Frequently Asked Questions on the Rights of Probationary Employees

1. What is a probationary employee?

Generally speaking, a probationary employee is an employee who is still serving a probationary or trial period following their appointment to a position.

The probationary period in the competitive service is 1 year. 5 C.F.R. § 801(a); 5 U.S.C. § 7511(a)(1)(A).

The probationary period for preference eligible employees in the excepted service is 1 year. 5 U.S.C. § 7511(a)(1)(B).

The probationary period for non-preference eligible employees in the excepted service is two years. 5 U.S.C. § 7511(a)(1)(C).

2. When do employees acquire full adverse action appeal rights for the purposes of Merit System Protection Board ("MSPB") appeals and union grievances?

Competitive Service

Employees in the competitive service acquire adverse action appeal rights after either completing their probationary or trial period or completing 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. 5 U.S.C. § 7511(a)(1)(A).

Excepted Service

Preference eligible employees in the excepted service acquire adverse action appeal rights after completing 1 year of current continuous service in the same or similar positions in: a) an Executive agency; or b) the United States Postal service or Postal Regulatory Commission. U.S.C. § 7511(a)(1)(B).

Non-preference eligible employees in the excepted service acquire adverse action appeal rights after either completing their probationary or trial period or completing 2 years of current continuous service in the same or similar position in an Executive agency under other than a temporary appointment limited to 2 years or less. U.S.C. § 7511(a)(1)(C).

3. When can agencies terminate probationary employees?

Probationary employees may be terminated at any time during their probationary period. OPM regulations also provide that agencies are required to terminate probationary employees if the employee "fails to demonstrate fully his or her qualifications for continued employment." 5 C.F.R. § 315.803(a).

4. What is the process for terminating probationary employees?

a. Terminations for Performance or Conduct During the Probationary Period

When an agency decides to terminate a probationary employee "because his work performance or conduct … fails to demonstrate his fitness or his qualifications for continued employment," the agency is required to notify the employee in writing of "the agency's conclusions as to the inadequacies of his performance or conduct" and the effective date of the removal action. 5 C.F.R. § 315.804(a).

Under these circumstances, a probationary employee is not entitled to an opportunity to respond to the notice of removal.

b. Terminations for Pre-Employment Conduct

When an agency decides to terminate a probationary employee for pre-employment conduct, in whole or in part, the employee is entitled to advanced notice and an opportunity to respond to the proposed termination. 5 C.F.R. § 805. The notice of proposed removal must provide "the reasons, specifically and in detail, for the proposed action." 5 C.F.R. § 315.805(a). The agency must provide the probationary employee with a reasonable amount of time to provide a written response to the notice of proposed removal. 5 C.F.R. § 315.805(b).

Should the agency decide to terminate the employee, the written notice of removal must be provided on or before the effective date of the action, contain the reasons for the action, and inform the employee of his or her MSPB rights of appeal. 5 C.F.R. § 315.805(c).

5. What MSPB appeal rights do terminated probationary employees have?

The MPSB appeal rights of probationary employees are extremely limited and controlled by regulation.

Probationary employees in the competitive service who are terminated under 5 C.F.R. § 315.804, i.e., for performance or conduct during the probationary period, may appeal only if they allege that their termination "was based on partisan political reasons or marital status." 5 C.F.R. § 315.806(b)

Probationary employees in the competitive service who are terminated for pre-employment reasons under 5 C.F.R. § 315.805, may allege that their termination was based on partisan political reasons or marital status and/or that their termination was procedurally deficient, i.e. the agency failed to provide the employee with advance notice and a reasonable opportunity to respond. 5 C.F.R. § 315.806(b)-(c).

Finally, a probationary employee in the competitive service may only file an appeal with the MSPB alleging unlawful discrimination based on "race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination Act of 1967, as amended), or disability" provided that the appeal also alleges that the termination was based on partisan political reasons or marital status or, for pre-employment conduct terminations, was procedurally deficient. 5 C.F.R. § 315.806(d).

Probationary employees in the excepted service generally have no right to appeal their removal to the MSPB. 5 U.S.C. § 1201.3(a)(3).

6. What Equal Employment Opportunity rights do probationary employees have?

The Equal Employment Opportunity Commission ("EEOC") has long held that probationary employees cannot be removed based on unlawful discrimination. Ileen C. v. Dep't of Justice, EEOC DOC 0120182464, 2019 WL 1988386 (2019).

