

Probationary Employees -- Limited Appeal Rights

Overview

The probationary/trial period is the final step in the examination process of a new employee. The probationary period can be a highly effective tool to evaluate a candidate's potential to be an asset to an agency before an appointment becomes final. However, for the probationary period to be used effectively, agencies must understand when an individual is considered to have full procedural and appeal rights, regardless of any probationary status.

Until the probationary period has been completed, a probationer is technically still an applicant for an appointment. The term "probationary period" generally applies to employees in the competitive service. "Trial period," by contrast, generally applies to employees in the excepted service, as well as to some appointments in the competitive service, such as term appointments, which have a one-year trial period set by the Office of Personnel Management. The term "probation" is also used to refer to the one-year trial period served by individuals who are newly appointed to supervisory positions.

During this period, probationary employees can be terminated for any perceived deficiency in performance or conduct, with minimal procedural requirements and without the need to meet the stringent "efficiency of the service" standard that governs the removal of tenured employees. However, a probationary employee does have some limited appeal rights to the MSPB.

This Quick Start Guide covers the following Key Points:

1. [Duration of probationary period on initial appointment to a competitive position](#)
2. [Supervisory probationary periods](#)
3. [Probationary terminations](#)
4. [MSPB appeals](#)
5. [Partisan political reasons](#)
6. [Marital status](#)
7. [Pre-appointment conditions](#)

Key Points

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source. The references to **Broida** in this Quick Start Guide are to federal employment law expert Peter Broida's treatise, *A Guide to Merit Systems Protection Board Law and Practice* (Dewey Publishing Inc.), to which **cyberFEDS**[®] has exclusive Web rights.

Duration of probationary period on initial appointment to a competitive position

- In the competitive service, the probationary period is set by law to one year. 5 CFR 315.802(a).
- In the excepted service, a trial period of up to two years can be set by individual agencies. 5 USC 7511(a)(1)(C)(ii).

- Preference eligibles in the excepted service serve a trial period of one year. 5 USC 7511(a)(1)(B).
- Term employees serve a trial period of one year. 5 CFR 316.304.
- An individual who is transferred, promoted, demoted or reassigned before completing probation must complete the probationary period in the new position. 5 CFR 315.801(b).
- The probationary period usually begins as of the effective date reflected on the Standard Form 50, though that has not been found determinative in all cases. *Hintz v. Department of the Army*, 94 FMSR 7006, 21 F.3d 407 (Fed. Cir. 1994); *Lopez v. Department of the Navy*, 106 LRP 47307, 103 MSPR 55 (MSPB 2006).
- If a probationary employee is absent more than 22 workdays during probation, the number of days in excess of 22 can be added to the length of the probationary period. 5 CFR 315.802(c).
- The probationary period ends when the employee completes her scheduled tour of duty on the day before the anniversary date of her appointment. 5 CFR 315.804(b).
- The probationary period for part-time employees is computed on the basis of calendar time, in the same manner as for full-time employees. 5 CFR 315.802(d).
- For intermittent employees, each day or part of a day in pay status counts as one day of credit toward the 260 days in a pay status required for completion of probation. However, the probationary period cannot be completed in less than one year of calendar time. 5 CFR 315.802(d).

Supervisory probationary periods

- Under 5 USC 3321, an individual serving in an initial appointment as a supervisor or manager in the competitive service is required to serve a probationary period. *Burton v. Department of the Air Force*, 112 LRP 30445, 118 MSPR 210 (MSPB 2012).
- The regulations governing supervisory probationary periods are found at [5 CFR 315.901 - 315.909](#).
- An individual in the competitive service who has been promoted to a supervisory position and who does not satisfactorily complete the probationary period "shall be returned to a position of no lower grade and pay than the position from which the individual was ... promoted." *Burton v. Department of the Air Force*, 112 LRP 30445, 118 MSPR 210 (MSPB 2012), *citing* 5 USC 3321(b); 5 CFR 315.907(a).
- An employee who is returned to the position from which she was promoted from a supervisor or manager position "has no appeal right" during her probationary period unless she nonfrivolously alleges that the action "was based on partisan political affiliation or marital status." *Burton v. Department of the Air Force*, 112 LRP 30445, 118 MSPR 210 (MSPB 2012), *citing* 5 CFR 315.908.

