UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

INTERIOR PROBATIONARY EMPLOYEES CLASS,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Agency,

and

DIRECTOR OF THE OFFICE OF PERSONNEL MANAGEMENT,

Intervenor.

DOCKET NUMBER
DC-0752-25-1550-I-1

DATE: July 17, 2025

ORDER CERTIFYING CLASS APPEAL

On March 4, 2025, the appellants filed the instant appeal seeking certification of a class appeal pursuant to 5 C.F.R. §1201.27. Initial Appeal File (IAF), Tab 1. 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 material facts stated here are not in dispute. On or about January 20, 2025, in response to a guidance memorandum from the Office of Personnel Management, the agency's Deputy Assistant Secretary for Human Capital reviewed the agency's probationary and trial period employees and decided to terminate the appointments of approximately 1,712 probationary and trial period employees in both the competitive and excepted service. IAF, Tab 23 at 72. Between February

14, 2025, and February 18, 2025, the agency sent the subject employees substantively identical termination notices. *Id.* Multiple examples of the notices are included in the record, all of which provide Board appeal rights.[1] IAF, Tabs 1, 14, 23.

On March 4, 2025, the appellants filed the instant request for a nation-wide class appeal on behalf of three named individuals who held competitive service probationary appointments with the Fish and Wildlife Service, the National Park Service, and the U.S. Geological Survey,[2] 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 Interior (DOI) ("Agency") and who were not provided the rights accorded to employees under a Reduction in Force ("RIF"), between February 10, 2025, and the first day of a hearing on Appellants claims." IAF, Tab 1.

On or after March 13, 2025, in response to other litigation, the agency began to reinstate the putative class members. IAF, Tab 23 at 73. On March 25, I granted the putative class counsel's request for discovery. IAF, Tab 3, 6. On April 7, 2025, I stayed discovery and all pending deadlines based on the agency's representation that it was rescinding the probationary terminations at issue. IAF, Tab 8. I extended the deadline for the agency to produce evidence of its rescission and then issued an Order to Show cause, providing the parties with the law applicable to a rescission. IAF, Tab 13. Both parties responded. IAF, Tabs 20, 23.

After reviewing the responses, I conducted a status conference to discuss the disputed issues related to class certification. IAF, Tab 26. After a second conference, at its request, I provided the agency with additional time and a deadline

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[1] In February, the Board docketed over 500 individual appeals from terminated agency employees which are being held in abeyance pending adjudication of the instant appeal.

[2] On April 30, 2025, the appellants filed a motion to substitute one of the original appellants with an individual who had been terminated from a probationary appointment with the Bureau of Land Management. IAF, Tab 14.

to submit evidence of a complete rescission. IAF, Tab 28. Both parties again responded. IAF, Tabs 29-34.

The agency submitted a declaration from its Acting Chief Human Capital Officer, stating that it has rescinded the February probationary terminations and taken steps to provide back-pay and restore benefits. IAF, Tab 33 at 5. The agency further explained that of the employees it terminated, 986 have been reinstated and returned to full duty, 269 have resigned from service, 323 have enrolled in the deferred resignation program, which requires those employees to waive their appeal rights, and 274 remain on administrative leave. IAF, Tab 33 at 4. The appellant produced declarations from class members identifying imperfections in the agency's rescission of the action, to include that the termination notices, while cancelled, remain in the employee's personnel files, errors in pay, failure to restore benefits, and retention on administrative leave. IAF, Tabs 23, 34.

Class Certification

The Board's regulations provide that an appeal may be heard as a class appeal if the judge determines that it is the "fairest and most efficient way to adjudicate the appeal" and that the representative of the parties will adequately protect the interests of all class members. *See* 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*, *e.g.*, *Kluge v. Department of Homeland Security*, 60 F.4th 1361, 1365 (Fed. Cir. 2023). Rule 23 sets out the following prerequisites to class certification: (1) the class is so numerous that joinder of all members is impracticable (frequently called the "numerosity" requirement), (2) that there are questions of law or fact common to the class (frequently called the "commonality" requirement), (3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class (frequently called the "typicality" requirement), and (4) that the representative parties will fairly and adequately protect the interests of the class (frequently called the "adequacy" requirement).

