

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

DHS PROBATIONARY EMPLOYEES
1 CLASS,

DOCKET NUMBER
DC-0752-25-1781-I-1

Appellant,

v.

DATE: May 23, 2025

DEPARTMENT OF HOMELAND
SECURITY,

Agency,

and

DIRECTOR OF THE OFFICE OF
PERSONNEL MANAGEMENT,

Intervenor.

ORDER CERTIFYING CLASS APPEAL

On March 5, 2025, the appellants filed the instant appeal seeking certification of a class appeal pursuant to 5 C.F.R. §1201.27. The appellant's request for certification to proceed as a class is **GRANTED**, as modified by this Order. The parties should read this order carefully, as it requires further response from both parties.

Background

The facts stated here are not in dispute. On February 14, 2025, the agency's Chief Human Capital Officer (CHCO) directed the agency to terminate individuals serving a probationary period, attaching a list of those individuals and a template notice provided by the Office of Personnel Management. IAF, Tab 16 at 704; Tab 19 at 10. Between February 14 and February 20, 2025, the agency terminated

approximately 369 individuals serving a probationary or trial period from two of its components using the template termination notice. IAF, Tab 16 at 5, 8; Tab 19 at 5. The template termination notice provided the individuals with notice of their right to appeal their separations to the Merit Systems Protection Board pursuant to 5 C.F.R. § 315.806.

The putative class counsel then filed this request for a nation-wide class appeal on behalf of three named individuals who held positions with the agency's Cybersecurity and Infrastructure Security Agency (CISA) and with the Federal Emergency Management Agency (FEMA)¹, as representatives of a class of "[a]ll persons who were subject to separation from federal service on the grounds that they were probationary or trial period employees of the Department of Homeland Security ("Agency") and who were not provided the rights accorded to employees under a Reduction in Force ("RIF"), at any time between February 10, 2025, and the first day of a hearing on appellant's claims." Initial Appeal File (IAF), Tab 1. On March 28, 2025, I granted the putative class representative's request for limited discovery to develop the record related to class certification, which also adjusted the schedule for briefing the issue of class certification. IAF, Tab 4. The parties conducted discovery. IAF, Tab 10, Tab 12, Tab 16 at 705-15. On April 29, 2025, the putative class representative's counsel supplemented its request for class certification. IAF, Tab 16. On May 6, 2025, the agency responded to the putative class counsel's request for class certification. IAF, Tab 19. The appellant supplemented its argument for class certification on May 13, 2025, and the record closed that day.² IAF, Tab 21.

¹ On March 14, 2025, the American Federation of Government Employees, AFL-CIO, also filed a request to proceed as a class on behalf of only FEMA employees. *DHS Probationary Employees 2 Class v. Department of Homeland Security*, MSPB Docket No. DC-0752-25-172-I-1. That request was denied.

² The appellant's request for leave to file this reply is granted.

Having considered the parties' submissions, I find that a class appeal is the fairest and most efficient way to adjudicate the appeal and that the putative class counsel and named appellants will adequately represent the interests of the parties, in accordance with the Board's regulations at 5 C.F.R. § 1201.27. In making this determination I am guided by the provisions of Rule 23 of the Federal Rules of Civil Procedure. *See* 5 C.F.R. § 1201.27. *See, e.g., Kluge v. Department of Homeland Security*, 60 F.4th 1361 (Fed. Cir. 2023). The parties do not dispute that the circumstances underlying this appeal satisfy the FRCP 23(a) prerequisites of numerosity, commonality, typicality and adequacy. IAF, Tab 19 at 6. The parties further agreed to refinement of the class definition to ensure that the class members could be definitively identified as required by FRCP 23(b)(3). IAF, Tab 19 at 6, Tab 21. The class will proceed as follows:

Class Definition

The class will consist of any agency employees serving in a probationary or trial period who were issued termination notices between February 14-20, 2025, pursuant to the February 14, 2025, instructions from DHS leadership.

The class does *not* include any individual who was terminated at or around the same time based on specific, individual performance or conduct deficiencies.

The class also does *not* include any individual who received a substantively identical termination notice but meets the 5 U.S.C. § 7511 definition of employee and is therefore entitled to appeal separately the merits of their termination to the Board.

Finally, the class does *not* include any individual who signed an agreement with the agency to enroll in its deferred resignation program or any similar agreement waiving their rights to pursue a Board appeal of their termination.

While the agency argued that the class should be limited to FEMA and CISA, the two agency components that employed the named appellants, I do not find such limitation necessary or efficient. The agency responsible for the action is the respondent in a Board appeal, not the underlying agency department or

subcomponent. *See, e.g., Doe v. Department of Justice*, 95 M.S.P.R. 198, n.2 (2003). Further, the interests of fairness and efficiency are served by including in the class any individual who was issued a substantively identical termination notice as directed by the agency CHCO’s February 14, 2025, email, that both parties submitted with their class certification briefs. IAF, Tab 16 at 704; Tab 19 at 10.