- The two-step process for establishing jurisdiction described in *Garcia v. Department of Homeland Security*, 106 LRP 7378, 437 F.3d 1322 (Fed. Cir. 2006) applies to an appellant's claim of marital status discrimination. Once an appellant makes nonfrivolous claims of board jurisdiction -- claims that, if proven, establish jurisdiction -- then the appellant has a right to a hearing. At the hearing, the appellant must prove jurisdiction by a preponderance of the evidence. If the MSPB determines that the appellant failed to prove jurisdiction by a preponderance of the evidence, then the board does not have jurisdiction. *Burton v. Department of the Air Force*, 112 LRP 30445, 118 MSPR 210 (MSPB 2012).

Probationary terminations

- **Broida:** Agency personnel offices typically send notices to supervisors prior to the completion of an employee's probation asking the supervisor if the employee should be retained. If the notices are sent out a month or two prior to the completion of probation, no problem with the timing of a termination should occur. Nonetheless, agencies frequently allow a probationer to work almost the full year of the initial appointment and then terminate the probationer on the last day of duty. This is risky business. If the agency incorrectly calculates the expiration of the probation period, the employee will be terminated without the procedural protections due a tenured employee. The removal may then be reversed for harmful error if the termination lacks constitutional safeguards. [Broida Guide to MSPB Law: Incorrect Determination of End of First Year of Employment](#).
- An agency must use a probationary period to determine the fitness of the employee for a position. The agency must terminate the employee's services during this period if he fails to demonstrate fully his qualifications for continued employment. 5 CFR 315.803(a).
- When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct fails to demonstrate his fitness or his qualifications for continued employment, it must terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. 5 CFR 315.804(a).
- If an agency wants to terminate a probationary employee for reasons based on conditions arising before her appointment (such as discovery of a failure to complete a claimed educational requirement for the position), she is entitled to: 1) notice of proposed adverse action; 2) file a written answer to the notice of proposed adverse action; and 3) written notice of adverse decision at the earliest practicable date. The notice must inform the employee of the reasons for the action and her right of appeal to the Merit Systems Protection Board. 5 CFR 315.805.
- Probationary employees terminated for pre-appointment reasons who contend that the agency did not comply with the procedural requirements of [5 CFR 315.805](#) can appeal to the MSPB. 5 CFR 315.806(c); *Tolbert v. Small Business Administration*, 107 LRP 2669, 104 MSPR 418 (MSPB 2007); *Gamble v. Department of the Army*, 109 LRP 37044, 111 MSPR 529 (MSPB 2009).

