

Senior Executives Association Comment on Proposed Rule Regarding Appeals by Probationary Employees and Supervisors or Managers Who Do Not Complete Probationary Periods

The Senior Executives Association (SEA) appreciates the opportunity to comment on the Office of Personnel Management's proposed rule revising the circumstances and procedures for adjudicating appeals by probationary employees and supervisors or managers who do not complete their probationary or trial periods.

SEA recognizes the importance of an efficient and credible process for addressing probationary employee terminations. As a general matter, federal employees serving probationary or trial periods have very limited appeal rights, reflecting the government's legitimate interest in assessing performance and conduct before granting full civil service protections. At the same time, limited due process safeguards for allegations of prohibited personnel practices, particularly claims involving partisan political discrimination or marital status, remain essential to maintaining confidence in the merit system.

SEA is concerned that the proposed rule would be inconsistent with the appearance and the reality of independent adjudication by transferring responsibility for these appeals from the independent Merit Systems Protection Board (MSPB) to OPM. As an alternative approach, SEA recommends several targeted reforms that improve efficiency and address potential overuse of the MSPB authority for probationary appeals, while preserving objectivity in this important process.

1. Actual and perceived conflicts of interest

The Civil Service Reform Act of 1978 deliberately separated management, policy, and adjudicatory functions. OPM was created as an agency designed to be responsive to the President, led by a Director appointed by and reporting directly to the President. To address concerns that this structure could compromise the impartial adjudication of employee appeals, Congress created the MSPB as an independent, bipartisan, quasi-judicial body. MSPB's design, including fixed and nonrenewable terms for Board members, removal only for cause, and budgetary safeguards, was intended to insulate it from improper political influence.

Transferring even limited appeal rights for probationary employees to OPM runs counter to this separation. Regardless of intent, placing adjudicatory authority within an agency designed to be responsive to presidential direction raises legitimate concerns about impartiality. This change risks undermining confidence in the merit system by reducing the perception of objective, independent review.

2. MSPB capacity and institutional role

OPM notes that MSPB has experienced periods in which appeals were not adjudicated as quickly as intended. Historically, however, MSPB maintained a strong record of timely adjudication, with most initial appeals resolved within approximately 120 days. Delays have

largely reflected periods when MSPB lacked sufficient membership or resources rather than structural flaws in its mission or design.

The more appropriate response is to ensure that MSPB is fully staffed and adequately resourced so it can carry out its statutory responsibilities. Reassigning adjudicatory authority does not address underlying capacity issues and departs from the framework Congress established to ensure independent review.

3. Adjudication is a quasi-judicial function best handled by a quasi-judicial body

Adjudicating employee appeals is inherently a quasi-judicial activity. Prior to the creation of MSPB, appeals within the Civil Service Commission were handled inconsistently, with varying procedures and limited transparency. MSPB professionalized this process by using trained administrative judges, publishing decisions, developing rules of evidence, and establishing precedential case law through Board review.

This approach provides clarity and predictability for agencies and appellants alike. Returning adjudicatory authority to OPM risks returning to a less consistent and less transparent system, with fewer procedural safeguards and reduced reliance on established precedent.

4. Appeals by probationary employees do not impose a significant management burden

Available data do not indicate that probationary employee appeals present a meaningful burden on agency operations. According to MSPB's FY 2024 Annual Report, 622 appeals were filed by probationary employees. Of those, 589 were dismissed outright, 28 were resolved through settlement, and only five were adjudicated on the merits. Five adjudicated cases across a civilian workforce of more than two million employees does not suggest a problem that warrants restructuring adjudicatory authority.

Conclusion and recommendations

SEA encourages OPM to reconsider the proposed transfer of adjudicatory authority. Rather than shifting appeals to OPM, SEA recommends targeted reforms that address efficiency concerns while preserving independent review, including:

- Early threshold screening of probationary appeals
- Expedited MSPB review for the limited categories of claims permitted by statute
- Clearer statutory and regulatory limits on the scope of probationary appeals
- Ensuring MSPB is fully staffed and resourced to act promptly

These steps would improve efficiency while maintaining the independence and integrity that are fundamental to the federal merit system.

SEA appreciates the opportunity to submit these comments and welcomes continued dialogue on constructive approaches to improving probationary appeal processes.