UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

COMMERCE PROBATIONARY EMPLOYEES CLASS,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Agency.

DOCKET NUMBER
DC-0752-25-1770-I-1

DATE: April 15, 2026

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. Between January 20 and March 17, 2025, the agency sent out termination notices to 790 probationary or trial period employees. AF, Tab 17 at 26-27. Of these, 27 employees were reinstated by the agency within days of their terminations, and one employee had been issued an individualized notice of termination based on conduct. *Id.* at 27. As such, a total of 762 probationary or trial period employees were terminated by the agency not based on an individualized determination, but rather as part of a mass termination.[1] AF, Tab 17 at 27; Tab 26 at 6. The notices sent to these employees were

[1] In their more recent filings, the appellants have indicated that this is the definition of the "main class" that they seek to have certified in the instant appeal. *See* AF, Tab 17 at 12; Tab 39 at 6.

substantively identical, and were based on guidance and templates received by the agency from the Office of Personnel Management. AF, Tab 1 at 30-39; Tab 14 at 9-10; Tab 15 at 5.

On or after March 13, 2025, in response to other litigation, the agency cancelled its above-described termination notices regarding the putative class members and placed those individuals into an administrative leave status. AF, Tab 17 at 27-28; Tab 37 at 28. Subsequently, on April 10, 2025, the agency issued notices to the putative class members stating that "the Department is reverting your termination action to its original effective date." AF, Tab 37 at 40. Thereafter, in response to a court order, the agency updated the putative class members' personnel files "to reflect that the second termination was not made retroactive to the date of the first termination."[2] *See id.* at 53.

On March 21, 2025, the appellants filed the instant request for a nation-wide class appeal on behalf of four 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 Commerce (DOC) ("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 May 19, 2025, I granted the putative class counsel's request for discovery. AF, Tab 19. On June 30, 2025, I conducted a status conference to discuss disputed issues related to class certification and to set a briefing schedule.

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[2] The appellants have sought certification of a subclass of individuals who completed their probationary or trial periods between their original termination dates and their subsequent terminations in April 2025. *See* AF, Tab 37; Tab 39 at 6. The agency has identified 47 individuals who fall into this category and has taken action to rescind these employees' terminations. *See* AF, Tab 41; Tab 43. The agency is still processing appropriate back pay/benefits for these individuals. *See* AF, Tab 43. Under these circumstances, I am reserving my ruling on the proposed subclass pending completion of the class certification process.

AF, Tab 25. The parties have now fully briefed the issue of certification of the main class.

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 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.

Here, when the request for class certification was filed, the agency had issued nearly identical termination notices to 789 employees. *See* AF, Tab 1 at 30-39; Tab 17 at 26-27. The agency rescinded 27 of these termination notices shortly after their issuance, reducing the number of employees who remained subject to them at the time that this request was filed to 762. *See* AF, Tab 17 at 27. The appellants argue that the Board has jurisdiction over these appeals because the agency failed to follow the regulations for conducting a RIF. AF, Tab 1. This jurisdictional question is founded on facts common to all the putative class members. It therefore satisfies both the commonality and typicality requirements and can be efficiently decided regardless of any issues related to the individual circumstances of the employees in question. I find these factors weigh in favor of class certification. The agency has submitted evidence that it has subsequently taken actions to rescind the terminations of 47 of the putative class members. *See* AF, Tab 41; Tab 43. While the agency's actions may have reduced the number of aggrieved class members, the agency does not dispute that the vast majority of the employees who were subject to the agency's second set of probationary and trial period terminations in April were not returned to duty in their positions of record or otherwise restored to the *status quo ante*. *See id*. I, therefore, find that the class is sufficiently numerous that individual adjudication would be inefficient, if not

infeasible. Neither party has challenged the adequacy of the putative class counsel.[3]

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; *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 in February and March 2025 which were not based on an individualized determination regarding their performance and/or conduct, in response to guidance issued by the Office of Personnel Management. The class does *not* include any individual who can nonfrivolously allege they are an "employee" with Board appeal rights as defined in 5 U.S.C. § 7511. The class does *not* include the 27 individuals whose terminations were rescinded by the agency shortly after their issuance. 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 class includes the individuals who were issued notices on or about April 10, 2025 indicating that their original probationary or trial period terminations were being reinstated, as all of these individuals necessarily received the above-described termination notices in February and March 2025.[4] *See* AF, Tab 38. The purpose of class certification is to address the appellant's assertion that the

[3] In their original brief opposing class certification, the agency raised an adequacy of representation argument. *See* AF, Tab 15 at 19-20. This argument was not founded on the qualifications of putative class counsel, but on the issue of commonality. *See id.* This argument is rejected for the same reasons articulated above.

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.[5] 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.

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[4] As discussed in footnote 2, above, it appears that 47 of the potential class members would be able to nonfrivolously allege they fit the definition of an "employee" with Board appeal rights as defined in 5 U.S.C. § 7511 as of April 10, 2025. As stated above, I am reserving ruling on the proposed subclass involving these individuals at this time.

[5] 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 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. *See* 5 C.F.R. § 351.901; *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.[6] *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[7] 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.

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[6] 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).

[7] 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.

FOR THE BOARD:

Jeremiah Cassidy
_____
Jeremiah Cassidy
Chief Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Service — Commerce Probationary Employees Class
Served on email address registered with MSPB

Appellant Representative

Electronic Service — Christopher Bonk
Served on email address registered with MSPB

Appellant Representative

Electronic Service — Brian Corman
Served on email address registered with MSPB

Appellant Representative

Electronic Service — Alice Hwang
Served on email address registered with MSPB

Appellant Representative

Electronic Service — Shannon Leary
Served on email address registered with MSPB

Appellant Representative

Electronic Service — Rebecca Ojserkis
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Appellant Representative

Electronic Service — Kevin Owen
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Appellant Representative

Electronic Service — Emily Postman
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Appellant Representative

Electronic Service — Anisha Queen
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Appellant Representative

Electronic Service — Daniel Rosenthal
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Appellant Representative

Electronic Service — Charlotte Schwartz
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Appellant Representative

Electronic Service — Joseph Sellers
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Agency Representative

Electronic Service — David Brown
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Electronic Service — Christiann Burek
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Electronic Service — Patrick Ehler
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Electronic Service — Stacy Long
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Electronic Service — Kristin Murrock
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Statutory Intervenor

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04/15/2026
(Date)

Jeremiah Cassidy

Jeremiah Cassidy
Chief Administrative Judge