



# ADVERSE ACTIONS: THE RULES AND THE REALITY

AUGUST 2015

## *The New Employee Probationary Period*

For most positions in the Federal civil service—those in what is known as the “competitive service”—the law provides that the first year of employment is a probationary period. An individual’s appointment is not considered final until the completion of probation. An agency may terminate a probationer’s appointment with no advance notice and only a limited right of appeal when it is not satisfied with the probationer’s performance or conduct. For other positions—those in what is known as the “excepted service”—the law does not require a probationary period per se, but it nonetheless provides that an agency may terminate an employee’s appointment during the first two years with no advance notice and no right of appeal.

The purpose of the probationary period is to provide an assessment opportunity in which the agency can judge the individual in the job before finalizing the appointment. In our 2005 report, [\*The Probationary Period: A Critical Assessment Opportunity\*](#), we discussed a number of findings and recommendations regarding the probationary period. One of our primary findings was that agencies were not using the probationary period as intended.

For the survey used in the 2005 report, we asked supervisors of probationers two related questions: (1) “Based on your experience with this employee’s performance and conduct thus far, if you could do it over again, would you select this employee for the position?” and (2) “Based upon your experience with this employee’s performance and conduct thus far, do you expect to retain this employee in his/her position beyond the probationary period?” As shown in the table below, many supervisors who were unsure if they would select the person again, or who were sure they would not select the person again, nevertheless intended to permit the appointment to be finalized.

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	Do you expect to retain beyond the probationary period?		
	Yes	No	Not Sure
<i>Supervisors who <u>would not</u> select again</i>	52%	31%	17%
<i>Supervisors who were <u>not sure</u> if they would select again</i>	82%	0%	18%

*The New Employee Probationary Period Continued*

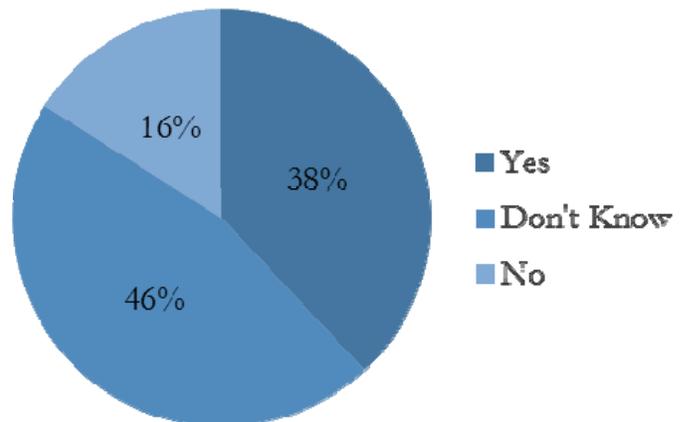
The probationary period serves an important role in the balance between empowering management to ensure that only good workers become tenured employees and ensuring that the civil service is protected from the implementation of arbitrary or improper adverse actions. However, the data indicates that during the probationary period, when individuals can be removed easily, supervisors are reluctant to separate those who are not a good fit for the job. In other words, how the rules are used determines the outcome, and in the case of the probationary period for new employees, those rules are often unused by management officials.

*The New Supervisor Probationary Period*

As with the probationary period for new employees, a current employee who is assigned to a supervisory position must complete a supervisory probationary period. The law provides that if a current non-supervisory employee becomes a supervisor and does not perform successfully in that role, the individual should be moved to a non-supervisory job (such as the one in which he or she was successful prior to becoming a supervisor). However, as with the probationary period for new employees, it appears that the new supervisor probationary period is not always being used as the assessment opportunity that it was meant to be. As discussed in our report, *A Call to Action: Improving First-Level Supervision of Federal Employees*, and shown in the figure below, a little more than a third of the surveyed supervisors reported that the probationary period was used to assess them when they first became Federal supervisors. Here too, the effectiveness of the tools provided for managing the workforce depends upon how agencies opt to use those tools.

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Was your probationary performance used to decide if you should continue in a supervisory role?



