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May 5, 2025

Jamieson Greer
Acting Special Counsel
U.S. Office of Special Counsel

Re: Probationary Termination Complaints
Response to Notice of Intent to Close

Dear Mr. Greer:

We submit this response, on behalf of our clients (identified in Exhibit 1), to the Office of Special Counsel's ("OSC") proposed closure notices sent on April 21, 2025 ("April 21 Notice").

Beginning on February 14, 2025, Democracy Forward Foundation and Alden Law Group ("DFF and ALG") filed multiple complaints to OSC on behalf of terminated probationary federal employees, alleging that these terminations were unlawful and constituted multiple prohibited personnel practices (PPPs). DFF and ALG requested that OSC, pursuant to its authority at 5 U.S.C. § 1214, seek a stay of these unlawful terminations with the Merit Systems Protection Board (MSPB). On February 21, 2025, OSC successfully petitioned the MSPB to stay the termination of six terminated probationary employees ("Feb. 21 Request"). Several days later, on February 28, 2025, OSC successfully petitioned the MSPB to broaden its relief and stay the terminations of all terminated probationary employees at the United States Department of Agriculture (USDA) ("Feb. 28 Request") (collectively, "Stay Requests"). In its Stay Requests, OSC explained—with significant detail, evidence, thoroughness, and analysis—how these probationary terminations were an unlawful Reduction in Force (RIF) and therefore constituted PPPs.

Now, however, OSC has reversed course. In a recent memo from April 8, OSC directed its staff to close out the probationary termination investigations because it no longer believes these terminations constitute PPPs. Consistent with that directive, the April 21 Notice informs DFF and ALG's clients that in will not pursue their claims. But in doing so OSC has hardly even attempted to explain its changed position. Instead, the April 21 Notice summarily states that "OSC is unable to pursue a claim that [the probationary terminations] are unlawful . . . because your termination, in the context of the government-wide effort to reduce the federal service through probationary

terminations, was more likely effected in accordance with the new administration's priorities than a decision personal to you." This "explanation" is, at best, incoherent—it provides no justification as to why *en masse* probationary terminations are somehow exempt from legal requirements simply because they were "effected in accordance with the new administration's priorities." At worst, it is an admission that OSC has decided to rubber-stamp plainly illegal actions merely because they were "effected in accordance with the new administration's priorities." Such an approach plainly violates OSC's statutory mandate to protect federal employees from PPPs.

We respectfully request that OSC reconsider its position. Both the evidence and the law are clear: thousands of probationary employees were terminated not based on individual assessments of their performance or conduct, but instead as part of a large-scale RIF. Those actions constitute PPPs.

I. The April 21 Notice Does Not Dispute Any Relevant Facts

Between February 12 and February 14, 2025, agencies terminated thousands of probationary employees throughout the federal government, including DFF and ALG's clients. As OSC explained in its Stay Requests, these en masse terminations were conducted as part of the Trump Administration's efforts to reduce and reorganize the federal workforce. They were not, contrary to the law's requirements, based on any individualized assessment of probationary employees' performance or conduct.

OSC documented how, between January 20 and February 11, 2025, President Trump issued Executive Orders and the Office of Personnel Management (OPM) provided memoranda and guidance to agencies, both written and oral, related to terminating probationary employees as part of the governmentwide effort to reduce and reorganize the federal workforce. Feb. 21 Request at 2-3; Feb. 28 Request at 3-7. As OSC explained, the evidence clearly showed that agencies carried out these terminations in connection with the Trump Administration's directives and guidance, not as a result of any individualized assessment. With respect to terminated probationary employees at USDA, OSC stated that its "investigation confirmed that USDA made no attempt to assess the individual performance or conduct of any of these probationary employees before deciding whether to terminate them." Feb. 28 Request at 7. Rather, "[w]hether USDA terminated each probationary employee therefore depended entirely on the nature of that employee's position, not on the adequacy of their performance or fitness for federal service." *Id.* Indeed, employees' termination notices did not provide any detail or individualized assessment of employees' performance or conduct (nor was there any evidence of performance or conduct issues), but instead those termination notices were based on a template provided by OPM and were carried out in accordance with White House and OPM guidance. *Id.* at 4-7; Feb. 21 Request at 3-8.

