

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

**COMMERCE PROBATIONARY
EMPLOYEES CLASS**

Appellants,

v.

DEPARTMENT OF COMMERCE

Agency.

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) **Docket No.** DC-0752-25-1770-I-1
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) **Before:** Jeremiah Cassidy
) Chief Administrative Judge
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) **Date:** January 16, 2026
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**APPELLANTS’ SUPPLEMENTAL BRIEF IN SUPPORT OF PROPOSED
POST-PROBATIONARY SUBCLASS**

Pursuant to the Administrative Judge’s (AJ)’s December 18, 2025 Order, Appellants submit this supplemental brief addressing the numerosity of Appellants’ proposed post-probationary subclass.

The Agency has identified 46 people who fall within the proposed post-probationary subclass. Because this number is sufficient to establish numerosity, the AJ should grant class certification as to the subclass.

Appellants note that, following the AJ’s December 18 Order, the Agency offered reinstatement to most members of the proposed 46-person subclass, apparently recognizing that these employees were unlawfully terminated. However, the Agency has not yet provided back pay or otherwise restored members of the subclass to the *status quo ante*—and has taken no such steps to offer reinstatement to the remaining 716 members of the main class. Accordingly, Appellants urge the

AJ to move forward with class certification as to the main class and subclass, subject to a future motion for partial dismissal if the claims of the subclass become moot.

I. Background

A. DOC's Mass Termination Actions.

Beginning on February 27, 2025, the Department of Commerce (DOC or Agency) fired 762 workers in a mass termination of workers the Agency regarded as probationary or trial period employees.¹ A federal court issued a temporary order briefly requiring the Agency to rehire the putative class members between February 27, 2025, and April 10, 2025. But once that court order expired, DOC summarily reinstated the mass terminations.

On December 16, 2026, Appellants filed an Amended Motion for Class Certification requesting that the AJ grant a putative subclass of DOC employees who completed their probationary or trial periods between February 27 and April 10, 2025. *See* IAF, Tab 37. As Appellants explained in their Amended Motion for Class Certification, those employees were entitled to due process rights—which the Agency ignored by summarily terminating them without following the RIF regulation or, in the alternative, without good cause, notice, or an opportunity to respond.

¹ This brief uses the term “probationary” to refer to both probationary and trial period employees, unless otherwise noted.

B. Appellants' Proposed Class and Subclass.

Appellants seek certification of the following main class:

The 762 individuals identified in the declaration of Jessica S. Palatka filed by the Agency in *Maryland v. U.S. Dep't of Agric.*, No. CV JKB-25-048 (D. Md. Mar. 25, 2025), ECF No. 103-1.

Appellants also seek certification of the following subclass, referred to as the “post-probationary subclass”:

Individuals among the 762 identified in the declaration of Jessica S. Palatka filed by the Agency in *Maryland v. U.S. Dep't of Agric.*, No. CV JKB-25-048 (D. Md. Mar. 25, 2025), ECF No. 103-1, who began working at DOC in the positions from which they were terminated as competitive service employees from February 27–April 10, 2024, or as excepted service employees from February 27–April 10, 2023.

Appellants previously explained why the proposed class satisfies the requirements of 5 C.F.R. § 1201.27(a) and Rule 23. *See* IAF, Tab 14 (Initial Supplement in Support of Class Certification); Tab 17 (Reply in Support of Class Certification); Tab 27 (Appellants' Reply to Agency's Remaining Objections to Class Certification).²

Further, Appellants previously explained that the post-probationary subclass satisfies the requirements of 5 C.F.R. § 1201.27(a) and Rule 23. *See* IAF, Tab 37

² *See also, e.g., HUD Probationary Emps. Class v. Dep't of Hous. & Urb. Dev.*, No. DC-0752-25-1771-I-1, Tab 28, at *4 (M.S.P.B. Dec. 2, 2025) (certifying a class of “approximately 312” HUD probationary employees who received “nearly identical termination notices” because a class appeal was the “fairest and most efficient way to adjudicate” the *de facto* RIF claims challenging the same early 2025 mass termination at HUD); *OPM Probationary Emps. Class v. Off. of Pers. Mgmt.*, No. DC-0752-25-1542-I-1, Tab 53 (M.S.P.B. Dec. 2, 2025) (similar); *Interior Probationary Emps. Class v. Dep't of the Interior*, No. DC-0752-25-1550-I-1, Tab 35 (M.S.P.B. July 17, 2025) (similar).

(Amended Motion for Class Certification). In a December 17, 2025, status conference, the AJ directed the parties to engage in “targeted discovery” and briefing limited to the issue of numerosity. *See* IAF, Tab 38, at 1.

