



Merit Systems Protection Board

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MSPB MAKES CLEAR HOW IT'S POSSIBLE FOR PROBATIONERS TO HAVE APPEAL RIGHTS

Today, the MSPB released a report entitled, "Navigating the Probationary Period after *Van Wersch* and *McCormick*." Since the U.S. Court of Appeals for the Federal Circuit issued its decisions in *Van Wersch v. Department of Health & Human Services* and *McCormick v. Department of the Air Force*, the interpretation of the factors affecting whether an employee serving in a probationary period has appeal rights has changed. "Federal agencies and employees need to understand the outcomes of these decisions to know whether an individual employed by the U.S. Government has full procedural and appeal rights upon termination, even when employed in a probationary or trial status," said Chairman Neil A. G. McPhie. "For the probationary period to be an effective assessment tool, agencies must have an accurate understanding, under the current interpretation of the law, of the length of the assessment period before the probationer becomes entitled to the same rights afforded to non-probationary employees. By the same token, probationary employees need accurate information about the circumstances under which they may have such rights. This report can help meet those objectives."

As noted in a September 2005 MSPB report, "The Probationary Period: A Critical Assessment Opportunity," the probationary period can be a highly effective tool to evaluate a candidate's potential to be an asset to the Government before an appointment becomes final. This report is a follow-up to the 2005 report and explores how procedural and appeal rights are generally established under the current law, as well as when a probationer may qualify for those rights.

In addition, the MSPB recommends specific steps for agencies to take to determine if an individual qualifies as an employee with such procedural and appeal rights, and recommends that the Office of Personnel Management review and clarify its regulations to conform to the interpretation of the law expressed by the Board's reviewing court in *Van Wersch* and *McCormick*. The report also includes a recommendation that Congress review and consider amending the statute governing the probationary period.

The MSPB is an independent, quasi-judicial agency with responsibility for deciding Federal employee appeals from personnel actions taken against them, protecting the integrity of the civil service and other Federal merit systems, and conducting studies of the civil service and other merit systems in the Executive Branch. To request a printed copy of the report, e-mail STUDIES@mspb.gov; call (202) 653-6772, extension 1350, or write: Merit Systems Protection Board, Office of Policy and Evaluation, 1615 M Street NW, Washington, DC 20419. The report may be downloaded from the Board's website at www.mspb.gov.