# 16 WAYS PROBATIONERS CAN APPEAL TERMINATIONS

*The single biggest lie told newly hired federal employees may be the words "Probationary employees have no rights." The second biggest might be that there is nothing the union can do for them during their probationary period. The truth is that a fired probationary employee has more than a dozen options for challenging a termination and only the union has the resources to enforce them. FEDSMILL.com has listed below many that the typical GS federal employee has.However, nothing here is intended as legal advice. If you have questions or doubts about how the cited precedents might apply to a specific set of facts, find an attorney for the answer.*

#1. **TO MSPB**– If terminated for reasons related to what the employee did before becoming a fed, e.g., lied on an application, management must: 1- give the employee a written notice of the specific charges it is relying upon, 2- an opportunity to reply in writing to those charges, and 3- written notice of the agency's final decision. The employee can appeal to the MSPB if he/she believes those procedures were not followed. 5 CFR 315.805

Additionally, if the agency terminates a probationary employee for pre-employment reasons (or a combination of pre and post-employment reasons), but only uses post-employment procedures, that termination can be reversed on appeal to the MSPB . See 68 MSRP 216.

#2. **TO MSPB**– This is a tricky one. Agencies can terminate probationers for pre-employment reasons using the "suitability" process of 5 CFR 731 rather than the regulations of 5 CFR 315.805. If they do use the 713 authority there is an extra procedural hurdle they must clear.

In April 2008, OPM issued revised suitability regulations. Under the new 5 C.F.R. § 731.103(g), "OPM retains jurisdiction to make final determinations and take actions in all suitability cases where there is evidence that there has been a material, intentional false statement, or deception or fraud in examination or appointment," and agencies are required to refer these cases to OPM for suitability determinations and suitability actions under this authority. MSPB has already hinted that where the record is unclear as to whether the agency is acting under 5 CFR 315 or 731, it will examine the facts and may overturn the termination if it did not get OPM's prior approval. See 111 MSPR 529.

#3. **TO MSPB**– If terminated for reasons related to what the employee did while working as a federal employee, management only needs to inform the employee that he/she is being terminated and make that effective before the end of the employee's work day on the last day of the probationary period. If terminated without having received the notice of termination before it was effective, the employee can appeal to MSPB. 106 MSPR 178 Consequently, if the agency waits until the last days of the employee's probationary period to give her the notice and she does not show up that day, it has a problem. MSPB has held that depriving an employee who

has completed a probationary period, namely a tenured employee, prior notice of the charges against him/her and an opportunity to reply is a denial of Constitutional due process. 98 MSPR 502

#4. **TO MSPB**– If terminated despite the fact that the employee believes he/she has already served enough time to complete a probationary period, the employee can appeal to the MSPB. For example, an agency made an employee restart his probationary period when it reassigned him from one position to another during his probationary period. Regulations permit agencies to do this if the employee is reassigned to a substantially different position, e.g., from secretary to accountant. However, if the agency was wrong to conclude that the period had to be restarted, the employee can appeal to MSPB for reinstatement claiming that he/she was entitled to full adverse action rights. Employees have similar rights when they are reinstated (113 MSPR 99), transferred rather than appointed (86 MSRP 476), had prior temporary employee service (20 MSPR 16), spent time in a nonduty or LWOP status during the probationary period (99 MSPR 187), etc. It is irrelevant whether the employee signed a document agreeing to another probationary period. McCormick v. Department of the Air Force, 307 F.3d 1339 and 98 M.S.P.R. 409.

If an employee alleges that she has enough time to be entitled to full adverse action rights rather than mere probationary procedures that should be a claim the employee can grieve to arbitration, but FLRA has been unclear about that to date. Some union needs to set that issue up with today's FLRA through an actual case or request for a major policy decision. See 66 FLRA 282

#5. **TO MSPB**– If terminated for reasons related to political affiliation or marital status, the employee can appeal to MSPB. 5 CFR 315.806 For example, an employee was fired for taking excessive leave. The leave was taken to care of his finance with whom he lived. The manager made several critical comments about how the employee would not have absence problems if he was married because then FMLA would entitle him to the leave. See 111 MSPR 305 and 115 MSPR 204.

Case law requires that the employee at least allege facts sufficient to show martial or political motives, such as the supervisor regularly raised questions about her marital status, she was assigned menial tasks not assigned to single employees, married employees were subjected to harsher standards, married employees were objects of ridicule, her responsibilities were given to an inexperienced single employee, single employees received better treatment and preferences for telework, she was the only single/pregnant/newly hired secretary and the only new secretary terminated, her supervisor made derogatory remarks about hers marital status, her supervisor questioned her repeatedly about her relationship with her husband from whom she was separated, the agency overlooked more serious acts of misconduct and performance deficiencies for married employees than single employees, etc.

