U.S. MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

[redacted]	)	
Appellants,	)	
v.	)	**Docket No. _____**
U.S. DEPARTMENT OF JUSTICE,	)	**AJ: TBD**
Agency.	)	**Date: April 9, 2025**
	)	*Originally Filed March 17, 2025*

FIRST *AMENDED* REDUCTION-IN-FORCE APPEAL
AND REQUEST FOR PROCESSING AS A CLASS OR CONSOLIDATED APPEAL

Introduction

This appeal involves a clear violation of law by the U.S. Department of Justice (Department or DOJ). On February 14, 2025, the Department summarily terminated the December 2024 cohort of newly appointed probationary Immigration Judges ("IJs") in the DOJ's Executive Office for Immigration Review (EOIR).[1] All thirteen IJs in the December 2024 cohort were highly experienced immigration attorneys appointed under the prior (Biden) Administration after an extensive application process.

The Department did not terminate these employees for any reason related to their individual performance or conduct. Rather, like thousands of other probationary employees across the government, the Department terminated this group of IJs as part of an effort to "reduce" the federal workforce. These probationary terminations share a common core of facts: Acting EOIR Director

[1] The Department appoints new IJs in "cohorts" or "classes," whereby a group of IJs starts and goes through a six-week training program upon appointment.

Sirce Owen fired all thirteen IJs, the Acting EOIR Director fired the IJs at the same time, and in each of the termination notices, the Acting EOIR Director identified a single identical reason ("retaining you is not in the best interest of the Agency"). *See* Exhibit 1, Notice of Termination.

The Department misused these employees' probationary status to effect a constructive or *de facto* reduction-in-force (RIF) without following the applicable RIF laws and regulations. The individual termination letters are an obvious pretext intended to avoid these RIF procedures, in contravention of applicable law and regulation and in violation of federal merit systems principles.

As set forth below, Appellants file on behalf of, and seek to represent, the following class: Immigration Judges appointed between December 2024 and January 2025 who were summarily terminated during their probationary/trial period on February 14, 2025, for reasons unrelated to their performance or conduct. Alternatively, Appellants request that the Board consolidate appeals filed by the cohort of IJs terminated during their probationary/trial period on February 14, 2025.[2] Appellants seek that the cases be consolidated for processing with the ***Western*** Regional Office, where seven other potential class members currently have appeals pending. *See* Appx. 1.

The relevant details of the instant appeal follow.

Background

1. The Appellants are [redacted] and [redacted].
2. The Agency is the Department of Justice, Executive Office for Immigration Review ("EOIR") ("the Agency" or "the Department").
3. [redacted] were members of a cohort of thirteen IJs appointed with start dates between December 16, 2024-January 12, 2025. All members of the cohort had already reported to their assigned court, and were scheduled to begin the

[2] Inclusive of the instant appeals, undersigned counsel represents a total of ten (10) members of the cohort of terminated IJs, each of whom were experienced career federal attorneys, fired on the same day and by the same official as the Appellant.

New IJ Training course on January 2025 and for investiture on February 14, 2025. All had successfully completed an intensive application process and had extensive prior legal experience. All were serving a new trial/probationary period.

4. Prior to the summary terminations, on January 31, 2025, Acting EOIR Director Sirce Owen sent a communication to all EOIR employees expressing concern over EOIR's "current budgetary needs" and identifying specific concerns about EOIR's actions in excepting immigration judges from a hiring freeze that went into effect in November 2024. Ex. 3.

5. [redacted] was appointed to her IJ position on December 15, 2024. Ex. 1a. At the time of her removal in February 2025, [redacted] was a probationary employee serving in an NTE two-year excepted service appointment, IJ-0905-00-01, in the [redacted] Immigration Court. *Id.*; Ex. 2a (SF-50s).

6. [redacted] was appointed to her IJ position on January 12, 2025. Ex. 1b. At the time of her removal in February 2025, [redacted] was a probationary employee serving in an NTE two-year excepted service appointment, IJ-0905-00-01, in the [redacted] Immigration Court. *Id.*; Ex. 2b (SF-50s).

