

Probationary Removals

By Joel Friedman

Although seemingly simple, probationary removals can be a treacherous area for the unwary MER Specialist or attorney. This note will attempt to point out some of the more dangerous pitfalls.

When removing a probationary employee at the end of his or her probationary period (not a good idea to begin with to wait that long) be careful where the “anniversary” date falls on the calendar. For example, if the employee’s anniversary date falls on a Monday—and the employee does not work weekends—his probationary period ends on the last day of his tour of duty before the anniversary date. So if his removal is effective the date of the preceding Friday, this removal as a probationer is procedurally defective. 5 CFR 315.804(b) This is because removals are effective at midnight and the employee completed his tour of duty before that time. The Agency can set a time on the last day earlier than midnight before the employee completes his tour of duty and avoid this problem.¹

Another problem is removing a probationer for a pre-employment reason, i.e. falsification of an employment application. Under 5 CFR 315.805 the agency must give advance written notice with the reasons stated specifically and in detail. The employee then has the right to respond. Failure to comply with this procedure is not necessarily fatal, however. The MSPB will review the case under the “harmful error” analysis. Only if harmful error is found, i.e. the probationer presents evidence that would have caused the Agency to have reached a different result had there been no error, the action will be set aside. Gaxiola v. Dept of the Air Force, 6 MSPR 515 (1981).

One other problem is that of “tacking”. In certain cases, a probationer may have prior service in a position credited toward completion of the probation period. (5 CFR 315.802(b)). Prior service in a position can be credited toward completion of the probationary period when certain conditions are met. These are: (1) service is rendered immediately prior to the career conditional appointment (2) in the same agency (3) in the same line of work, and (4) no break in service of 30 days or more during the prior service. The MSPB has decided a fair amount of cases examining this criteria. (See Haning v. Marine Corps, 31 MSPR 252 (1986); Chandler v. ICC, 3 MSPR 55 (1980); Phillips v. DHUD, 44 MSPR 48 (1990)).

The bottom line is to make sure you give a probationary removal a serious look before you sign off.

¹ Editor’s Note: Days of a scheduled tour of duty in a leave status are properly considered part of a probationary period. See *Hardy v. Merit Systems Protection Board*, 13 F.3d 1571, 1573 (Fed. Cir.) (annual leave does not alter the end of a probationary period) cert. denied, 114 S.Ct. 2739 (1994). On the other hand, the probationary period may be extended by an extended period of LWOP. *Herring v. Department of Veterans Affairs*, 72 M.S.P.R. 96 (1996), 72 MSPR 96. [*Linda B.R. Mills*]