UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

COMMERCE PROBATIONARY EMPLOYEES CLASS, Appellants,	)	Docket No: DC-0752-25-1770-I-1
v.	)	Chief Administrative Judge: Jeremiah Cassidy
U.S. DEPARTMENT OF COMMERCE, Agency.	)	January 26, 2026

AGENCY'S OPPOSITION TO APPELLANT'S AMENDED MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Pursuant to 5 C.F.R. § 1201.27(b) and the December 18, 2025 Order and Summary of Status Conference, the United States Department of Commerce (Agency), through its undersigned representative, hereby submits its Opposition to Appellant's Amended Motion for Class Certification. In its Amended Motion and Supplemental Brief, Appellants seek the certification of a subclass of individuals who allegedly completed their probationary and/or trial period between the original date of their termination and April 10, 2025. In support of this request, Appellants claim that the prospective subclass meet all Rule 23 requirements. However, the Agency disputes that there are issues common to the class and subclass. Specifically, and as asserted in the Agency's prior briefing, the Board does not have jurisdiction over the claims of the class as general and the Appellant's cannot use the claims of a small group of individuals to gain jurisdiction over the entire class.

Furthermore, as acknowledged by Appellants, the Agency has already taken action to cancel the termination action, reinstated each of the individuals at issue, and given each individual the option of returning to duty or negotiating a resignation date. Therefore, these

individuals have not been terminated and should not be a member of the class let alone a member of the subclass. As such, the Board should not certify this subclass. Further, contrary to Appellant's concerns, the Board does not need to certify the subclass as any issues that arise with providing this relief will be individual questions not common questions as required by Rule 23(b)(3). Therefore, the Board should deny certification of the subclass.

II. BACKGROUND

1. On March 6, 2025, Maryland and other states filed a complaint in United States District Court for the District of Maryland against the Agency, and other Federal government agencies, alleging that their termination of probationary employees circumvented RIF requirements. See Maryland v. United States Dep't of Agric., No. CV JKB-25-0748 (D. Md. Mar. 6, 2025), ECF No. 1.

2. On March 13, 2025, the court entered a Temporary Restraining Order (TRO) restraining the Agency from, among other things, terminating certain affected probationary employees and ordering them to reinstate all affected probationary employees. See Maryland v. United States Dep't of Agric., No. CV JKB-25-0748, 2025 WL 800216 (D. Md. Mar. 13, 2025).

3. That same day, the Agency became a party to another lawsuit in United States District Court for the Northern District of California and that court subsequently issued a similar preliminary injunction. See Am. Fed'n of Gov't Emps., AFL-CIO v. United States Off. of Pers. Mgmt., No. C 25-01780 WHA, 2025 WL 820782, (N.D. Cal. Mar. 14, 2025).

4. On March 14, 2025, four named Appellants filed the instant appeal, seeking to represent the following class:

> All persons who were subject to separation from federal service on the grounds that they were probationary or trial period employees of the Department of Commerce (DOC) ("Agency"), and who were not provided a Reduction in Force ("RIF") notice, see 5 C.F.R. § 351.801, between February 10, 2025, and the first day of a hearing on Appellants' claims.

See Initial Appeal File (IAF), Tab 1 at 2.

5. Three of the four named Appellants indicate they were in the competitive service. See IAF, Tab 1 at 6, 12, 18. All three of the Appellants in the competitive service acknowledge that they were in their probationary period and have less than one year of total prior Federal service. See id. The remaining Appellant was a non-preference eligible in the excepted service in their trial period, with less than two years of Federal service. See IAF, Tab 1 at 24.

6. By letter dated March 17, 2025, John Guenther, Acting General Counsel for the Agency, informed certain probationary employees that, in compliance with the TRO in State of Maryland *et al* v. United States Department of Agriculture *et al.,* the Agency was reinstating them to the Federal service and placing them in a non-duty paid status. See IAF, Tab 2 at 7.

7. On April 1, 2025, the United States District Court for the District of Maryland issued a preliminary injunction superseding the temporary restraining order and requiring the named defendants to reinstate affected probationary employees.

8. On April 9, 2025, the United States Court of Appeals for the Fourth Circuit stayed the preliminary injunction issued by the United States District Court for the District of Maryland. See Maryland v. United States Dep't of Agric., No. 25-1248, 2025 WL 1073657 (4th Cir. Apr. 9, 2025)

9. On April 10, 2025, the Agency notified impacted probationary employees that it would be reverting the termination action to its original effective date. See IAF, Tab 2 at 7.

10. On April 22, 2025, the administrative judge in the instant matter issued an Acknowledgment Order directing Appellants, within 7 calendar days, to supplement or amend their request for this case to be heard as a class appeal. IAF, Tab 5. The Order further directed the Agency to file its response to class certification within 14 calendar days. Id.