### *The Standard of Proof*

As discussed in our report, *Addressing Poor Performers and the Law*, the law provides that when an adverse action taken under chapter 75 of title 5 is appealed to the U.S. Merit Systems Protection Board (MSPB), the agency must support the reason(s) for its action by preponderant evidence. In plain English, “preponderant evidence” means that it is more likely than not that the assertions are true.

As a part of this study, we surveyed proposing and deciding officials for removal actions that were implemented under chapter 75 or equivalent procedures. These actions included conduct-based as well as performance-based issues, *but the rules that the agencies chose to effectuate the removals set the standard of proof as preponderant evidence*. Our survey asked these officials what standard of proof they used when deciding to propose or implement these removal actions. As shown in the table below, few officials reported that they used the standard contained in the law. The overwhelming majority of respondents indicated that they used the standard of “beyond a reasonable doubt.” Only five percent of deciding officials and three percent of proposing officials used the correct, less-demanding standard set in law.

As with the probationary periods discussed earlier, the standards set by Congress or the Office of Personnel Management can greatly differ from the practices of agency officials who make the day-to-day decisions about Federal employees; it is the decisions reached by these officials that will determine whether an individual is retained or separated.

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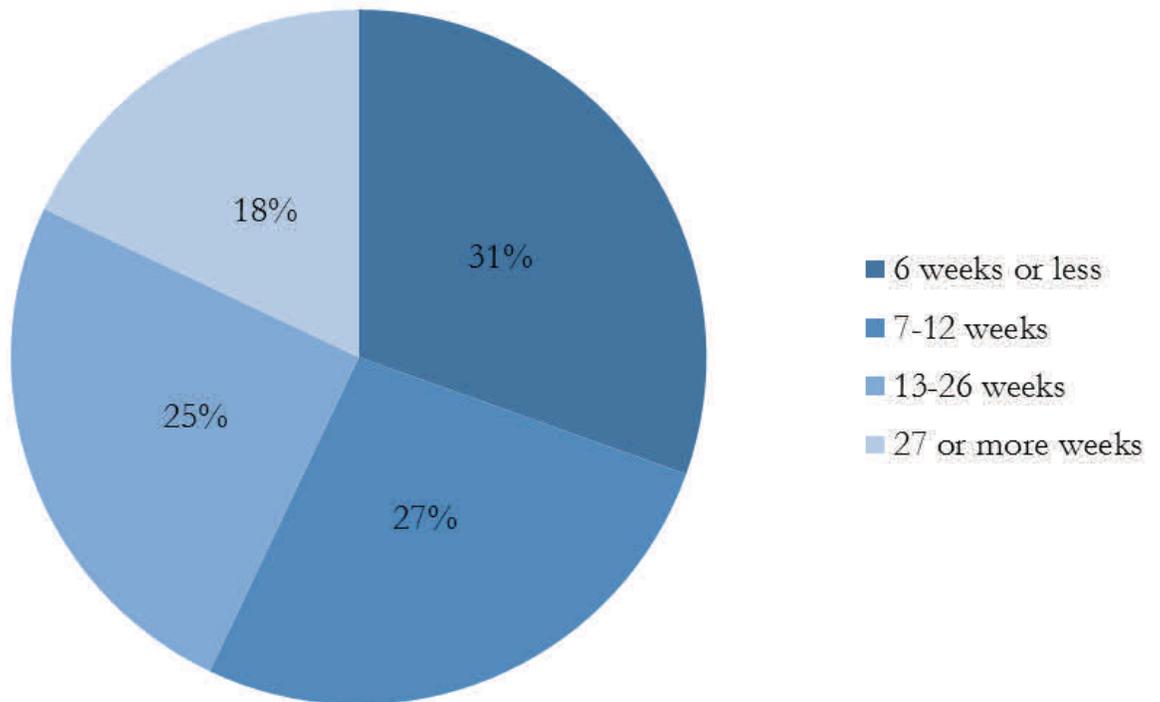
Standard of Proof Used	Proposed Removal	Decided Removal
Beyond a reasonable doubt	90%	84%
Highly likely	7%	10%
More likely than not	3%	5%
Reasonable person could conclude	1%	1%

*The Length of the Removal Process*

By statute, the removal of a non-probationary employee in the competitive or excepted services cannot take place sooner than 30 days from the point at which it is proposed. However, if there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed, a removal can be effectuated in as little as seven days. But, an agency official must first become aware of the poor performance, misconduct, or other issue and determine if it is appropriate to propose a removal.

