at issue here, the appellant raised a nonfrivolous allegation of jurisdiction over his appeal based on the theory set forth in *Exum* and its progeny. It is undisputed that the appellant was an employee with Board appeal rights in the RCA position when he accepted the CCA position, because he was preference eligible and served in that position

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of the rule set forth in *Exum* and subsequent Board decisions applying *Exum*.

continuously for more than a year. IAF, Tab 12 at 20-21; RF, Tab 5 at 8. We further find that when, as here, the appellant was selected for the CCA position while he was serving in the RCA position, and the 5-day break in service only occurred because he was changing positions within the agency, the break in service does not preclude the application of the theory set forth in *Exum*. *Cf. Williams-Hargraves v. Department of Housing & Urban Development*, 88 M.S.P.R. 176, ¶ 11 (2001) (finding that the theory in Exum did not apply when an appellant had not been employed by an agency for 7 months when she accepted her new position with the agency).

It appears undisputed that the agency did not explicitly inform the appellant that he would lose his Board appeal rights if he moved from the RCA position to the CCA position. RF, Tabs 5-8. However, the agency contends that it gave the appellant "sufficient information to understand he would waive his appeal rights by changing positions" because: (1) the CCA vacancy announcement stated that breaks in service were required and that the position was a temporary appointment not to exceed 360 days; and (2) the appellant's job offer letter for the CCA position stated that his appointment would be subject to a probationary period. RF, Tab 5 at 15-16, 88.

Nevertheless, for a preference-eligible individual in the excepted service, such as the appellant, the absence or completion of a probationary or trial period is not determinative of whether he is an employee with Board appeal rights. *Maibaum v. Department of Veterans Affairs*, 116 M.S.P.R. 234, ¶ 9 (2011). Rather, the dispositive issue is whether the appel-

lant satisfied the requirement of 1 year of current continuous service in the same or similar positions, and service in a temporary appointment may be counted towards the completion of that requirement. *Id.*; *see* 5 U.S.C. § 7511(a)(1)(B). Although the appellant was aware that a break in service was required at the time that he changed positions, there is no indication that he understood the legal implications of the required break in service on his Board appeal rights.[10]

We need not decide whether the information that the agency provided the appellant was sufficient to notify him that he would lose his appeal rights because regardless, for another reason, we find that he failed to raise a nonfrivolous allegation of jurisdiction over his appeal under the theory in *Exum*. Under *Exum* and its progeny, an appellant may only retain Board appeal rights from a former position if he establishes that he would not have accepted his new position with the agency if he had known of the resulting loss of appeal rights.[11] *Yeressian*, 112 M.S.P.R. 21, ¶ 13 (remanding an appeal for a jurisdictional finding regarding whether an appellant would have accepted a new position if he had known

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[10] However, the appellant has not directly asserted that he failed to understand the legal implications of the break. RF, Tab 6 at 27-28.

[11] Although the appellant requests that we overrule prior Board precedent to this effect, we decline to do so. RF, Tab 6 at 23-24. The appellant has failed to provide a persuasive justification as to why we would restore appeal rights from a former position when an employee would have accepted a new position regardless of the loss of appeal rights.

of the loss of appeal rights); *Exum*, 62 M.S.P.R. at 350 (same). On remand, we ordered the appellant to submit evidence and argument regarding whether he would have accepted the CCA position if the agency had informed him that he would lose his appeal rights. RF, Tab 2 at 4. In response, the appellant submitted a declaration under penalty of perjury, which stated, "At this point in time, I do not know whether I would have accepted the CCA position in April 2015 had I been informed by the [agency] that I would have allegedly lost my appeal rights." RF, Tab 6 at 28. Because the appellant failed to allege that he would not have accepted the CCA position if he had known that he would lose his appeal rights, we find that he failed to raise a nonfrivolous allegation of jurisdiction over the appeal.[12]

Accordingly, for these reasons and the reasons set forth above, we affirm the initial decision, as modified, to supplement the administrative judge's jurisdictional analysis, still dismissing the appeal for lack of jurisdiction.[13]

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[12] The Board's regulations define a nonfrivolous allegation as "an assertion that, if proven, could establish the matter at issue." 5 C.F.R. § 1201.4(s).

[13] We also have considered the appellant's argument before the Federal Circuit that the Board has jurisdiction over the appeal based on a purported due process violation, and find that it fails to raise a nonfrivolous allegation of Board jurisdiction. LF, Tab 5 at 51-54. An allegation that the agency failed to provide due process does not confer an independent basis for the Board to review matters outside of its jurisdiction. *Rivera v. Department of Homeland Security*, 116 M.S.P.R. 429, ¶ 16 (2011).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request review of this final decision by the U.S. Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode.htm. 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.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD: _____

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEREK T. WILLIAMS,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

UNITED STATES POSTAL SERVICE,
Intervenor

2017-1535

Petition for review of the Merit Systems Protection Board in No. DA-0752-15-0530-M-1.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

ORDER

Petitioner Derek T. Williams filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on September 4, 2018.

FOR THE COURT

August 28, 2018
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX D

U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. § 7511 provides in pertinent part:

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service—

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

(ii) except as provided in section 1599e of title 10, who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(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; and

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

(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 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. § 7512 provides in pertinent part:

This subchapter applies to—

(1) a removal;

* * *

5 C.F.R. § 752.402 provides in pertinent part:

In this subpart -

Current continuous employment means a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday.

Day means a calendar day.

* * *

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.