

# Is the Employee an “Employee”?

## A Simple Quiz for Representatives

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If you represent federal employees or postal workers, then you surely know who is entitled to appeal or grieve disciplinary actions. Right? Then you should have no problem scoring 100% on this simple “yes-no” quiz. Just answer the seven questions and email or fax the quiz back to me. I will score your quiz and email it back to you. In about a week or so, I will post the answers on my blog and in a follow-up email newsletter.

Under 5 U.S.C. §§ 7512(1) and 7513(d), a person who meets the definition of "employee" in 5 U.S.C. § 7511(a)(1) is entitled to appeal his/her removal to the Merit Systems Protection Board. *Illich v. Department of Air Force* 96 M.S.P.R. 11, \*135. U.S.C § 7511(a)(1) defines “employee” as follows:

- (A) an individual in the competitive service—
  - (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;
- (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 Rate 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.

### QUESTION #1

Assume that appellant, a non-preference eligible, had served continuously as Security Assistant, a competitive service position, with the Department of the Navy from January 31, 1999 until December 2, 2000 when she was terminated. On December 4, 2000, the appellant received a competitive service, term appointment to a GS-9 Personnel Security Specialist position with the Department of Defense. Her term appointment was subject to her completion of a one-year trial period. On November 30, 2001, less than one year into

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her trial period, the agency terminated the appellant during the trial period based on her alleged unavailability for duty.

Is the appellant in our hypothetical an “employee” entitled to appeal her removal to MSPB? What additional facts if any do you need to make that determination?

Yes, she is an employee because she completed more than one year of current continuous service when you tack her Navy service onto her DoD service. There is no break in service because December 3, 2000 falls on a Sunday.

#### QUESTION # 2

Assume that on April 9, 2000, appellant, a non-preference eligible, received a career-conditional appointment to the competitive service position of Heavy Mobile Equipment Repairer with the Department of the Army subject to his completion of a one-year initial probationary period. On November 16, 2000, the agency terminated the appellant from his position during the probationary period based on his alleged failure to demonstrate his fitness for continued employment. The appellant indicated on his MSPB appeal form that he began his federal service on January 27, 1992.

Is the appellant in our hypothetical an “employee” entitled to appeal her removal to MSPB? What additional facts if any do you need to answer this question?

Don't know. We need to know the type of appointment under which appellant served immediately before his appointment with the Department of the Army. If he served under other than temporary appointment limited to 1 year or less in the competitive service and he had no break in service between appointments, he would be an employee if he had more than one year of current combined service.

#### QUESTION # 3

Assume that on June 2, 1991, appellant accepted a career-conditional appointment in the competitive service with the Department of Health and Human Services, subject to completion of a one-year probationary period, which she subsequently completed. Without a break in service, on August 29, 1999, she accepted a career-conditional appointment in the competitive service with the Department of Air Force, subject to a one-year probationary period beginning August 29, 1999. On February 22, 2000, the Department of Air Force separated appellant during her probationary period.

Is the appellant in our hypothetical an “employee” entitled to appeal her removal to MSPB? What additional facts if any do you need to answer this question?

Yes, she is an employee because she has more than one year of current continuous service under other than temporary appointment limited to 1 year or less in the competitive service.

#### QUESTION # 4

Assume that on August 12, 2001, appellant accepted a career-conditional appointment in the competitive service with the Department of the Air Force subject to her completion of a one-year initial probationary period. Before accepting this appointment and without a break in service, appellant had served in the agency for over three consecutive years in non-probationary positions. During the probationary period, the agency removed appellant for failure to request leave properly, leaving work without permission, and making false statements.

Is the appellant in our hypothetical entitled to grieve her removal under the collective-bargaining agreement? What additional facts if any do you need to answer this question?

No, she is not entitled to grieve because by law probationers are not covered under the collective bargaining agreement.

#### QUESTION # 5

Assume that before April, 2002, appellant served in the part-time, excepted service position of Store Worker, WG-6914-02, with the Defense Commissary Agency (DECA). Thereafter, without a break in service, the appellant received a competitive service appointment to the position of Custodial Worker, WG-3566- 02, with DECA. This was a temporary appointment limited to one year. Shortly thereafter, this appointment was converted to a career-conditional appointment to the same position, subject to a one-year probationary period. Effective April 4, 2003, DECA separated the appellant during probation from his position based on alleged misconduct.

Is the appellant in our hypothetical an “employee” entitled to appeal his removal to MSPB? What additional facts if any do you need to answer this question?

No. Appellant did not complete one year of current, continuous service under other than a temporary appointment limited to one year or less, precluding jurisdiction over his termination appeal on that ground; even assuming that employee's initial position in the excepted service could be counted toward one-year requirement, employee's excepted service position was followed immediately by a temporary appointment limited to one year, which was then followed by a career conditional appointment from which employee was terminated.

#### QUESTION # 6

Assume that on January 1, 2001, appellant, a preference eligible, received a Veterans Readjustment Act appointment to the position of Widget Maker, GS-301-15 with the Department of Defense. Without a break in service, on January 1, 2002, appellant was transferred to the position of Widget Maker, GS-301-15 with the Department of Air Force, still under the VRA appointment. On December 29, 2002, the Air Force removed appellant for misconduct.

Is the appellant in our hypothetical an “employee” entitled to appeal his removal to MSPB? What additional facts if any do you need to answer this question?

**Yes. Appellant is a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions. That he served in different agencies does not change the fact that he completed a year in the same position.**

#### QUESTION # 7

Assume that in March, 1998, appellant, a non-preference eligible, accepted a career conditional appointment in the competitive service as a Border Patrol Agent with the Immigration and Naturalization Service, after which he successfully completed a one-year probationary period. On March 11, 2001, he accepted a career conditional appointment with INS as a Deportation Officer, subject to a 1-year probationary period. Before the 1 year expired, the agency terminated him.

Is the appellant in our hypothetical an “employee” entitled to appeal his removal to MSPB? What additional facts if any do you need to answer this question?

**Don't know. We need more facts to determine if appellant served continuously between his two competitive service appointments. If he did not have a break in service between serving as a Border Patrol Agent and as a Deportation Officer, he would be an employee who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less even though he served in different positions.**

About the author

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Action appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations. He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication's compact disc *MSPB LITIGATION TECHNIQUES*

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