The appeals underlying the appellant's request for class certification present multiple jurisdictional issues. The Board's jurisdiction over an agency action is determined by the nature of the action at the time an appeal is filed with the Board. *See Fernandez v. Department of Justice*, 105 M.S.P.R. 443, ¶ 5 (2007) (citing *Hagan v. Department of the Army*, 99 M.S.P.R. 313, ¶ 6 (2005)). However, an agency's unilateral modification of its action after an appeal has been filed can divest the Board of jurisdiction if the appellant consents or the agency *completely rescinds* the action. *See Fernandez*, 105 M.S.P.R. at ¶ 5. The agency claims that it has cancelled the termination notices issued to putative class members and returned many of them to pay and duty status, with back pay and restored benefits. I have considered these facts in the context of class certification. For an agency to effectively rescind or cancel the action appealed, it must return the potential class members to status quo ante. *Harris v. Department of the Air Force*, 96 M.S.P.R. 193 (2004). Here, this means that the agency must have placed the appellants, with back pay, in a position of the same grade, pay, status, and tenure as the one occupied before the agency action, and remove all references to the action from the appellants' personnel files. *See Payne v. U.S. Postal Service*, 77 M.S.P.R. 97, 101 (1997); *Tyrrell v. Department of Veterans Affairs*, 60 M.S.P.R. 276, 278 (1994). An agency's representation that it intends to pay an employee or intends to remove references from a personnel file is not sufficient to moot a viable claim. *See Sredzinski v. U.S. Postal Service*, 105 M.S.P.R. 571, ¶ 7 (2007). Placement of an employee on administrative leave following cancellation of an adverse action is also insufficient. *Id.*, ¶ 8.

Considering these issues in the context of class certification, to the extent that putative class members challenge the agency's rescission, the issues they raise are not common to or typical of other class members and are not amenable to class adjudication. IAF, Tab 23. When this request was filed, the agency had issued nearly identical termination notices to over 1,700 employees. The appellant argues that the Board has jurisdiction over these appeals because the agency failed to

follow the regulations for conducting a RIF. IAF, Tabs 1, 23, 34. Unlike the issues presented by a potential rescission, this jurisdictional issue is founded on facts common to all the putative class members. It satisfies both the commonality and typicality requirements and can be efficiently decided in advance of addressing any issues related to individual rescissions. I find these factors weigh in favor of class certification. The agency acknowledged that there are still nearly 300 employees on administrative leave. IAF, Tab 33. It also appears to concede that it has not removed references to the cancelled actions from employee personnel files. *Id.* While the agency's actions have likely reduced the number of aggrieved class members significantly, I find that the class is still sufficiently numerous that individual adjudication would be inefficient, if not unfeasible. Neither party has challenged the adequacy of the putative class counsel.

Having considered the parties' submissions and the circumstances here, 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*, 60 F.4th at 1365.

Class Definition

The parties submitted a joint status report in which they appear to agree that if a class is certified, the class should be defined more clearly than in the appellant's initial request. The class will proceed as follows:

The class will consist of any agency employees serving in a probationary or trial period who were issued termination notices between February 14-18, 2025, in response to a January 20, 2025, guidance memorandum issued by the Office of Personnel Management.

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 does *not* include any individual that can nonfrivolously allege they are an "employee" with Board appeal rights as defined in 5 U.S.C. § 7511.

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 the right to pursue a Board appeal of their termination.

While the agency argued that the class should be limited to those employees who remain on administrative leave, I find such a limitation unnecessary. The purpose of class certification is to address the appellant's assertion that the agency's actions violated the RIF regulations. Resolving that question will create efficiencies. The appellant argued that individuals who may be employees with Board appeal rights as defined in 5 U.S.C. § 7511 should not be excluded from the class because that determination is factually intensive. However, for that very reason, individuals who believe they should have Board appeal rights as an employee must pursue individual appeals rather than be included in a class that may not provide the full spectrum of relief to which they are entitled.

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 who 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 nonfrivolously allege Board jurisdiction based on the limited regulatory appeal rights in 5 C.F.R. §§ 315.805-.806.[3] I have excluded from the class any individual who can nonfrivolously allege they are an "employee" with Board appeal rights as defined in 5 U.S.C. § 7511.

Rather, the appellants assert that the Board has jurisdiction over the agency's actions as a RIF. *See* 5 U.S.C. § 3502; 5 C.F.R. part 351. 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).

I will conduct a status conference with the parties to discuss the scope of any necessary jurisdictional discovery and to set a schedule for briefing and determination of this issue. I will also discuss with the parties the need for the appellant to 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

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[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.

[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).

part of the class and be bound by any decision in this appeal unless they "opt out" by filing an individual appeal[5] within 35 days of the date of this order.

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.

FOR THE BOARD:

Sara K Snyder
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Sara K Snyder
Chief Administrative Judge

FOR THE BOARD:

Sara K Snyder
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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.