- **Broida:** Under 5 CFR 315.805(a), if an agency decides to terminate a probationer for pre-appointment reasons, the agency must give advance notice with reasons stated specifically and in detail. If the basis for the termination is a pre-appointment criminal record, for example, the agency should state in the notice to the probationer specifically what charges it relied upon and whether they were citations or arrests, as well as the dates of the charges and the places of the charges or misconduct. Lacking such specificity, the board holds that there is no statutory or regulatory requirement that the employee seek clarification of the charges. The agency bears the responsibility for providing details in the notice to the probationer. If the appellant is deprived of fair notice of the charges and is hampered, if not obstructed, in his right to respond, the error is substantially prejudicial to the employee's rights under 5 CFR 315.805. [Broida Guide to MSPB Law: Harmful Error Analysis](#), citing *Hibbard v. Department of the Interior*, 81 FMSR 1964, 6 MSPR 181 (MSPB 1981).
- A probationary employee in the competitive service alleging that the agency denied him his procedural rights where he is being terminated for pre-appointment reasons does not have a statutory right to a pre-termination hearing. *Peery v. Department of the Navy*, 89 FMSR 5251, 40 MSPR 377 (MSPB 1989).
- To terminate an individual while he is still a probationer, the separation action must be effected prior to the end of the probationer's tour of duty on the last day of probation, which is the day before the anniversary date of his appointment. *Honea v. Department of Homeland Security*, 112 LRP 35132, 118 MSPR 282 (MSPB 2012).
- If the anniversary date falls on a weekend or holiday, the employee must be terminated no later than the day before the last regular workday; e.g., on a Friday if the last scheduled workday during the probationary period would fall on that Saturday. *Hannon v. Department of the Air Force*, 84 FMSR 5183, 19 MSPR 510 (MSPB 1984).
- Under the revised 5 CFR 731.203(g), agencies no longer need approval from OPM prior to taking unfavorable suitability actions within their delegated authority, but they are required to report to OPM all unfavorable suitability actions taken under [5 CFR Part 731](#) within 30 days after they take the action. *Gamble v. Department of the Army*, 109 LRP 37044, 111 MSPR 529 (MSPB 2009).

MSPB appeals

- **Broida:** Critical to assessment of tenure is the determination of whether an employee is serving as a probationer. That determination requires an understanding of the nature of the employee's appointment. The determination of status is important. Occasionally the litigation is not over the merits of the discharge of the probationer, but over the question of whether the employee was a probationer at all. If the individual discharged as a probationer was in fact tenured, the discharge may be reversed for lack of minimum due process. [Broida Guide to MSPB Law: Probationary Classification Problems](#).

- **Broida:** A probationer's lot is not a happy one. This maxim is confirmed by OPM regulations that grant probationers' termination appeals under only limited circumstances. The theme is developed in many board and judicial decisions denying review of termination of probationary appointments, no matter how egregious the circumstances. The board is dedicated to the preservation of probationary status. [Broida Guide to MSPB Law: Appeal Rights of Probationers](#).
- A probationary employee in the competitive service may appeal a termination if she alleges that it was based on partisan political reasons or marital status. *Marynowski v. Department of the Navy*, 112 LRP 36291, 118 MSPR 321 (MSPB 2012), citing 5 CFR 315.806(b).
- An individual in an excepted service position does not have MSPB appeal rights during her probationary period based on discrimination because of marital status or partisan political reasons, as those are regulatory grounds for appeal that are available only to individuals in the competitive service. *Ramirez-Evans v. Department of Veterans Affairs*, 110 LRP 10947, 113 MSPR 297 (MSPB 2010).
- In determining whether an appellant has established jurisdiction under 5 CFR 315.806(b), the MSPB follows a two-step process. First, the appellant must make nonfrivolous claims of jurisdiction, i.e., factual allegations that, if proven, would establish that her termination was based on partisan political reasons or marital status. An appellant who makes such claims must then prove the basis for jurisdiction, i.e., that her termination was based on partisan political reasons or marital status, by a preponderance of the evidence. *Marynowski v. Department of the Navy*, 112 LRP 36291, 118 MSPR 321 (MSPB 2012).
- A probationary employee can appeal a termination she alleges was based on discrimination because of race, color, religion, sex, national origin, age, or disability. However, such an allegation can be raised only in conjunction with a termination appeal based on partisan political reasons or marital status or on procedural improprieties in a termination for conditions arising before appointment. 5 CFR 315.806(d); *Jafri v. Department of the Treasury*, 95 FMSR 5255, 68 MSPR 216 (MSPB 1995), *aff'd* 78 F.3d 604 (Fed. Cir. 1996).
- An individual who separated during her probationary period may have appeal rights to the MSPB if she can show that she involuntarily resigned and she is an "employee" as defined at 5 USC 7511. *Robinson v. Department of the Army*, 106 LRP 43311, 102 MSPR 546 (MSPB 2006).

