# Supreme Court Denies Certiorari On MSPB Jurisdiction Case

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Two United States Postal Service employees challenged MSPB dismissals, for lack of jurisdiction, of their removal appeals. The MSPB found that the employees did not have appeal rights because they did not meet the definition of “employee” under 5 U.S.C. § 7511(a)(1)(B)(ii), which requires one year of current continuous service. The United States Court of Appeals affirmed the MSPB’s dismissals. On April 1, 2019, the United States Supreme Court denied the petition for writ of certiorari appealing the appeals court decision, thereby affirming and making final the dismissal of the employees’ MSPB removal appeals.

At the Federal Circuit, one employee argued that he was an “employee” with appeal rights under *Roden v. Tennessee Valley Authority*, 25 M.S.P.R. 363 (1984). The employee argued that he qualified as an “employee” under a “continuing employment contract” theory due to the aggregation of his temporary appointments. The Board requested a remand from the appeals court so that it could determine whether *Roden*, a case that was thirty-four years old, was still good law. The Board’s request was granted, and on remand, while the Board had a quorum, the Board found that regulations promulgated by the Office of Personnel Management (“OPM”) since *Roden* had superseded the case law, and that OPM had purposely abrogated the “continuing employment contract theory” when it promulgated 5 C.F.R. § 752.402. The Board dismissed the case, and the employee appealed again to the Federal Circuit.

The second employee argued at the Federal Circuit that he was an “employee” with appeal rights under *Roden* as well. The appeals court remanded the case to the Board, and while the Board had a quorum, it dismissed the case for lack of jurisdiction since the Board had just overruled *Roden*. However, the employee also argued that he was an “employee” with appeal rights because he retained his appeal rights from his prior appointment, citing *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344 (1991). In *Exum*, the Board found that employees retained appeal rights from a previous position if, when they accepted a new position, the agency failed to inform the employee that the change of position could result in the loss of MSPB appeal rights. The Board dismissed the appeal, finding that the employee did not meet the requirements of *Exum* because he did not show that he would have rejected his new position had he known that he would lose his appeal rights. The employee appealed again to the Federal Circuit.

Considering both cases together, the Federal Circuit affirmed the Board’s dismissals and overruling of *Roden*. The appeals court also overruled *Exum*. Specifically, the appeals court found that the “continuing employment contract” theory in *Roden* was abrogated by OPM’s superseding regulations, which were entitled to deference. In overruling *Exum*, the appeals court found that its previous decision in *Carrow v. Merit Systems Protection Board*, 626 F .3d 1348 (Fed Cir. 2010) was correct, and that an agency’s failure to advise an employee on the terms of a new appointment does not create appeal rights in positions for which Congress did not grant appeal rights. The appeals court noted the Board’s practice of applying *Exum* only to transfers within the same agency, but found that *Carrow*, a case that involved an inter-agency transfer, was equally applicable to intra-agency transfers, and so specifically disapproved the Board’s *Exum*rule.

For the above stated reasons, the United States Court of Appeals for the Federal Circuit affirmed the Board’s dismissal of the two cases for lack of jurisdiction on June 11, 2018. The employees petitioned the United States Supreme Court for a writ of certioari, and on Monday, April 1, 2019, the Court denied certiorari, making the appeals court decision final.

Read the full case: [*Williams v. MSPB, Winns v. MSPB*](http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/17-1535.Opinion.6-7-2018.1.pdf)*.*

See the cert denial: [United States Supreme Court Order List, April 1, 2019](https://www.supremecourt.gov/orders/courtorders/040119zor_ed9f.pdf).