11. On April 29, 2025, Appellants filed their Initial Supplement in Support of Class Certification. See IAF, Tab 14. Therein, Appellants submitted various evidence and arguments in support of class certification and reiterated their desire to represent the following class:

> All persons who were subject to separation from federal service between February 10, 2025, and the first day of a hearing on Appellants' claims on the grounds that they were probationary or trial period employees of the Department of Commerce ("Agency") and who were not provided a Reduction in Force ("RIF") notice, see 5 C.F.R. § 351.802.

See IAF, Tab 14 at 13.

12. On May 6, 2025, the Agency filed its Opposition to Class Certification See IAF, Tab 15.

13. On May 13, 2025, Appellants filed a Request for Leave to Submit a Reply in Support of Class Certification and Proposed Reply. See IAF, Tab 14 at 17. Therein, Appellant sought to amend their proposed class definition to the following:

> 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.

14. On July 9, 2025, the Agency filed its Reply arguing that the Appellants' proposed definition still does not satisfy the requirements of commonality and typicality. See IAF, Tab 26.

15. On September 12, 2025, Judge William Alsup in the N.D. California issued an order in Am. Fed'n of Gov't Emps., AFL-CIO v. United States Off. of Pers. Mgmt., requiring the Agency to update the effective date of the termination action to April 9, 2025 or later.

16. On December 16, 2025, Appellants filed an Amended Motion for Class Certification seeking to certify the following 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, see Exhibit G (Palatka Decl.), 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.

III. ARGUMENT

A. The individuals at issue should not be considered part of the putative class.

As detailed above, Appellants are seeking to certify a subclass of individuals that were terminated from their positions in the competitive service or excepted service between February 27, 2025 and April 10, 2025. However, these individuals should no longer be considered part of the class or a subclass as the Agency has taken action to cancel those terminations and offer each of the individuals the option of returning to duty or resigning. See Ex. A. The Agency identified 47 individuals who completed their probationary and/or trial period during the time period in question and beginning in early December 2025, reached out to the impacted individuals to inform them that their termination was being rescinded and had the option of returning to work and/or resigning. Id. Out of these 47 individuals, 37 have agreed to return to duty with a number of these individuals already returning to work at the respective bureaus. The remaining individuals that opted not to return have negotiated a return date. Id. For all of these individuals, the Agency will be providing backpay from the date of the termination action to the date of their return to duty and/or resignation date. Id. As these individuals have not been terminated, they no longer fit within the proposed class definition let alone the proposed subclass.

B. Appellants fail to satisfy the prerequisite of commonality or typicality.

Commonality requires a showing that "there are some questions of law or fact common to the class." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) (citing Fed. R. Civ. P. 23(a)(2)). In focusing on the commonality requirement, the court noted that the rule requiring a plaintiff to show that "there are questions of law or fact common to the class" is "easy to misread, since any competently crafted class complaint literally raises common questions." Id

(internal quotations omitted). Instead, class member claims must depend upon a common contention and "that common contention must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id at 350.

Here, Appellant has failed to show that their subclass has the same questions of law or fact common to the class. Appellants argue that the subclass advances the same jurisdictional issue that the class does, "whether the Agency subjected them, along with the entire class, to a *de facto* RIF without affording them their RIF rights under OPM regulations." See IAF, Tab 37. However, this argument ignores a critical difference in the Board's jurisdiction of "employees" with appeal rights versus those that were still serving a probationary or trial period at the time of their separation.

Specifically, with respect to the appellants that were not employees" with appeal rights under 5 U.S.C. § 7511, the Board's jurisdiction is limited to only those grounds appealable by employees serving a probationary period at the time of their termination. See 5 C.F.R. § § 315.805, 315.806. At the time of the action at issue, terminated probationary employees in the competitive service could only bring an appeal of their termination to the Board in three very limited circumstances: (1) the employee was discriminated against on account of their marital status; (2) the employee was discriminated against based on their partisan political affiliation; or (3) the agency action was based (in whole or part) on issues that arose pre-appointment and the required procedures were not followed. Niemi v. Dep't of Interior, 114 M.S.P.R. 143, ¶ 9 (2010). An individual in the excepted service has no similar right to appeal. See Ramirez–Evans v. Department of Veterans Affairs, 113 M.S.P.R. 297, ¶ 10 (2010); see also Barrand v. Department of Veterans Affairs, 112 M.S.P.R. 210, ¶ 8 (2009). However, this is not the case for the

individuals who completed their probationary and/or trial period as a result of Judge Alsup's order. Otherwise stated, the Board's jurisdiction of the class as a whole versus the Board's jurisdiction of the subclass are not necessarily answered by the question of whether the Agency subjected them, along with the entire class, to a *de facto* RIF. The Board may have jurisdiction over an adverse action if an Appellant is an "employee" as defined by 5 U.S.C. § 7511(a)(1). However, it is well-settled that someone serving in a probationary or trial period is not an "employee" and is generally without the right to appeal a removal to the Board. See Mastriano v. Fed. Aviation Admin., 714 F.2d 1152 (Fed. Cir. 1983). Therefore, the Board should find that Appellants have failed to satisfy the commonality requirement for certification of the subclass.