Partisan political reasons

- Discrimination based on "partisan political reasons" under 5 CFR 315.806(b) means discrimination based on affiliation with any political party or candidate. *Marynowski v. Department of the Navy*, 112 LRP 36291, 118 MSPR 321 (MSPB 2012).
- **Broida:** A religious organization was found not to qualify as a political party or candidate in *Smith v. Department of the Army*, 111 LRP 65649 (MSPB 2011, *nonprecedential*). [Broida Guide to MSPB Law: Partisan Political Reasons](#).

Marital status

- To make a nonfrivolous allegation of marital status discrimination, an appellant must allege facts that, taken as true, would show that she was treated differently because of her marital status or facts that go to the essence of her status as married, single, or divorced. *Marynowski v. Department of the Navy*, 112 LRP 36291, 118 MSPR 321 (MSPB 2012).
- **Broida:** Family or child care responsibilities were found to be an insufficient basis to invoke marital status discrimination jurisdiction over a probationer's discharge in *Merritt v. Department of the Navy*, 110 LRP 74669 (MSPB 2010, *nonprecedential*). [Broida Guide to MSPB Law: Marital Status](#).
- **Broida:** Conclusory assertions centering upon sexual orientation did not establish marital status discrimination jurisdiction over a probationer's termination in *Miller v. Department of the Treasury*, 110 LRP 74669 (MSPB 2010, *nonprecedential*). [Broida Guide to MSPB Law: Marital Status](#).
- **Broida:** The marital status discrimination jurisdiction of the board is unique to probationary competitive service appointees, as the board suggested in *Lee v. Office of Personnel Management*, 110 LRP 70903 (MSPB 2010, *nonprecedential*). [Broida Guide to MSPB Law: Marital Status](#).

Pre-appointment conditions

- A probationer who was terminated pursuant to 5 CFR 315.805 for reasons based wholly or partially on pre-appointment conditions, may appeal her termination if she alleges the agency failed to follow the procedural requirements of 5 CFR 315.805, i.e., advance written notice of the proposed termination and the opportunity to provide a written response. 5 CFR 315.806(a), (c); *Gamble v. Department of the Army*, 109 LRP 37044, 111 MSPR 529 (MSPB 2009).
- If a probationer's termination is based on conditions arising before his appointment, he may appeal on the ground that the agency did not provide him with the procedural rights to which he was entitled as a probationary employee. However, there is a distinction between a preexisting condition and the effect that condition has on an employee's performance during his probationary period. "Tracing back" a performance deficiency to a pre-appointment condition could transform almost every separation of a probationer into a case involving a condition arising before appointment. *Rivera v. Department of the Navy*, 110 LRP 27189, 114 MSPR 52 (MSPB 2010).
- **Broida:** The probationer who is terminated for post-appointment reasons has no right to substantive review of the actions causing his dismissal. He may file an appeal complaining of discrimination. Normally the only litigation that occurs, other than contests over whether the probationary period has or has not been fully served at the time of termination, concerns the characterization of the reasons for the removal; i.e., whether the reasons are for pre-

appointment problems, entitling the probationer to greater procedural rights, or for post-appointment reasons. [*Broida Guide to MSPB Law: Post-Appointment Reasons*](#).

Other Resources

- [Quick Start Guide: Probationary Employees -- Full Appeal Rights](#)
- [Quick Start Guide: Jurisdiction -- Categories of Employees](#)
- [Quick Start Guide: Jurisdiction -- Types of Actions](#)
- [Quick Start Guide: Career and Career-Conditional Appointments](#)
- [Checklist Plus+: Probationary Period -- Using It as an Assessment Tool](#)
- [Checklist Plus+: Delivering Removal and Termination Notices](#)
- [MSPB Report: Navigating the Probationary Period After *Van Wersch* and *McCormick*, January 2007](#)
- [MSPB Report: The Probationary Period -- A Critical Assessment Opportunity, August 2005](#)
- [Broida Guide to MSPB Law: Appeal Rights of Probationers](#)

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