

U.S. Merit Systems Protection Board
Information Sheet No. 4
Probationary Employees

Purpose

The purpose of this information sheet is to provide general guidance and background information. It does not represent an official statement approved by the Board itself, and is not intended to provide legal counsel or to be cited as legal authority. Instead, it is intended only to help the public become familiar with the MSPB and its procedures. In all instances, however, the Board's regulations and current case law control with respect to the matters discussed here.

Does every Federal employee have a right to appeal his removal to the Board?

No. Congress granted appeal rights to the Board to only certain employees and over certain personnel actions, and the Office of Personnel Management (OPM) has provided appeal rights in other limited situations. Your right to appeal your removal to the Board will depend on whether you meet the definition of an "employee" under the law (5 U.S.C. § 7511(a)(1)) and whether you meet the requirements of any OPM regulation that grants additional appeal rights. Whether you are an "employee" with appeal rights will depend in part on whether you are in the competitive service (defined in 5 C.F.R. § 212.101) or the excepted service (defined in 5 C.F.R. § 213.101). The Standard Form 50 documenting your appointment in the Federal service will reflect whether you are in the competitive or excepted service. All employees of the U.S. Postal Service and the Tennessee Valley Authority are in the excepted service. Generally, probationary employees are excluded from the definition of "employee" in 5 U.S.C. § 7511(a)(1)(A) (competitive service) and (C) (excepted service), but in some circumstances they may nonetheless meet the definition depending on the amount, type, and timing of their service.

Do probationary employees have a right to appeal their termination to the Board?

Probationary employees do not have a statutory right to appeal their termination to the Board. If you are a preference eligible in the excepted service and you have not completed 1 year or more of current, continuous service in the same or similar position, you may not appeal your termination to the Board. If you are a non-preference eligible in the excepted service and you have not completed 2 years or more of current, continuous service, in most circumstances you may not appeal

your termination to the Board. There are no regulatory appeal rights for excepted service employees terminated during probation.

However, probationary employees in the competitive service or serving under a Veterans' Recruitment Appointment (VRA) do have limited appeal rights to the Board by regulation. 5 C.F.R. § 315.806. VRA appointees have the same regulatory rights of appeal to the Board as competitive service employees terminated during probation.

Do all probationary employees in the competitive service have the same regulatory rights?

No, those rights will depend on whether you are terminated for conditions arising prior to, or subsequent to, your appointment. In addition, employees serving a probationary period on initial appointment to a supervisory or managerial position are subject to 5 C.F.R. Part 315, Subpart I, and their rights are not discussed in this Information Sheet.

What are my due process rights if I am terminated during my probationary period in the competitive service?

If the agency proposes to terminate you in whole or in part for conditions arising before your appointment, you are entitled to notice of the reasons for the proposed termination, a reasonable time to answer the proposal notice and to furnish supporting affidavits, and written notice of the agency's decision. That decision will include the reasons for the action and notice of your right to file an appeal with the Board. 5 C.F.R. §§ 315.805 and .806. You may appeal on the ground that your termination was not effected in accordance with the procedural requirements of § 315.805.

If the agency terminates you for unsatisfactory performance or conduct during your probationary period, you are entitled to a written notice why you are being separated and the effective date of the separation. The agency must, at a minimum, state its conclusions as to the inadequacies in your performance or conduct. 5 C.F.R. §315.804. You may appeal your termination (if it was not required by statute) only if you allege it was based on partisan political reasons or marital status. 5 C.F.R. § 315.806(b).

If you were terminated for pre-appointment reasons and you raise a denial of procedures, or if you were terminated for post-appointment reasons and you allege marital status or partisan political discrimination, you may also raise discrimination based on race, color, religion, sex, national origin, age, or disability. 5 C.F.R. § 315.806(d).

In all probationer appeals under 5 C.F.R. § 315.806, the Board may consider only these issues, but may not decide whether the reason the agency terminated your appointment was correct.

What other review rights do I have?

You may have the right to file an Equal Employment Opportunity complaint, a grievance, or a request for corrective action with the Office of Special Counsel. You should quickly attempt to determine whether such options exist before you file an appeal, because frequently the type of review you seek first constitutes an “election of remedy” that may limit or preclude other review options.

What if I have other procedural questions?

- (1) Call the regional office in which your appeal is pending.
- (2) Send email to the Board at mspb@mspb.gov, or telephone, toll free, and leave a message at 1-800-209-8960.
- (3) Go to the Board's website at www.mspb.gov and access OPM's regulations at 5 C.F.R. Part 315H.