OSC's April 21 Notice does not dispute any of these facts. Nor could it, because the evidence that OSC reviewed and uncovered is indisputable: agencies did not terminate probationary employees based on their performance or conduct, but instead terminated them based on direction and guidance from President Trump and OPM.

II. The April 21 Notice Does Not Explain OSC's Changed Legal Analysis

Rather than contest the facts, the April 21 Notice claims that, "[a]fter a thorough

consideration of the legal issues involved, the Acting Special Counsel has concluded that OSC is unable to pursue a claim that [the] probationary termination was a PPP." But OSC's vacuous explanation of its "consideration of the legal issues" does not provide any rationale as to why OSC's prior detailed, careful, and thorough legal argument is now incorrect.

A. *OSC's Stay Requests Explain Why Probationary Terminations Are PPPs*

In its Stay Requests, OSC explained how the probationary terminations constituted PPPs. Under 5 U.S.C. § 2302(b)(12), an agency commits a PPP if it takes a personnel action and "such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in [5 U.S.C. § 2301]." Further, under 5 U.S.C. § 1216(a)(4), OSC may investigate "activities prohibited by any civil service law, rule, or regulation."

Here, as OSC argued in its Stay Requests, the evidence shows that these probationary terminations were in fact RIFs taken in connection with the Trump Administration's directives to reduce and reorganize the federal workforce, not individual terminations based on performance or conduct. Yet agencies did not follow any applicable legal requirements for RIFs. This means that these personnel actions were PPPs because they violated the RIF statute and regulations—5 U.S.C. § 3502 and 5 C.F.R. Part 351—which directly concern multiple merit system principles, including:

- Selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, 5 U.S.C. § 2301(b)(1);
- All employees should receive fair and equitable treatment with proper regard for their constitutional rights, 5 U.S.C. § 2301(b)(2);
- The Federal work force should be used efficiently and effectively, 5 U.S.C. § 2301(b)(5);
- Employees should be retained on the basis of the adequacy of their performance, 5 U.S.C. § 2301(b)(6);
- Employees should be protected against arbitrary action, 5 U.S.C. § 2301(b)(8)(A).

As OSC explained, the RIF statute and regulations afford employees important substantive and procedural rights, which agencies violated in committing these PPPs. Feb. 14 Request at 14-15; Feb. 21 Request at 13-15. Agencies "used the probationary status of employees to accomplish a RIF without affording the employees the substantive rights and due process they are entitled by law." Feb. 21 Request at 10.

Moreover, OSC argued that, in addition to violating the RIF statute and regulations, agencies' probationary terminations also violated another set of regulations that directly concern merit system principles, specifically 5 C.F.R. § 315.801 *et seq.*, which generally prohibits "terminating probationary employees in the competitive service for reasons other than their individual fitness for federal employment." *Id.* at 16. Here, however, agencies plainly did not terminate probationary employees based on their individual fitness for federal employment; in fact, they did not even assess it.

B. *OSC's April 21 Notice Provides No Meaningful Explanations*

OSC's April 21 Notice does not contend with or refute its prior arguments. It does not argue that probationary terminations were compliant with the RIF statute and regulations, does not

argue that the terminations were based on individualized assessments, does not argue that the RIF statute or regulations or 5 C.F.R. § 315.801 *et seq.* are unrelated to merit system principles, and does not argue that probationary employees lack substantive and procedural rights under these laws. In short, the April 21 Notice does not even address OSC's prior position.

Instead, it offers, in its entirety, two terse justifications for its conclusion that "OSC is unable to pursue a claim that [the] probationary termination was a PPP."

First, the April 21 Notice claims that "[e]ven if OSC could prove that the decision to terminate your probationary employment was not based on an individualized assessment of your performance, OSC is unable to pursue a claim that it was unlawful…because your termination, in the context of the government-wide effort to reduce the federal service through probationary terminations, was more likely effected in accordance with the new administration's priorities than a decision personal to you." Yet nowhere does OSC explain how this determination has any legal relevance or why terminations that are "effected in accordance with the new administration's priorities" are immune from applicable legal requirements. Indeed, the fact that the terminations were carried out based on White House and OPM priorities, rather than an individualized assessment, is precisely the point—these terminations were in fact RIFs, but they did not follow RIF requirements and were therefore unlawful PPPs. The April 21 Notice's first rationale confirms this indisputable point.