7. [redacted] was appointed to her IJ position on December 29, 2024. Ex. 1c. At the time of her removal in February 2025, [redacted] was a probationary employee serving in an NTE two-year excepted service appointment, IJ-0905-00-01, in the [redacted] Immigration Court. *Id.*; Ex. 2c (SF-50s).

Agency Personnel Action

8. The personnel action appealed is the Agency's constructive or *de facto* RIF, effective February 14, 2025, summarily terminating the thirteen most recently appointed IJs, all of whom were in their probationary/trial periods. On February 14, 2025, the Agency, via Acting EOIR Director Owen, emailed all IJs in the December 2024 cohort an almost

identical letter stating that their "term appointment as an excepted service Immigration Judge (IJ)… is hereby terminated today." The Agency provides as the sole reason for the removal: "EOIR has determined that retaining you is not in the best interest of the Agency." (Exhibit 1). The Agency did not provide any of the terminated IJs any notice of appeal rights to the MSPB. See Ex. 1.

9. The removal action is improper because:

    a) The Agency's summary termination of thirteen probationary IJs, including Appellants, via near-identical template separation notices and on the same date constitutes a constructive or *de facto* RIF.[3] The Agency failed to carry out this RIF in accordance with the laws and regulations governing RIFs. See 5 U.S.C. § 3502, 5 C.F.R. Part 351.[4]

    b) The Agency misused Appellants' probationary status[5] -- to effect a constructive

[3] RIF regulations provide for an orderly process of determining which employees are retained rather than separated and ensuring that those decisions are made according to merit-based factors. See 5 U.S.C. § 3502; 5 C.F.R. §§ 351.501-506. The law requires that employees with better performance ratings and disabled veterans with veterans' preference are retained over other competing employees in their retention groups. 5 U.S.C. § 3502. Three of the terminated IJs are veterans, which could give them preference over other employees in a RIF; it is not a foregone conclusion that Appellants would be separated during a RIF.

[4] The Board has jurisdiction over an appeal of a constructive or *de facto* RIF and must order corrective action. *See* 5 C.F.R. § 351.902; *Bielomaz v. Dep't of the Navy*, 86 M.S.P.R. 276, 311 (2000) (recognizing that probationary employees subject to RIF may have rights to appeal the RIF); *Coleman v. Fed. Deposit Ins. Corp.*, 62 M.S.P.R. 187, 189-90 (1994) (holding that an appellant need not be an "employee" under § 7511 to enjoy Board appeal rights under RIF procedures under 5 C.F.R. § 351.202); *see also Cox v. Tennessee Valley Auth.*, 41 M.S.P.R. 686, 689 (1989) (concluding that the agency "was required to invoke RIF procedures" when it released a competing employee from his competitive level when the release was required because of a reorganization); *Perlman v. Dep't of the Army*, 23 M.S.P.R. 125, 126-27 (1984) (noting the agency admitted that the removal was not based upon Mr. Perlman personally or the performance of his duties, concluding that the agency should have, but failed to, afford him any procedural or substantive RIF rights when it effected his removal as part of a reorganization and ordering the agency to cancel the removal action and provide him with back pay); 5 C.F.R. § 351.201(a)(2) (stating, in relevant part, that "[e]ach agency shall follow this part when it releases a competing employee from his or her competitive level ... when the release is required because of ... [a] reorganization.").

[5] As the legislative history of the Civil Service Reform Act explains, "[t]he probationary or trial period . . . is an extension of the examining process to determine an employee's ability to actually perform the duties of the position." S. Rep. No. 95-969, at 45 (1978).

RIF without complying with the requisite RIF laws and regulations – when it terminated Appellants for reasons unrelated to satisfactory performance or conduct.

c) The removal was taken in violation of 5 U.S.C. § 2302(b)(4) and (b)(12).

