UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

HUD PROBATIONARY EMPLOYEES CLASS,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Agency.

DOCKET NUMBER
DC-0752-25-1771-I-1

DATE:

ORDER GRANTING REQUEST FOR CLASS CERTIFICATION

On March 21, 2025, the appellants filed the instant appeal seeking certification of a class appeal pursuant to 5 C.F.R. §1201.27. Appeal File (AF), Tab 1. The appellants' 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. In early February 2025, in response to a guidance memorandum from the Office of Personnel Management, the agency compiled and then reviewed a list of its then current probationary and trial period employees and decided to terminate the appointments of approximately 312 probationary and trial period employees in both the competitive and excepted service. AF, Tab 14 at 22. On February 14, 2025, the agency sent the subject employees substantively identical termination notices. AF, Tab 18.

On March 21, 2025, the appellants filed the instant request for a nation-wide class appeal on behalf of three named individuals 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 Housing and Urban Development ("Agency") and who were not provided a Reduction in Force ("RIF") notice, . . . between February 10, 2025, and the first day of a hearing on Appellants' claims." AF, Tab 1.

On or after March 13, 2025, in response to other litigation, the agency began to reinstate the putative class members. AF, Tab 14 at 22-23. On March 25, 2025, I granted the putative class counsel's request for discovery. AF, Tab 5. On June 27, 2025, I conducted a status conference to discuss disputed issues related to class certification and to set a briefing schedule. AF, Tab 20. The parties then submitted supplemental briefs regarding the question of whether employees who received termination notices in May 2025 should be included in the putative class. AF, Tabs 24, 25.

The agency submitted a declaration from its Chief Human Capital Officer, stating that it rescinded the February probationary terminations and was making efforts to place all 312 affected employees on administrative leave by March 17, 2025. AF, Tab 14 at 22-23. The agency has not argued that the rescission of the probationary terminations provided all the putative class members with the equivalent of a *status quo ante*[1] remedy, nor has it argued that the appeal should be dismissed as moot.

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

[1] While the agency provided evidence that it intended to place all the probationary employees who were terminated on February 4, 2025 on administrative leave status by March 17, 2025, it did not specify whether the employees received backpay for the intervening pay periods nor whether their termination notices were removed from their personnel files.

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 appellants' 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)). Nonetheless, 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. For an agency to effectively rescind or cancel the action appealed, it must return the potential class members to the *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 removed 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 generally insufficient. *Id.*, ¶ 8.

When the request for class certification was filed, the agency had issued nearly identical termination notices to approximately 312 employees. The appellant argues that the Board has jurisdiction over these appeals because the agency failed to follow the regulations for conducting a RIF. AF, Tabs 1, 11, 24. This jurisdictional question is founded on facts common to all the putative class members. It satisfies both the commonality and typicality requirements and can be efficiently decided regardless of any issues related to individual rescissions. I find these factors weigh in favor of class certification. 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 class will consist of any agency employees serving in a probationary or trial period who were issued termination notices on or about February 14, 2025, in response to a January 20, 2025, guidance memorandum issued by the Office of Personnel Management. 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.

The appellants argued that the class should also include employees who received second termination notices on May 15, 2025. AF, Tab 24. I find that expansion of the class definition to refer to the second round of termination notices is unnecessary. The appellants conceded that "each of the approximately 74 probationary termination notices resent in May 2025 was to an employee that had already received notice of their probationary termination in February 2025." AF, Tab 24 at 6. Accordingly, all of these individuals are already included in the class definition. 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.

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.[2] I have excluded from the

[2] 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

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.[3] *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 appellants 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 part of the class and be bound by any decision in this appeal unless they "opt out" by filing an individual appeal[4] within 35 days of the date of this order.

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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.

[3] 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).

[4] 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.

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:

Jeremiah Cassidy

Jeremiah Cassidy
Chief Administrative Judge