Second, the April 21 Notice states that OSC is not pursuing a claim because "there is no well-established precedent that the targeting of probationary employees as a class (as opposed to targeting specific positions) constitutes a RIF." This argument is even more nonsensical than the first. As an initial matter, it is based on an incorrect premise—agencies *did* in fact target specific positions. OSC previously concluded as much: "Through its investigation, OSC has obtained documents and interviewed multiple USDA personnel at relevant levels within that agency to gain a clear picture of how the probationary terminations at issue occurred. This evidence shows that USDA conducted a mass termination of approximately 5,900 probationary employees without consideration of their individual performance or fitness for federal employment, but rather because it did not identify their positions as 'mission-critical.'" Feb. 21. Request at 4. Moreover, even if OSC determined that the en masse termination of probationary employees was not a RIF, the "targeting of probationary employees as a class" would undoubtedly constitute a PPP in that it would violate multiple laws that directly concern merit system principles. This includes, at minimum, 5 C.F.R. § 315.801 *et seq.*, which, as OSC previously noted, prohibits "terminating probationary employees in the competitive service for reasons other than their individual fitness for federal employment." *Id.* at 16.

The April 21 Notice does not provide any coherent explanation for OSC's changed position, much less a compelling one. OSC should follow its reasoned, thorough, and detailed analysis in its Stay Requests and, in accord with that analysis, pursue the claim that the en masse probationary terminations are PPPs.

III. OSC Has A Legal Obligation to Protect Probationary Employees From PPPs

OSC's obligations here are not discretionary. Under 5 U.S.C. § 1212(a), "The Office of Special Counsel *shall*…protect employees…from prohibited personnel practices…and, where

appropriate [] bring petitions for stays" (emphasis added). OSC recognized this statutory mandate in its Stay Requests: "OSC has a legal obligation to protect federal employees from prohibited personnel practices and petition for a stay." Feb. 21 Request at 8. Consistent with that obligation, and "[i]n accordance with its legal responsibility to safeguard the merit system," *id.* at 2, OSC petitioned the MSPB to stay probationary terminations because they constituted PPPs.

Now, however, OSC appears to be abandoning its Congressionally-mandated, legal obligations. The April 21 Notice—and the recent memo on which this determination is based—confirm as much.

In an April 8, 2025, Memorandum, "Updated Policy Regarding Recent Probationary Employee Cases," newly appointed Senior Counsel Charles Baldis, acting pursuant to delegated authority from you, instructs OSC investigators to conduct only a "simple review" of probationary complaints. The memo asserts, incongruously and in a significant and illegal departure from precedent, that its review of complaints by terminated probationary employees should be consistent with "the narrow grounds listed in 5 U.S.C. § 7511," further explaining:

> Moreover, the appeal rights of probationary employees to the MSPB under § 315.806 limit those rights to terminations related to discrimination or terminations related to conditions arising before employment, neither of which apply in the ordinary allegations here. This weighs heavily against treating alleged violations outside of those limitations as matters in which OSC should intervene.

OSC April 8, 2025 Memo at 4. OSC appears to assert that, absent an allegation of individualized animus or improper motivation, it will not examine whether an Agency's termination of a probationer violates merit system principles. This position is explicitly contrary to OSC's statutory mandate to protect *all* employees from PPPs, without regard to whether the employees have a right to direct appeal to the MSPB. OSC's directive effectively excludes probationary employees from the full protection of the merit systems principles enshrined in 5 U.S.C. § 2301.

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In sum, there is no reasonable dispute that the en masse probationary terminations are PPPs. Nothing in the April 21 Notice (or the April 8 Memo on which that Notice is based) calls into question this clear legal conclusion. To fulfill its statutory obligations, OSC must therefore withdraw the April 21 Notice and again protect federal employees from unlawful action.

Respectfully submitted,

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Exhibit 1 – List of Complaints and Relators