

Identifying Probationers and Their Rights

A probationary period takes place in the competitive service. The term “trial period” is often used to describe a similar period in the excepted service. However, in both cases, the purpose is to provide the agency with the opportunity to assess if the employee will be an asset to the Government prior to the finalization of the appointment.¹⁰³

For individuals in the competitive service outside the Department of Defense, the probationary period is one year. The National Defense Authorization Act of 2016 extended this period to a minimum of 2 years for the Department of Defense.¹⁰⁴ For the excepted service, the trial period can vary, but is often either one or two years.¹⁰⁵ In general, most probationers and individuals in a trial period will have very limited procedural and appeal rights.

Limited Rights of Probationers

The limited rights of probationers in the competitive service are derived from regulations issued by the U.S. Office of Personnel Management (OPM). Because the very nature of the excepted service is that it is excepted from the ordinary rules of the competitive civil service, OPM tends to provide fewer regulations that apply to the excepted service. However, agencies may provide their own regulations and policies governing such employment.¹⁰⁶

When a probationer (in the competitive service) is removed for “conditions arising before appointment,” the individual is entitled to the following:

- (1) “[A]dvance written notice stating the reasons, specifically and in detail, for the proposed action.”¹⁰⁷

¹⁰³ For a discussion of the purpose and use of the probationary and trial periods, see U.S. Merit Systems Protection Board, *The Probationary Period: A Critical Assessment Opportunity* (2005), at 34.

¹⁰⁴ 5 C.F.R. § 315.802(a). *But see* 10 U.S.C. § 1599e (stating that for employees of the Department of Defense, “the appointment of a covered employee shall become final only after such employee has served a probationary period of two years. The Secretary concerned may extend a probationary period under this subsection at the discretion of such Secretary. . . [S]ection 7501(1) and section 7511(a)(1)(A) (ii) of title 5 shall be applied to such [an] individual by substituting ‘completed 2 years’ for ‘completed 1 year’ in each instance it appears”).

¹⁰⁵ See, e.g., *Lopez v. Department of the Navy*, 108 M.S.P.R. 384, ¶ 2 (2008) (1-year trial period); *Kursar v. Department of Transportation*, 102 M.S.P.R. 306, ¶ 2 (2006) (1-year trial period); 5 C.F.R. § 362.303(f) (“The duration of the Recent Graduates appointment in the excepted service is a trial period.”)

¹⁰⁶ See *National Treasury Employees Union v. Horner*, 854 F.2d 490, 492 (D.C. Cir. 1988) (explaining that “a variety of more flexible and informal procedures – some established by OPM and others developed by individual agencies – are used to recruit and select new employees into the excepted service”).

¹⁰⁷ 5 C.F.R. § 315.805(a).

(2) “[R]easonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.”¹⁰⁸

(3) Notification “of the agency’s decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the Merit Systems Protection Board (MSPB), and inform him of the time limit within which the appeal must be submitted[.]”¹⁰⁹

These rights do not come directly from a statute. Rather, they can be traced back to regulations promulgated by the Civil Service Commission (CSC) in 1968.¹¹⁰ OPM has chosen to keep these rights in its own regulations.¹¹¹

In contrast, if a probationer is removed for reasons of performance or conduct during the probationary period, the agency “shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action.” There is no right to a notice of proposed termination.¹¹² These procedures can also be traced to the CSC’s 1968 regulations.¹¹³ If the termination is for reasons that arose both before and after the probationary appointment, then the process for “conditions arising before [finalized] appointment” is used.¹¹⁴

A probationer then has, again by regulation, limited appeal rights to MSPB.¹¹⁵ If the probationer was terminated for reasons arising before the probationary appointment, the probationer “may appeal on the ground that his termination was not effected in accordance with the procedural requirements” set forth in 5 C.F.R. § 315.805.¹¹⁶

If the termination occurs for reasons arising either before or after the probationary appointment, and the termination is not required by statute, then the probationer can appeal the action if he or she alleges that it

¹⁰⁸ 5 C.F.R. § 315.805(b).