The law does not address the period of time that an agency uses between the point at which it becomes aware of an issue and the point at which the removal is proposed. In our survey for the report, *Addressing Poor Performers and the Law*, we asked proposing officials for removal actions (based on conduct, performance, or both) taken under chapter 75 of title 5, “From the time you first became aware of the possibility of the offense, how many weeks was it before the personnel action took effect?” As shown in the figure below, for more than two-thirds of removal actions, the agency took over six weeks to effectuate the action in question. Almost one-fifth of the removal actions took over 6 months to effectuate. (Only 23 percent of removal actions were effectuated in five weeks—35 days—or less.) Thus, how much time passes before an agency removes an employee with identified issues depends more on the decisions made by agency officials than it does on the 30-day proposal period set forth in statute.

THE PROPOSAL PERIOD SET FORTH IN STATUTE IS NOT THE ONLY FACTOR THAT INFLUENCES HOW MUCH TIME PASSES BEFORE AN AGENCY REMOVES AN EMPLOYEE WITH IDENTIFIED ISSUES.



*The Period to Reply to a Proposed Removal*

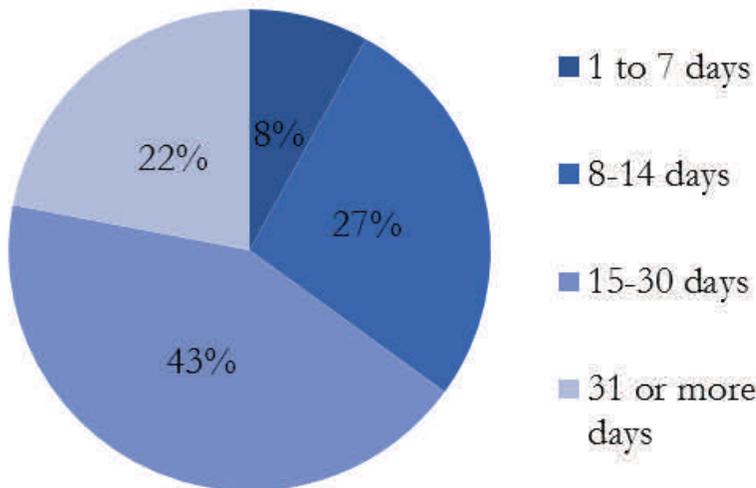
We recently discussed the rules for removing an employee in our report, [What is Due Process In Federal Civil Service Employment?](#) As that report explains, the U.S. Supreme Court has held that before removing a tenured employee in a public merit-based system, the individual must be told of the proposed action and given a meaningful opportunity to respond to the charges. The current statute provides that opportunity by requiring that the agency provide a written notice of the reasons for the proposed action and give the individual “reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer[.]”

The statute also states that, absent a crime, the agency must wait a minimum of 30 days after proposing the action before implementing it. This means that a proposing official can offer an employee an opportunity to reply that is two or three times as long as the mandatory 7 days, or the deciding official can extend the offered reply period, without automatically causing the agency to delay the effective date of the action.

In the survey for the report, [Addressing Poor Performers and the Law](#), we asked deciding officials for removal actions (based on performance, conduct, or both) whether they had provided an extension to the period to reply, and how long the extension lasted. Half of the removal action deciding officials reported that they provided an extension. As shown in the figure below, nearly two-thirds of those extensions were for an additional 15 days or more. These extensions of more than 2 additional weeks, when added to the initial period to reply, most likely delayed the agency’s ability to effectuate the action immediately upon the expiration of the 30-day waiting period. This is particularly true for those actions where the extension alone exceeded 30 days.

The period to reply must be meaningful in order for the action to be valid, and what is meaningful will likely vary based on the charges and evidence in a particular case. This data demonstrates the extent to which officials may find irrelevant the minimum waiting period set in statute when they determine that the case requires more time.

OFFICIALS MAY FIND IRRELEVANT THE MINIMUM WAITING PERIOD SET IN STATUTE WHEN THEY DETERMINE THAT THE CASE REQUIRES MORE TIME.