If the employee alleges martial or political bias, she is also entitled to appeal to MSPB on the more traditional civil rights discrimination grounds, e.g., include an allegation that another motive for her termination was her Hispanic origin. 5 CFR 315.806(d)

#6. **TO FLRA**– If terminated based on having exercised the right to join the union, serve as a union representative or even just file a contract grievance, the employee can appeal to the FLRA alleging a violation of his/her rights. The FLRA has the power to order the employee reinstated with back pay. Typically, it will require the employee to show the following: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. IBPO, 35 FLRA 113. The agency can avoid FLRA overturning its termination if it shows by a preponderance of the evidence that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. The FLRA has said, "The fact that probationary employees can be terminated without cause does not permit the Respondent to terminate them in violation of the Statute. Good reason or even no reason at all would be permissible, so long as the reason is not illegal. But termination for reasons in violation of the Statute are unfair labor practices. . . .To remedy the violations we will order that they be offered retroactive reinstatement, be made whole, and have their records expunged of mention of the terminations, to the extent consistent with law and regulation. NFFE, 57 FLRA 109 and NTEU, 61 FLRA 16. The Authority has not addressed, however, whether the termination of a probationary employee is grievable and arbitrable when the employee alleges that the termination was the result of a ULP. See NTEU, 65 FLRA 281

#7. **TO FLRA**– If terminated because of some procedure, rule or requirement that management implemented without notifying and bargaining with the union, the union can file a ULP charge with FLRA (or through its grievance procedure) and ask that management be required to reinstate the probationary employee with back pay. For example, if a probationer comes into the union office and announces that he has been given a termination letter, the union rep should look at the reason for the termination to see if there is any way to allege that management never informed the union of the expectation, practice, requirement, standard, procedure or criteria cited as the reason for the employee's termination.

An individual employee cannot file this charge with the FLRA. It must be filed by the union because it is the union's right that has been violated. However, nothing stops the union from filing the ULP charge with the FLRA while the employee pursue an appeal to MSPB on other grounds.

#8. **TO OSC**– Another option the employee has if terminated due to having exercised a union right is to ask the U.S. Special Counsel to pursue a prohibited personnel practice complaint

against the agency. (Apparently the Special Counsel is not bothered that the employee could go to FLRA which is the primary enforcement agency for violations of labor rights.) For example, a probationary employee of the Navy Support Activity filed a grievance against his manager. When the agency almost immediately moved to fire the employee, the Special Counsel first obtained a stay which temporarily prohibited the agency from firing the employee. When the Special Counsel completed its investigation and sent the report to the Secretary of Navy, the proposed termination was withdrawn and the employee was given full relief. See Perfetto and Hoyt.

#9. **TO OSC**– If terminated for releasing information that management did not want released to people outside the federal agency or even to certain people inside the agency with a legitimate right to know, the employee can ask the U.S. Special Counsel to file a prohibited personnel practice complaint against the agency. For example, the Defense Commissary Agency fired a probationary employee allegedly for a day of AWOL when the supervisor denied the employee's request for sick leave. This happened not long after the employee notified the Dept. of the Army via a phone message that the Commissary was allowing people to shop there without proper military authorization. The Special Counsel obtained a settlement reinstating the employee and giving her 21 months back pay on the grounds that the agency likely violated the Whistleblower Protection Act. 62 MSRP 666 To establish that an agency committed the personnel practice prohibited by 5 U.S.C. § 2302(b)(8), i.e., reprisal for engaging in whistleblowing activities under the Whistleblower Protection Act (WPA), an individual must show that (1) he made a disclosure protected under 5 U.S.C. § 2302(b)(8), and (2) the disclosure was a contributing factor in the agency's personnel action.85 MSPR 60. The employee has a right to appeal even if he was only perceived as a whistleblower, but in reality not one. 116 MSPR 689 The employee can appeal the OSC decision to MSPB after the OSC has notified him that it has terminated its investigation or 120 calendar days have passed since he first sought corrective action.

#10. **TO EEOC**– If terminated because of one's race, color, national origin, gender, religion, disability status or for being 40 or older, the employee can file an EEO discrimination charge against the agency. For example, in Pantoja v. Ashcroft, a female Correction Officer violated a work rule and was terminated during her probationary period. EEOC reinstated her when it found male employees who violated the same rule were not terminated. In Bowling v. Henderson the agency fired an African-American female employee for achieving only 87% on an examination when 95% was passing. However, EEOC found it had retained a Caucasian male employee three years earlier who only achieved a score of 71%. A probationary employee need only prove the following to have a good chance to succeed in a disparate treatment case: (1) that she is a member of the protected groups; (2) that she was qualified for the position at issue; (3) that she was discharged; and (4) that similarly situated employees not in her protected groups were treated more favorably.

If the employee believes religious discrimination played a role in his terminated all he need show EEOC is that: (1) he has a bona fide religious belief, the practice of which conflicted with their

employment, (2) he informed the agency of this belief and conflict, and (3) the agency nevertheless enforced its requirement against the complainant. Once an employee establishes that, the Agency must show that it made a good faith effort to reasonably accommodate his religious beliefs and, if such proof fails, the Agency must show that the alternative accommodation suggested by the employee could not be granted without imposing an undue hardship on the Agency's operations.

This is another claim that FLRA has not yet clearly said is grievable and arbitrable, but there is no apparent statutory reason why it is not. Again, some union needs to step up to get a direct answer from the FLRA about whether such a claim is grievable.

