

MERIT SYSTEM : 1) Chief Appeals Referee in Division of
EMPLOYMENT SECURITY : Employment Security not an attorney within
: exemption provisions of State Merit System
: Act; 2) Incumbent with merit system status
: under Merit System Council continues to en-
: joy merit status.



April 3, 1952

4/16/52

Honorable Ralph J. Turner
Director
Personnel Division
State Department of Business and Administration
630 Jefferson Street
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an opinion which we re-state as follows:

Prior to the enactment of the present State Merit System Law, a merit system was administered by the Missouri Merit System Council for several state agencies, including the Unemployment Compensation Commission and the Division of Employment Security.

Under the said merit system an employee of the Division of Employment Security obtained merit status in a position known as Chief Appeals Referee. The primary duties of this job involved the hearing of appeals from administrative determinations arising under the Unemployment Compensation Law, and did not include the ordinary duties of an attorney.

You ask:

1) Whether or not the position as Chief Appeals Referee is an exempt position under the present State Merit System Act;

2) Whether or not an employee with merit status under the Merit System Council as a Chief Appeals Referee may continue to enjoy such merit status subsequent to the enactment of the State Merit System Law, and

3) Since the present incumbent had merit system status under the Merit System Council is a new examination required or does he automatically retain his former merit status?

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Included in your request are definitions and examples of work performed by the Chief Appeals Referee in the Division of Employment Security. We note that the primary duty of the Chief Appeals Referee is for supervision and organizing appeals from administrative determinations relating to unemployment compensation benefits and other such actions of the division.

We note that Section 288.370 (1), RSMo 1949, provides for legal counsel for the division.

Section 36.030 (4), RSMo 1949, provides for the exemption of attorneys regularly employed or appointed in any department or division subject to law. Since there is an attorney specifically provided for by statute for the Division of Employment Security, and since the primary duty of the Chief Appeals Referee is not that generally associated with legal counsel, we do not believe that exemption from the State Merit System Act is applicable to the job of Chief Appeals Referee as constituted in the past and at present. We do not believe that because a requirement once existed that the Chief Appeals Referee have the ability to secure a license to practice law in the State of Missouri is determinative of the question. We think the main question is whether or not the Chief Appeals Referee is an attorney as set forth in the exemptions under the State Merit System Act. Under all the circumstances we conclude that the job of Chief Appeals Referee is properly in the classified service.

You ask whether or not an employee with merit status under the Merit System Council as a Chief Appeals Referee may continue to enjoy such status.

During the same Session of which the State Merit System Act was passed the General Assembly also set up the Division of Employment Security in Laws of Missouri, 1945, page 1734, where we find the following provision for the continuance in office of employees then employed by the Unemployment Compensation Commission on a non-partisan merit system basis which reads as follows:

"* * * The division shall establish and enforce fair and reasonable regulations for appointments, promotions, and demotions based upon ratings of efficiency

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and fitness and for terminations for cause; Provided, however, that all persons now employed by the Unemployment Compensation Commission on a non-partisan merit system basis shall be entitled to continue as employees of the division and shall have all the rights and privileges in such employment as are provided for new employees appointed and qualified under this section; and Provided, further, that the division may employ and fix the compensation of attorneys without regard to the provisions of this subsection."

We further find that Section 36.030 (9), RSMo 1949, provides for exemption as follows:

"All positions and appointments in divisions of the service subject to this law which have been heretofore required to be filled upon the basis of merit and fitness; provided, however, that one year after this law becomes effective, this exemption shall cease and determine and thereafter the selection, appointment, pay, tenure and removal of persons to or from all such positions shall be governed by the provisions of this chapter; and provided further that all persons now or hereafter appointed or employed in divisions of the service on the basis of merit and fitness as heretofore required, shall be entitled, after their exemption from the provisions of this chapter ceases, to continue as employees in said division of the service and shall have all the rights and privileges in such employment as are provided for persons appointed and qualified under this law."

A fair reading of these hold-over provisions seems to indicate a clear legislative intent to permit persons in

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positions which were required to be filled by the Merit System are to be retained. Therefore, we conclude that an employee with merit system status under the Merit System Council as Chief Appeals Referee continues to hold such merit status.

Your third question is whether or not a new examination is required or whether the present incumbent who had merit system status under the Council would recover his merit status automatically. Since we have ruled above that such an employee retains his status as a matter of law, he has never lost such status, and there is no present vacancy in the office of Chief Appeals Referee for which an examination is required.

CONCLUSION.

Therefore, it is the opinion of this department that:

- 1) The job of Chief Appeals Referee in the Division of Employment Security is not exempt from the State Merit System Act as an "attorney".
- 2) An employee with merit status under the State Merit System Council as Chief Appeals Referee continues to hold such merit status, and no new examination is required to fill this position.

Respectfully submitted,

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APPROVED:



J. E. TAYLOR
Attorney General

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