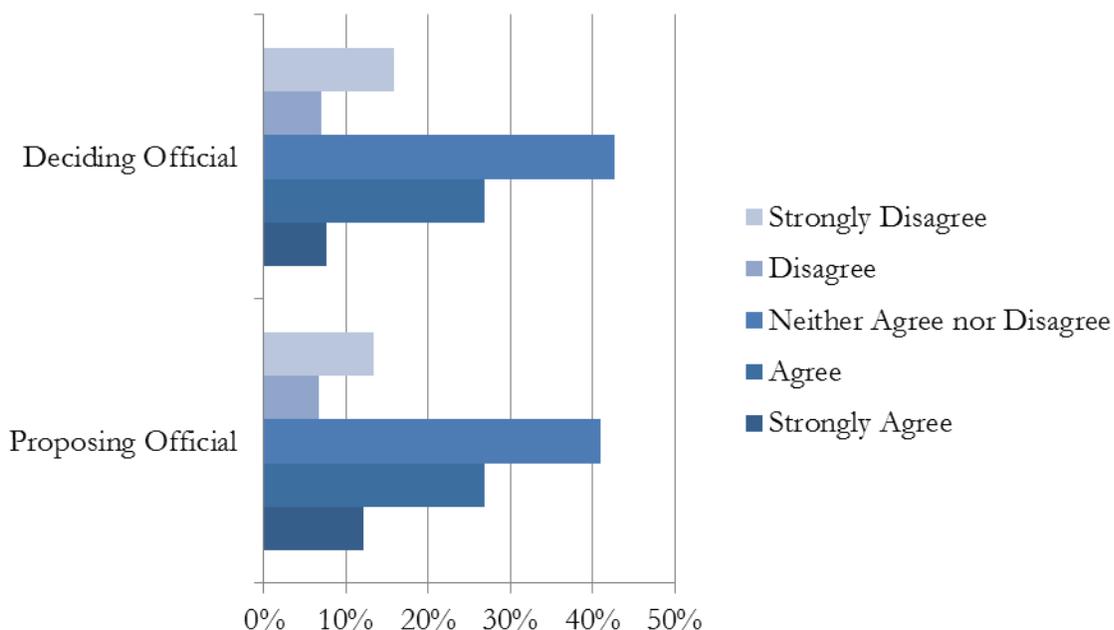


*Perceptions Regarding the Scope of Employee Rights*

It has often been said that it is too hard to remove Federal employees who have conduct or performance issues. In the survey for the report, *Addressing Poor Performers and the Law*, we asked proposing and deciding officials for removal actions (based on performance, conduct, or both) whether they agreed with the statement that “Federal employees have too many rights.” This is a unique population to answer that question, because these are officials who have actual experience using the system to remove Federal employees who have appeal rights under chapter 75 of title 5. As shown in the figure below, proposing and deciding officials generally shared similar views. Overall, only 10 percent of officials strongly felt that employees had too many rights while 15 percent strongly disagreed with the statement. The most common view, held by 42 percent of respondents, was neutral, which appears to indicate that proposing and deciding officials felt that Federal employees had an appropriate level of rights.

There were very slight differences between the two groups, particularly among those who felt most strongly that employees have too many rights. For deciding officials, only 7.6 percent strongly agreed that employees had too many rights, while 12.1 percent of proposing officials strongly agreed with that statement. It is interesting that the officials most responsible for ensuring that the agency provides a meaningful opportunity to respond to the charges—and who would be required to defend the action to a third party—tended not to strongly object to the level of rights given to the individuals that they removed.

OVERALL, ONLY 10 PERCENT OF OFFICIALS STRONGLY FELT THAT EMPLOYEES HAD TOO MANY RIGHTS WHILE 15 PERCENT STRONGLY DISAGREED WITH THE STATEMENT. THE MOST COMMON VIEW, HELD BY 42 PERCENT OF RESPONDENTS, WAS NEUTRAL.