Typicality focuses on the similarities or differences between the class representatives' legal theories and claims. See Boley v. Universal Health Servs., Inc., 36 F.4th 124, 133 (3d Cir. 2022) (citing In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 597–98 (3d Cir. 2009)). The overriding principle in assessing typicality is that the interests of the class members must be fairly encompassed within the class agents' claim. Falcon, 457 U.S. at 160. Similar to commonality, Appellants also have typicality issues with the proposed subclass. Here, the proposed subclass does not have claims that are typical of the larger class. As demonstrated above, Appellants' proposed class casts such a wide net that their claims do not necessarily challenge the same Agency practice. See Supra Section IV(B)(2); see also Falcon, 457 U.S. at 157 n.13 (explaining that commonality and typicality tend to merge and are often indistinguishable). As such, the Board should also find that Appellants have failed to satisfy the typicality requirement for certification of the subclass.

C. Appellants fail to satisfy the Federal Rule of Civil Procedure 23(b)(3) with respect to certification of the subclass.

Rule 23(b)(3) was created for circumstances where "class action treatment is not as clearly called for" but where class certification may nonetheless be "convenient and desirable." See Anchem Products, Inc. v. Windsor, 521 U.S. 591, 615 (1997) (citing Fed. R. Civ. P. 23 advisory committee's note). A party seeking class certification under Federal Rule of Civil Procedure 23(b)(3), must establish that common questions of law or fact "predominate" over questions affecting individual class members and that a class resolution is the "superior" method to other available methods for the fair and efficient adjudication of the controversy. See id. Appellants allege that the proposed subclass has common questions that predominate over individual ones. Specifically, whether the members of the subclass earned due process rights and whether the Agency violated those due process rights. See IAF, Tab 37. However, as detailed above, that is no longer the issue before the Board. As Appellants acknowledged, the Agency has already taken steps to return the individuals identified as completing their probationary and/or trial period during the time period in question to their former positions in the Agency.

Appellants now argue that the Board should still certify the subclass as the individuals in question have not received their backpay and can later dismiss the subclass as appropriate if the claims are moot. However, certifying the class no longer makes sense as the interests of the parties are no longer "sufficiently cohesive to warrant adjudication by representation." Anchem Products, Inc. v. Windsor, 521 U.S. 591, 623 (1997). Rule 23(b)(3)'s superiority determination involves comparing representative litigation as a procedural mechanism to available alternatives. See Dickens v. GC Services Limited Partnership, 706 Fed. Appx. 529, 537–38 (11th Cir. 2017) (explaining that, "[p]roper superiority analysis considers 'the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the

plaintiffs.'") (quoting Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc., 601 F.3d 1159, 1184 (11th Cir. 2010)).

As detailed in the attached declarations, the Agency has contacted all of the individuals that it identified as having completed their probationary and/or trial period prior to their updated termination date and informed them that they were rescinding the termination action. Ex. A. Each individual had the option of either returning to duty or resigning from the Agency and they would receive backpay from the effective date of the termination until either their return to duty or resignation. The primary issue that remains in the calculation of backpay. This is not a quick process and requires the impacted individuals to provide information on any outside earnings and for the Agency to provide that information, along with the relevant pay information to the National Finance Center so that it can calculate the backpay, with applicable interest. The Agency is in the process of collecting this information to distribute to NFC and is happy to provide updates to the Board on its process. However, the fact that this process is still ongoing does not make certification of the subclass appropriate. The issues that would remain before the Board would be individualized issues as to whether backpay was appropriately calculated and not issues that are common to the class. As such, the Agency requests that the Board deny the Appellants' request to certify a subclass in the instant appeal.

IV. CONCLUSION

As Appellants have not shown that there are common and typical issues across the class and requested subclass, Board should deny certification of the subclass.

Respectfully submitted,

/s Christiann Burek
Christiann Burek
Agency Representative

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DECLARATION OF AMY O. ECKSTINE

I, Amy O. Eckstine, pursuant to 28 U.S.C. § 1746, do hereby state and aver:

1. I serve as a Supervisory HR Specialist in the Talent Acquisition Division at the National Institute of Standards and Technology (NIST), U.S. Department of Commerce (DOC). I have held this position since October 2017.