Jurisdiction

The Board may not have jurisdiction over the matter being appealed. Jurisdiction is the authority of the Board to make decisions about legal matters. The Board does not have jurisdiction over all matters that are alleged to be unfair or incorrect. *See Miller v. Department of Homeland Security*, 111 M.S.P.R. 325, 332-22 (2009). Subject to some exceptions, the Board generally does not have jurisdiction to review the termination of individuals serving a probationary or trial period that are not “employees” as defined by 5 U.S.C. § 7511.

The class members are all individuals who were serving a probationary or trial period. The issue of the Board’s jurisdiction to review their terminations is common to the class, and the Board must dismiss this appeal if it does not have jurisdiction over the agency’s actions. The appellants do not assert that the class members could non-frivolously allege Board jurisdiction based on the limited regulatory appeal rights in 5 C.F.R. §§ 315.805-.806,³ and I have excluded from the class any individual that can non-frivolously allege they are an “employee” with Board appeal rights as defined in 5 U.S.C. § 7511.

³ On April 24, 2025, President Donald J. Trump issued an Executive Order (EO) titled “Strengthening Probationary Periods in the Federal Service,” promulgating part 11 of Title 5, Code of Federal Regulations (Probationary and Trial Periods (Rule XI)). <https://www.ecfr.gov/current/title-5/part-11>. By its terms, the EO supersede subpart H of part 315 of Title 5, Code of Federal Regulations (Probation on Initial Appointment to a Competitive Position), rendering it inoperative and without effect for actions taken on or after April 24, 2025. Subpart H included limited appeal rights for the competitive service based on claims of marital status and partisan political discrimination, as well as the procedural protections applicable when a termination was based on pre-employment reasons. This EO does not apply to the terminations challenged here, which occurred prior to April 24, 2025.

Rather, the appellants assert that the Board has jurisdiction over the agency's actions as a Reduction in Force (RIF). *See* 5 U.S.C. § 3502; 5 C.F.R. part 351. The agency's termination letters do not refer to a RIF or reference the RIF regulatory authority, nor does the agency's action comply with the procedural requirements therein. IAF, Tab 16 at 9; Tab 17 at 5. The agency denies that it conducted a RIF or that it was required to comply with those procedures. *Id.*

The Board's jurisdiction over RIF appeals is not statutory and instead derives from regulation. *Kohfield v. Department of the Navy*, 75 M.S.P.R. 1, 4 (1997). The Board has jurisdiction when an employee was furloughed for more than 30 days, separated, or demoted by a RIF action as defined in OPM's regulations. 5 C.F.R. § 351.901. *See Adams v. Department of Defense*, 96 M.S.P.R. 325, ¶ 9 (2004). The appellant has the burden of establishing the Board's jurisdiction under the regulation by a preponderance of the evidence.⁴ *See* 5 C.F.R. § 1201.56(b)(2)(i)(A).

The appellant's submission in support of class certification included argument related to the Board's jurisdiction. I ORDER the appellant to submit any additional evidence and argument they would like considered with respect to the Board's jurisdiction on or before **June 12, 2025**. The agency may reply to the appellant's submission by no later than **June 26, 2025**. The record on Jurisdiction will close on **June 26, 2025**. No further evidence or argument will be accepted after that date unless the party submitting it shows that it was not previously available, or it is in response to new evidence and argument submitted by the opposing party immediately before the record closed. 5 C.F.R. § 1201.59(c). The last day for any such submission is July 1, 2025.

Discovery

If the parties wish to pursue further or additional discovery related to the jurisdictional issue, they must do so promptly. I have included time in this

⁴ A preponderance of the evidence is "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." *See* 5 C.F.R. § 1201.4(q).

schedule for the parties to complete discovery on the jurisdictional issue. If the parties require additional time to gather and produce information necessary to their jurisdictional submissions, they must contact this office and schedule a call to revise the briefing schedule.

Notice

The parties represent that approximately 369 individuals were terminated in response to the CHCO's February 14, 2025, email. Class counsel included copies of the termination notices and a list of individuals with their supplemental request for class certification. IAF, Tab 16 at 28-703, 716-24. The appellant must notify each impacted employee, in writing: that this class has been certified, that they may meet the definition of the class, and that they will become part of the class and be bound by any decision in this appeal unless they "opt out" by filing an individual appeal⁵ within 30 days of the date of this order. By no later than **May 30, 2025**, I **ORDER** the parties to meet and confer with respect to the text of the notice that will be provided to the class members, and to submit the proposed notice to the Board. If the parties are unable to agree to the text of the notice, they may each submit their version for approval.

Exceptions and Objections

Any objections or exceptions to any of the matters addressed above must be **received** in this office within 10 calendar days of the date of this order or shall be deemed waived.

Sara K Snyder

FOR THE BOARD:

Sara K Snyder
Chief Administrative Judge

⁵ To the extent that putative class members have already filed individual appeals, they will be notified by separate order that their appeals will be dismissed and subsumed in the class unless they timely elect to proceed individually.