### *A Note About This Publication*

The U.S. Merit Systems Protection Board has the authority to study the civil service and report upon its findings (5 U.S.C. § 1204(a)(3)). MSPB typically releases information gathered through its studies function by issuing a report to Congress and the President, with copies made available to the public. Reports usually attempt to present a relatively complete picture of a topic or sub-topic. MSPB's Office of Policy and Evaluation may issue information on a smaller scale through articles in its newsletter, *Issues of Merit*. This publication differs from *Issues of Merit* insofar as it is an effort to supply information on interrelated topics surrounding a single theme, but it does not cover a topic in the same depth that would be found in an MSPB report.

### *Selected Pertinent Statutes and Regulations*

- 5 U.S.C. § 3321 (Competitive Service Probationary Period)
- 5 C.F.R. §§ 315.801-806 (Probation on Initial Appointment to Competitive Service)
- 5 C.F.R. §§ 315.901-909 (Probation on Initial Appointment to Supervisory or Managerial Position)
- 5 U.S.C. § 4303 (Actions Based on Unacceptable Performance)
- 5 C.F.R. §§ 432.104-106 (Addressing Unacceptable Performance)
- 5 U.S.C. §§ 7501–7504 (Suspension for 14 Days or Less)
- 5 U.S.C. §§ 7511–7514 (Removal and Suspension for More Than 14 Days)
- 5 C.F.R. §§ 752.201-406 (Adverse Actions)
- 5 U.S.C. §§ 7701-7703 (Appeals)
- 5 C.F.R. §§ 1201.1-205 (MSPB Practices and Procedures)

Copies of MSPB reports and newsletters are available to the public at no cost at [www.mspb.gov/studies](http://www.mspb.gov/studies). The methodologies used for the surveys discussed in this publication are explained in the individual reports.

Inquires about MSPB and its work should be directed to MSPB's Clerk of the Board at (202) 653-7200 or [MSPB@mspb.gov](mailto:MSPB@mspb.gov).

The U.S. Merit Systems Protection Board is an independent, quasi-judicial agency in the executive branch that serves as the guardian of Federal merit systems. MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies. MSPB's vision is a highly-qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people.

## *Relevant Materials for Reference*

MSPB has been issuing reports related to the health of the civil service since 1981. We have also published articles in our *Issues of Merit* newsletter since 1996. Our website's studies page, [www.mspb.gov/studies](http://www.mspb.gov/studies), contains copies of these publications. Below is a list of some available materials that readers may find relevant to the subjects covered in this publication. The list below is not all-encompassing and we encourage people and organizations with an interest in a merit-based civil service to search the MSPB studies website for items that correspond to their interests.

### **Reports:**

[What is Due Process in Federal Civil Service Employment](#) (2015).

[Clean Record Settlement Agreements and the Law](#) (2013).

[A Call to Action: Improving First-Level Supervision of Federal Employees](#) (2010).

[Addressing Poor Performers and the Law](#) (2009).

[Alternative Discipline: Creative Solutions for Agencies to Effectively Address Employee Misconduct](#) (2008).

[Navigating the Probationary Period After \*Van Wersch\* and \*McCormick\*](#) (2007).

[The Probationary Period: A Critical Assessment Opportunity](#) (2005).

[Federal Supervisors and Poor Performers](#) (1999).

[Removing Poor Performers in the Federal Service](#) (1995).

### ***Issues of Merit* Articles:**

[Probationary Periods: A Missed Opportunity to Address Poor Performance](#), Spring 2015, p. 5.

[Alternative Discipline: What You Need to Know](#), Feb. 2009, p. 3.

[What Agencies Should Know in a Post-\*Van Wersch\* and \*McCormick\* World](#), Jul. 2006, p. 6.

[Due Process: What You Need to Know](#), May 2006, p. 5.

[The Trial Period: A Missing Link](#), Jan. 2006, p. 1.

[Replace Warm Bodies With Working Bodies](#), Apr. 2005, p. 5.

[Department of Health and Human Services: Administering the Probationary Period](#), Jan. 2005, p. 3.

[Using the Probationary Period to Weed Out Selection Errors](#), Jun. 2004, p. 5.

[Lessons Learned on Removing Poor Performers](#), Summer 2004, p. 6.

[Poor Performers: Does the Solution Address the Problem](#), Jul. 2003, p. 1.

[Who Says You Can't Fire a Poor Performer](#), Feb. 2003, p. 4.