

AFGE Council 222

Sent: Thursday, March 6, 2025 7:35 AM
Subject: Action Alert: Protecting Probationary Employees' Rights



National Council of HUD Locals - Council 222

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AFFILIATED WITH AFL-CIO
WE ARE COMPRISED OF HUD LOCALS THROUGHOUT THE U.S.

<https://afgecouncil222.com>

March 10, 2025

Action Alert: Protecting Probationary Employees' Rights

Dear Members,

As we continue to navigate the challenges facing our federal workforce, I want to address a critical issue affecting many of our probationary colleagues. Recently, AFGE has provided guidance on how probationary employees can challenge their separations from federal service. It is crucial that we understand our rights and the options available to us.

Understanding Your Rights:

- **Probationary Employees Have Limited Rights:** While probationary employees have fewer protections compared to permanent employees, there are still avenues to challenge separations. AFGE is actively engaged in federal court litigation regarding probationary separations, but the outcomes and timelines are uncertain.
- **Filing an MSPB Appeal:** Probationary employees can file an appeal with the Merit Systems Protection Board (MSPB) **within 30 days of separation**, alleging that their termination was a constructive reduction in force (RIF) violating applicable regulations, 5 C.F.R. Part 351. You can also contact the James & Hoffman law firm for potential representation, though this does not guarantee legal assistance or extend the appeal deadline.
- **Filing a Complaint with the Office of Special Counsel (OSC):** Employees can file a complaint with OSC alleging prohibited personnel practices. As we navigate the challenges facing probationary employees, it's crucial to note that the Office of Special Counsel (OSC) has recently been impacted by the firing of its director, Hampton Dellinger. This development comes after Dellinger's efforts to halt the mass firings of probationary employees, which he argued were unlawful. The OSC had successfully obtained a temporary stay from the Merit Systems Protection Board (MSPB) for over 5,700 USDA probationary employees, citing prohibited personnel practices. However, with Dellinger's removal, the OSC's ability to pursue these cases may be compromised. The absence of a Special Counsel (or a replacement who will not pursue this same support Director Dellinger did) could delay or complicate the processing of complaints, potentially affecting the MSPB's ability to

rule on similar cases. Despite these challenges, the MSPB remains a critical venue for probationary employees to challenge their separations, and we will continue to monitor developments closely.

Important Considerations:

- **Challenging Separations is Challenging:** Winning cases as a probationary employee is difficult, and there are no guarantees of success. Choosing one administrative forum may limit future options.
- **Fact-Specific Cases:** Outcomes depend heavily on individual circumstances. Other avenues, such as EEO complaints or claims of discrimination, may be applicable based on specific facts.

Resources and Support:

Employees may also contact the James & Hoffman law firm, with whom AFGE is associating, who are presently pursuing MSPB “class appeals” on behalf of separated probationary employees – although employees should understand that contacting the firm does not guarantee representation and doing so will not toll the deadline to file an appeal with the MSPB. See <https://www.jamhoff.com>.

Additional resources are available on the AFGE website at: www.AFGE.org/AFGEStrong.

Please take a look at the guidance detailed below from AFGE. Please reach out to your local union representatives with any questions.

In solidarity,

Antonio F. Gaines
President
AFGE National Council 222

From: **AFGE** <actionnews@union.afge.org>
Date: Thu, Mar 6, 2025 at 5:01 PM
Subject: AFGE Guidance on Challenging Probationary Separations
To: <afg422@gmail.com>



probationary employees have extremely limited rights compared to permanent employees, probationary employees may still have options to challenge their separations from federal service. AFGE is engaged in federal court litigation with respect to probationary separations and other matters affecting the federal workforce. However, the timeline for these cases is uncertain,

AFGE is providing this guidance to assist recently separated probationary employees. While probationary employees have extremely limited rights compared to permanent employees, probationary employees may still have options to challenge their separations from federal service. AFGE is engaged in federal court litigation with respect to probationary separations and other matters affecting the federal workforce. However, the timeline for these cases is uncertain, and the eventual outcomes and available relief remain unclear. Therefore, recently separated probationary employees should be aware of their right to file individual challenges consistent with the guidance below. Filing an individual challenge to an employee's separation is unlikely to impact any relief that may result from AFGE's ongoing federal court litigation.

Probationary employees separated as part of the recent and ongoing mass layoff of probationary employees may file an appeal with the Merit Systems Protection Board (MSPB) alleging that their separation was in fact a constructive reduction in force (RIF) that was conducted in violation of applicable RIF regulations, 5 C.F.R. Part 351.

Employees who wish to file an MSPB appeal must file timely, usually within 30 days of their separation. Employees may also contact the James & Hoffman law firm, with whom AFGE is associating, who are presently pursuing MSPB "class appeals" on behalf of separated probationary employees – although employees should understand that contacting the firm does not guarantee representation and doing so will not toll the deadline to file an appeal with the MSPB. See <https://www.jamhoff.com>.

Probationary employees may also file a complaint with the Office of Special Counsel ("OSC") alleging their separation was a prohibited personnel practice, for example under 5 U.S.C. § 2302(b)(12). OSC has been pursuing prohibited personnel practice claims on behalf of separated probationary employees and recently obtained a temporary stay from the MSPB of over five thousand separations at the U.S. Department of Agriculture. These recent claims by OSC have not required employees to file individual complaints. As of March 5, 2025, however, there is no Special Counsel to make determinations on complaints filed with OSC. Moreover, if an employee chooses to file an individual complaint with the OSC, it may preclude their ability to pursue a claim through the MSPB.

Locals, councils, and individual employees should understand that whichever route they choose, probationary employee cases are extremely difficult to win and there is no guarantee of success. Locals, councils, and employees should also understand that challenging their separation in one administrative forum may preclude them from choosing another forum later. For instance, if an employee files an individual complaint with OSC over their probationary termination, it may

preclude them from filing an appeal over their termination with the MSPB. Decisions on how to proceed should be made carefully and only after thoughtful consideration of the associated risks and benefits.

Lastly, case outcomes can be very fact specific. For example, some cases may present facts that would support other avenues of challenge, such as via an Equal Employment Opportunity complaint or, for those in the competitive service, via claims of marital or partisan political discrimination to the MSPB under 5 C.F.R. Part 315. Some employees may also allege that they were not probationary at the time of their separation and therefore were entitled to adverse action protections. Determinations as to whether an employee was entitled to adverse action protections are also very fact specific and depend on a variety of factors. See 5 U.S.C. §7511(a)(1). Questions concerning scenarios like these, as well as with respect to union grievances, should be directed to the AFGE General Counsel's Office.

Additional resources are available on the AFGE website at: www.AFGE.org/AFGEStrong.

In Solidarity,

AFGE

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