II. The 46-Person Subclass Satisfies the Numerosity Requirement.

The numerosity requirement is typically met when a class includes 40 or more people. *Novella v. Westchester Cty.*, 661 F.3d 128, 143–44 (2d Cir. 2011); *see also Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012) (similar); *Orr v. Shicker*, 953 F.3d 490, 498 (7th Cir. 2020) (similar); *In re: Zetia (Ezetimibe) Antitrust Litig. v. Merck & Co., Inc.*, 7 F.4th 227, 234 (4th Cir. 2021) (similar).

Here, the proposed subclass satisfies the numerosity requirement because the Agency has identified 46 people who belong in the subclass. *See* Ex. A (Agency Responses to Appellants’ Discovery Requests). The large number of terminations and their widespread geographic distribution renders individual adjudication “inefficient, if not unfeasible.” *See HUD Probationary Emps.*, No. DC-0752-25-1771-I-1, Tab 28, at *4. Further, when all members of a subclass are also members of a larger, general class, courts apply a “relaxed numerosity approach.” William B. Rubenstein, *Newberg & Rubenstein on Class Actions* § 3:16. Under this relaxed approach, a court may create a subclass that contains a “substantial” number of class members, but “still less than” the typical threshold for certifying the whole class, “for reasons of convenience and judicial economy.”³ *Id.* Thus, the proposed subclass plainly meets the numerosity requirement.

³ Fed. R. Civ. P. 23(d) authorizes courts to create a case-management subclass of a class action that would “segregate[e] a distinct legal issue that is common to

III. In recent weeks, the Agency has offered reinstatement to at least some members of the proposed subclass—but has not yet provided them with back pay.

In recent weeks, the Agency has begun making offers of reinstatement to the 46 members of the subclass. On January 14, 2025, the Agency represented to Appellants’ counsel that: (1) the Agency has contacted substantially all members of the putative subclass to make an offer of reinstatement; (2) subclass members will receive back pay, but that the Agency is not yet able to provide a firm timeline for when they will effectuate back pay payments.

Because subclass members have not yet received back pay, they have not yet been restored to the *status quo ante* and their appeals may not be dismissed as moot at this time. *See Fernandez v. Dep’t of Just.*, 105 M.S.P.R. 443, 446 (M.S.P.B. 2007) (holding that the Board may not dismiss an appeal as moot unless an employee has “received all of the relief that he could have received ‘if the matter had been adjudicated and he had prevailed.’”) However, Appellants continue to monitor the Agency’s progress in returning members of the subclass to the status quo. Appellants are open to dismissing subclass members’ claims as moot if the Agency does, in fact, make these 46 employees whole.

some,” but not all, “members of the existing class.” Rubenstein, *Newberg & Rubenstein on Class Actions* § 7:32 (6th ed. Dec. 2025 update); *see also, e.g., Peters v. Aetna Inc.*, 2 F.4th 199, 243–44 (4th Cir. 2021) (explaining that “subclasses may be created for purposes of case management” when some members of a class action have a distinct, additional legal claim in common). Case-management subclasses are an informal tool used to promote efficiency and so need not “have different representation” nor “independently comply with all of the requirements of Rule 23(a), (b), and (g).” Rubenstein, *Newberg and Rubenstein on Class Actions* § 7:29 (6th ed.); *see also id.* § 7:32.

Notably, the Agency has not taken any steps to make the other 716 members of the putative class whole. All 716 of those class members have live claims. Thus, Appellants request that the AJ: 1) certify the general class; 2) certify the proposed post-probationary subclass, with the understanding that the subclass's claims may later be dismissed as moot; and 3) allow the general class to proceed to jurisdictional discovery, without waiting for the Agency to effectuate back pay payments to subclass members on an uncertain timeline.

CONCLUSION

For the foregoing reasons, the named Appellants respectfully request that the Chief Administrative Judge:

- (1) Certify a class appeal for: The 762 individuals identified in the declaration of Jessica S. Palatka filed by the Agency in *Maryland v. U.S. Dep't of Agric.*, No. CV JKB-25-048 (D. Md. Mar. 25, 2025), ECF No. 103-1. *See* IAF, Tab 37, Ex. G (Palatka Decl.);
- (2) Certify a subclass of class members who began working at DOC in the positions from which they were terminated as competitive service employees from February 27–April 10, 2024, or as excepted service employees from February 27–April 10, 2023;
- (3) Authorize jurisdictional discovery and issue a jurisdictional discovery schedule; and
- (4) In the alternative, if the Chief Administrative Judge is not yet prepared to certify a class appeal or create the proposed subclass based on the current record, grant Appellant's pending Motion to Compel class discovery responses and authorize additional discovery related to the proposed subclass.

Respectfully submitted,

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