¹⁰⁹ 5 C.F.R. § 315.805(c).

¹¹⁰ 33 Fed. Reg. 172 at 12402, 12422 (Sep. 4, 1968).

¹¹¹ 5 C.F.R. § 315.805.

¹¹² 5 C.F.R. § 315.804.

¹¹³ 33 Fed. Reg. 172 at 12402, 12422 (Sep. 4, 1968).

¹¹⁴ 5 C.F.R. § 315.805.

¹¹⁵ 5 C.F.R. § 315.806. *See Stokes v. Federal Aviation Administration*, 761 F.2d 682, 684-85 (Fed. Cir. 1985) (explaining that while a probationer has no statutory right of appeal, by regulation MSPB will consider probationer appeals when the probationer alleges the action was the result of partisan politics or marital status discrimination).

¹¹⁶ 5 C.F.R. § 315.806(c).

“was based on partisan political reasons or marital status.”¹¹⁷ In such a case, the appellant must first make an allegation of marital status discrimination supported by factual assertions. If the appellant makes such a facially non-frivolous allegation, the probationer has a right to a hearing at which he or she must support the allegation with a showing of facts which would, if not controverted, require a finding that the agency action was motivated by marital status discrimination. If, and only if, the appellant makes the required showing in support of that allegation, and the agency is unable to successfully controvert that factual showing, MSPB will proceed to determine the merits of the case, *i.e.*, whether the agency has articulated and supported a nondiscriminatory reason for its action, and whether the probationary employee has shown that reason to be mere pretext.¹¹⁸

Probationers and Trial Period Individuals with More Rights

As explained in our 2007 report, *Navigating the Probationary Period After Van Wersch and McCormick*, the U.S. Court of Appeals for the Federal Circuit has held that Congress’s word choices when phrasing 5 U.S.C. § 7511 resulted in certain probationary and trial period individuals having due process, procedural, and appeal rights even though it was unlikely that Congress intended this result.¹¹⁹

If an individual in the competitive service “has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less[.]” then the person may have full procedural and appeal rights even when in a probationary period.¹²⁰ Similarly, if an individual in the excepted service “has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less[.]” then the person may have full procedural and appeal rights while in a trial period.¹²¹ Some individuals may have “preference” as a result of military service, although not everyone with military service has preference.¹²² Individuals eligible for preference will obtain procedural and appeal rights after one year “of current continuous service in the same or similar positions” in the excepted service.¹²³

¹¹⁷ 5 C.F.R. § 315.806(b).

¹¹⁸ *Burton v. Department of the Air Force*, 118 M.S.P.R. 210, ¶ 8 (2012) (summarizing the court’s holding in *Stokes v. Federal Aviation Administration*, 761 F.2d 682, 686-87 (Fed. Cir. 1985)).

¹¹⁹ *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144, 1151 (Fed. Cir. 1999) (holding that while the legislative history supported the Government’s argument regarding what Congress intended the law should achieve, the court was instead required to follow the “language that emerged when Congress actually took pen to paper”). See U.S. Merit Systems Protection Board, [Navigating the Probationary Period After Van Wersch and McCormick](#) (2007), at 12-13.

¹²⁰ 5 U.S.C. § 7511(a)(1)(A).

¹²¹ 5 U.S.C. § 7511(a)(1)(C).

¹²² For more on the complexities of preference based on military service, including preference derived from the service of family members, see U.S. Merit Systems Protection Board, [Veteran Hiring in the Civil Service: Practices and Perceptions](#) (2014), at 7-8. See also, U.S. Office of Personnel Management, *VetGuide*, available at <https://www.opm.gov/policy-data-oversight/veterans-employment-initiative/vet-guide/>.

¹²³ 5 U.S.C. § 7511(a)(1)(B).

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Our 2005 report, *The Probationary Period: A Critical Assessment Opportunity*, recommended to Congress and OPM changes that they could implement to make the probationary period more meaningful and effective as an assessment opportunity.¹²⁴

¹²⁴ U.S. Merit Systems Protection Board, *The Probationary Period: A Critical Assessment Opportunity* (2005), at 34.