2. NIST identified 3 individuals who completed their probationary period between February 27, 2025 and April 10, 2025. In early December 2025, NIST contacted the three impacted individuals and informed them that NIST was rescinding their termination. The impacted individuals were offered the choice between returning to NIST or resigning. Two individuals declined the offer to return to their position and negotiated resignation dates effective in December 2025, and one individual returned to duty on December 29, 2025. The two individuals that declined to return to NIST will receive backpay from the date of the termination action up to their resignation date. The individual that returned to NIST will also receive backpay for the time period between the termination date and December 14, 2025.

3. In order to calculate the backpay owed, NIST will send requests the week of January 26, 2026 to each of these individuals to provide information about outside earnings

during the relevant time period. Once NIST/DOC receives that information, they will submit the information regarding outside earnings along with the relevant pay information for processing to the National Finance Center who will calculate the backpay, including any applicable interest.

I have read the above statement consisting of 2 pages. I declare under the penalties of perjury that the foregoing is true, correct, and complete to the best of my knowledge and belief.

AMY ECKSTINE Digitally signed by AMY ECKSTINE Date: 2026.01.26 12:36:21 -05'00'

Amy Eckstine

Date 01/26/2026

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DECLARATION OF CAROLYN SCHAD

I, Carolyn Schad, pursuant to 28 U.S.C. § 1746, do hereby state and aver:

1. I serve as Acting Director for the Office of Human Resources at the U.S. Patent and Trademark Office (USPTO), U.S. Department of Commerce (DOC). I have held this position since February 2025.

2. USPTO identified 3 individuals who completed their probationary period between February 27, 2025 and April 10, 2025. On January 9, 2026, USPTO contacted the three impacted individuals and informed them that USPTO was rescinding their terminations. The impacted individuals were offered the choice between returning to USPTO or resigning.

3. All three individuals agreed to return to duty. All three of them were reinstated to USPTO employment, as of January 12, 2026. One individual was placed on paid administrative leave on January 12, 2026, continues to be on this paid leave, and will return to work as soon as her equipment is delivered. The second individual requested a return-to-work date of January 15, 2026, the USPTO agreed and placed her on paid administrative leave on January 12-14, 2026, and she then returned to work on January 15, 2026. The third individual was placed on leave without pay (LWOP) on January 12, 2026, and will remain on LWOP until their return-to-

duty date scheduled for February 2, 2026.

4. All three individuals will receive all backpay for which they are entitled for the period between their April 10, 2025 termination date and January 12, 2026 reinstatement date.

5. USPTO is currently working on a calculation of the backpay owed to the three individuals. USPTO plans to send requests to each of these individuals to provide information about outside earnings during the relevant time period. Once USPTO/DOC receives that information, they will submit the information regarding outside earnings along with the relevant pay information for processing to the National Finance Center, which will calculate the backpay, including any applicable interest.

I have read the above statement consisting of 2 pages. I declare under the penalties of perjury that the foregoing is true, correct, and complete to the best of my knowledge and belief.

CAROLYN SCHAD

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Carolyn Schad

Date

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U.S. DEPARTMENT OF COMMERCE, Agency.	)	January 23, 2026

DECLARATION OF ANDREW GREEN

I, Andrew Green, pursuant to 28 U.S.C. § 1746, do hereby state and aver:

1. I serve as the Acting Director, Office of Human Capital Services, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce (DOC). I have held this position since October 6, 2025.

2. NOAA identified 38 individuals who completed their probationary period between February 27, 2025 and April 10, 2025, and two individuals who completed their trial period during that same time. NOAA has contacted all 40 individuals and informed them that NOAA was rescinding their termination. The impacted individuals were offered the choice between returning to NOAA or resigning. Of those 40 individuals, 32 have accepted the offer to return to NOAA and eight have chosen to resign. The eight that declined to return to NOAA have negotiated resignation dates with NOAA and will receive backpay from the date of the termination action up to their resignation date. The individuals that accepted reinstatement will also receive backpay for the period between the termination action and their return to duty.

3. In order to calculate backpay owed, NOAA will be requesting that all 40 individuals provide information about outside earnings during the relevant time period. Once

NOAA/DOC receives that information, it will submit the information regarding outside earnings along with the relevant backpay for processing to the National Finance Center who will calculate the backpay, along with interest.

I have read the above statement consisting of 2 pages. I declare under the penalties of perjury that the foregoing is true, correct, and complete to the best of my knowledge and belief.

ANDREW GREEN

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Andrew Green

1/26/2026
Date