#11. **TO EEOC**– If a probationary employee was not herself a victim of illegal discrimination, but was fired as reprisal for filing a charge she later withdrew or supporting another employee's efforts to correct discrimination against him, the employee can ask the EEOC for reinstatement on the basis that she was the victim of retaliation or reprisal. Unless the employee has direct evidence of the reprisal, he/she must show (1) he or she engaged in a protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment or it followed his prior EEO activity within such a period of time as to infer reprisal motivation. EEOC provides a short valuable guide to retaliation that lists more examples of what it consider to be retraliatory behavior.

This is another claim that FLRA has not yet clearly said is grievable and arbitrable, but there is no apparent statutory reason why it is not.

#12. **TO DOL/MSPB**– The USERRA (Uniformed Services Employment and Reemployment Rights Act) gives federal employees, including probationary employees, the right to challenge a termination if they believe it was based in any way on their military service. (See USC 4324)

They may also appeal if they are the victim of reprisal for being involved in another employee's USERRA claim, e.g., where (1) another employee has taken an action to enforce a USERRA protection, and (2) the reprisal victim testified or otherwise made a statement in or in connection with any USERRA proceeding, or (3) has assisted or otherwise participated in an USERRA investigation, or (4) has exercised a right provided for in USERRA. This prohibition against retaliation applies regardless of whether the person has performed service in the uniformed services. 38 U.S.C. § 4311(b).

Because this is a relatively new area of law, particularly for a federal probationer, employees or unions should check their appeal plans with an attorney or similar expert before moving ahead, but start by reading 113 MSPR 168.

#13. **TO OSC**– The best we at FEDSMILL.com can tell there is no case law where a probationary employee was terminated for exercising a FMLA (Family Medical Leave Act) right. (Normally, this would require that the employee show (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) a casual connection exists between the adverse employment action and plaintiff's exercise of FMLA rights.) But it seems as if all the ingredients are there to permit the Special Counsel to file a prohibited personnel action if a probationer is terminated due to his use of FMLA. With probationary periods now lasting more than a year in many cases, more employees will have FMLA rights. Be careful when relying on Postal Service cases because they are under a different set of FMLA rules than most federal employees.

#14- **TO OSC**– Again, we have not found any cases involving a probationer, but if an employee is directly or indirectly intimidated, threaten, or coerced over decisions about getting compensated for time worked, especially overtime under the Fair Labor Standards Act, this appears to be an issue that the Special Counsel could pursue. (Normally, this would require that the employee show (1) that he or she engaged in an activity protected by the FLSA; (2) that he or she suffered adverse action by the employer subsequent to or contemporaneous with such protected activity; and (3) a causal connection existed between the employee's activity and the employer's adverse action.)

However, most collective bargaining agreements will permit employees to pursue the issue through the grievance-arbitration process. Typically, such contract provisions are read as prohibiting the employee from choosing any other option to appeal an FLSA matter. If the employee is a probationer, the union must worry about the lack of FLRA precedent allowing probationers to pursue this issue to arbitration.

We offer the same advice for situations where the employee is being terminated entirely or partially for exercising a right under the Occupational Safety and Health Act and regulations. Start your inquiry by reading 103 MSPR 345.

#15- **TO OSC**– We are just speculating now, but it is a prohibited personnel practice to take an action against an employee for refusing to obey an order that would require the individual to violate a law (5 USC 2302(b)(9)) If a probationer was terminated for just that reason, test out what the Special Counsel will do with such a claim.

#16- **TO MSPB**– Finally, while an agency can terminate a probationary employee for a physical inability to do the job, if a work-related injury caused the employee's inability, the employee may have the right to be reinstated to the job. An individual who has been separated from his position during his probationary period, and who is partially recovered from a compensable injury, may appeal to the Board "for a determination of whether the agency is acting arbitrarily

and capriciously in denying restoration." 5 C.F.R. § 353.304(c). In order to establish MSPB jurisdiction, the employee must show that: (1) she is partially recovered from the injury; (2) she requested restoration within certain limitations; (3) the agency denied that request; and (4) she was separated from her position due to a compensable injury. See 35 MSPR 528 and Roche v. US. Postal Service, 828 F.2d 1555.

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So, when you stand before a group of newly hired employees as their union representative or simply talk with a single probationer be sure to point out that they do have rights—and that the best way to enforce them is by becoming a union member.

Be sure to check out the related FEDSMILL.com articles about probationers, namely the Open Letter that your union could send to all probationers to boost membership and the Interview Checklist of questions to ask an employee who comes to you for help because of a notice that he or she is about to be terminated.

*(Once again, please understand that FEDSMILL.com is not offering legal advice with this article or anything else published on this web site. Not all federal employees are covered by the same statutes and regulations. Moreover, we are not even alleging that our list is a complete list of appeal options an employee has. For example, what if the probationer resigned in return for a settlement agreement and that agreement is later violated by the agency. MSPB has ordered corrective action in those cases, but not yet decide whether it has the power to do so for a probationer. 98 MSPR 628 If you need advice, consult a competent attorney.)*