Unlawful discrimination is discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, age (40 or older), disability, and genetic discrimination. Additionally, agencies may not remove probationary employees in retaliation for engaging in protected activities, e.g., opposing or reporting unlawful discrimination.

Consequently, probationary employees who reasonably believe their termination was based on unlawful discrimination or in retaliation for engaging in a protected activity may file an EEO complaint. It should be noted however, that it is exceedingly rare for the EEOC to overturn the removal of a probationary employee.

7. Can probationary employees file a complaint to the Office of Special Counsel ("OSC") to challenge their termination?

Yes, a probationary employee may file a complaint with OSC if he or she reasonably believes that the termination was a prohibited personnel practice under 5 U.S.C. § 2302(b), such as reprisal for protected whistleblowing.

If the OSC finds that the employee's complaint has merit, the OSC can request that MSPB stay the employee's removal from federal service. The MSPB will issue a stay when the OSC is able to show: 1) the employee engaged in protected activity; 2) agency

officials knew of the employee's protected activity; 3) the agency took a personnel action against the employee; and 4) there exists a causal connection between the protected activity and the personnel action taken. Special Counsel ex rel. Rigdon v. Dep't of Army, 98 M.S.P.R. 110, 113 (2004); see also Special Counsel ex rel. Hoyt v. Dep't of Veterans Affairs, 84 M.S.P.R. 314, (1999).

Employees should understand, however, there is no guarantee of MSPB review of an OSC complaint. This is because not every complaint to the OSC will generate an MSPB case or allow an employee to file an Individual Right of Action ("IRA") appeal to the MSPB in the event that the OSC does not move forward with the complaint or decides to drop an existing complaint. IRA appeals, e.g., appeals that may be filed with the MSPB by an employee alleging their termination was the product of a prohibited personnel practice, are controlled by 5 U.S.C. § 1221(a) and may only be filed over certain prohibited personnel practices described in 5 U.S.C. §§ 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D). See https://www.law.cornell.edu/uscode/text/5/2302. An IRA appeal also may only be filed if: (a) the OSC notifies the employee that the investigation has been terminated and no more than 60 days have elapsed since that notice; or (b) 120 days after filing a complaint seeking corrective action from the OSC, the employee has not been notified by the OSC that it will seek corrective action.

8. Can probationary employees, or their unions, file a grievance over the removal of a probationary employee?

It depends. Many collective bargaining agreements exclude grievances challenging the removal of a probationary employee from the negotiated grievance process. Even for those CBAs that don't, grievances challenging the removal of a probationary employee are likely limited to alleging that the removal was motivated by union animus. See U.S. Dep't of Justice, I.N.S. v. FLRA, 709 F.2d 724, 728-29 (D.C. Cir. 1983) (explaining that unions cannot bargain for substantive or procedural protections of probationary employees' continued employment that exceed the protections granted by statute and regulation); see also NTEU v. FLRA, 848 F.2d 1273, 1276-77 (D.C. Cir. 1988)(holding a proposal non-negotiable that would allow grievances to challenge probationary removals motivated by unlawful EEO discrimination).

Consequently, unions may be limited to filing grievances challenging probationary removals only where there is evidence that the decision to remove was based on union animus. See Dep't of Navy, Pascagoula, Miss. and Nat'l Assoc. of Gov't Emps., 73 F.L.R.A. 443, 449 (2023) (explaining that agencies may not terminate probationary employees for a reason that violates the Federal Labor-Management Relations Statute); Dep't of Agric., Food and Nutrition Service and NTEU, 61 F.L.R.A. 16, 22 (2005); see also Indian Health Serv., Crow Hospital Agency, Montana and Marcella A. Knaub et al., 57 F.L.R.A. 109, (2001) (ordering the reinstatement of two probationary employees whose terminations were motivated by union animus). Once a union makes the case-specific and fact dependent determination to file such a grievance, the union should allege an unfair labor practice and explain the basis for the claim of union animus.

9. Can probationary employees, or their unions, file an unfair labor practice ("ULP") charge with the Federal Labor Relations Authority ("FLRA") to challenge a probationary removal?

Yes, but only if the employee or the union has a reasonable belief based on demonstrable evidence that the termination was motivated by union animus. AFGE, however, advises against filing a ULP charge at this time, as the FLRA cannot issue a ULP complaint until the Trump Administration appoints a General Counsel to the FLRA. It is also unlikely that the Administration will appoint a General Counsel favorable to employees or labor.

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