Affirmative defenses

10. Due Process: The Agency's failure to apply RIF regulations has deprived Appellants of substantive as well as procedural rights that could allow them to keep their jobs or be reassigned to new positions and would have allowed them, at a minimum, to remain employed during the RIF process. *See* 5 U.S.C. § 3502; 5 C.F.R. §§ 351.501-506.
11. Prohibited Personnel Practices: The Agency's summary removal of Appellants violated 5 U.S.C. § 2302(b)(1), (b)(4) (regarding deception or willful obstruction of a person's right to compete for employment) and (b)(12) (regarding taking a personnel action that violates a law, rule, or regulation concerning merit system principles), because:
    a) The RIF statute and regulations at 5 U.S.C. § 3502 and 5 C.F.R. part 351 concern, among other merit system principles, 5 U.S.C. § 2301(b)(6) and 5 U.S.C. § 2301(b)(8)(A), which provide that employees should be retained on the basis of the adequacy of their performance, separated when they cannot or will not improve their performance to meet required standards, and protected against arbitrary action. Thus, terminating employees in violation of this law and regulation constitutes a prohibited personnel practice under § 2302(b)(4) and (b)(12).
    b) Terminating employees in their trial period for reasons other than their individual fitness for federal employment is contrary to 5 U.S.C. § 7511(a)(1)(C). As this statute implements or directly concerns the merit system principles described in 5 U.S.C. §§ 2301(b)(1), (5), (6), and (8)(A), violating it constitutes a prohibited

personnel practice under § 2302(b)(4) and (12).

Request for Class Appeal, or in the Alternative, Consolidation

12. Appellants requests that the Board process the instant appeal as a multi-region class action appeal pursuant to 5 C.F.R. § 1201.27.

13. Appellants requests the opportunity to submit briefing on the appropriateness of certifying a class consisting of other probationary employees in the December 2024 IJ cohort (i.e., IJs appointed between December 16-January 16, 2025) who were summarily terminated on February 14, 2025, via nearly identical notices and based on identical justifications.

14. A class appeal is the "fairest and most efficient way to adjudicate the appeal." 5 C.F.R. § 1201.27(a). Appellants and the other IJs summarily terminated on February 14, 2025, are similarly situated in that all were subjected to the same constructive or *de facto* RIF. Appellants and their similarly situated colleagues meet requirements for class certification consistent with MSPB regulation and guidance. Specifically:

    a) Numerosity: the Appellants, up to thirteen in total, are located across the country and would otherwise have to proceed in multiple different MSPB regional offices. The most efficient way to proceed is to process the complaint as a class or consolidated action before a single Administrative Judge in a single regional office.

    b) Commonality: All members of the class face common questions of law and fact that predominate over any questions affecting only individual members. Common questions include whether these probationary IJs were terminated pursuant to a constructive or *de facto* RIF. The IJs were terminated for identical reasons, via near identical letters, sent by the same individual and on the same date. The IJs were all in their initial probationary or trial period.

    c) Typicality: Appellants claims are typical of (and identical to) the claims of the class.

d) Adequacy: Appellants will fairly and adequately represent and protect the interests of class members. Appellants have retained counsel competent and experienced in MSPB practice and procedure and in complex issues impacting federal employment.

e) Predominance and Superiority. Class certification under Fed. R. Civ. P. 23(b)(3) is also appropriate because common questions of fact and law predominate over questions affecting only individual class members, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. The class members have been damaged and are entitled to recovery because of the Department's common, uniform, and unlawful constructive or *de facto* RIF. The remedy and monetary relief is identical for all class members.

Remedies requested

15. Appellants request the following remedies:

a. Rescission of the removal;

b. Retroactive reinstatement with back pay, interest, and benefits;

c. Reimbursement of full and reasonable attorney fees and costs;

d. Compensatory and consequential damages;[6]

e. All other relief that will provide Appellants with make-whole relief; and

f. Any other relief deemed appropriate.

16. The name, address, and telephone number of Appellants' counsel are noted below.

17. Neither [redacted] nor anyone acting on their behalf has filed a grievance or a formal discrimination complaint with any agency regarding this

[6] These damages include the Agency's failure to pay severance pursuant to 5 U.S.C. § 5595 or other law or regulation.

matter.

18. **AN IN-PERSON HEARING IS HEREBY REQUESTED.**

19. This appeal is timely filed pursuant to 5 C.F.R. § 1201.22(b)(1).

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Respectfully submitted,

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