UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON, DC

INTERESTED TERMINATED PROBATIONARY EMPLOYEE – COMMERCE, et al.	)	**DOCKET NUMBERS**
Appellants,	)	**CB-1205-25-0021-U-1**
	)	**CB-1205-25-0022-U-1**
v.	)	**CB-1205-25-0023-U-1**
	)	**CB-1205-25-0024-U-1**
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, et al.	)	**CB-1205-25-0025-U-1**
	)	**CB-1205-25-0026-U-1**
Agencies.	)	**CB-1205-25-0027-U-1**
	)	**CB-1205-25-0028-U-1**
	)	**CB-1205-25-0029-U-1**
	)	**CB-1205-25-0030-U-1**

BRIEF ON BEHALF OF THE UNITED STATES OFFICE OF SPECIAL COUNSEL AS AMICUS CURIAE

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae, the U.S. Office of Special Counsel (OSC), is an independent federal agency charged with safeguarding the merit system by investigating and seeking corrective and disciplinary action for prohibited personnel practices (PPPs), as defined in 5 U.S.C. § 2302(b).

Petitioners' request for a regulation review by the Merit Systems Protection Board (MSPB) pursuant to 5 U.S.C. § 1204(f) concerns the termination of probationary employees and alleges that said terminations are PPPs under § 2302(b)(12) by "violat[ing] any law, rule, or regulation implementing, or directly concerning, the merit system principles" enumerated in 5 U.S.C. § 2301(b). *See* Tab 1, Req. for Regulation Review (Mar. 7, 2025) [hereinafter Pet.].

Although § 1204(f) is a different vehicle,[1] OSC has received over 2,000 complaints filed pursuant to 5 U.S.C. § 1214 involving nearly identical claims regarding the terminations of

[1] Ordinarily, the MSPB may not entertain a claim under § 2302(b)(12) absent a proceeding brought by OSC under § 1214 or § 1215. *See Hugenberg v. Dep't of Com.*, 2013 M.S.P.B. 92, ¶ 25 (2013); *Merzweiler v. Off. of Pers. Mgmt.*, 100 M.S.P.R. 442, ¶ 8 (2005).

probationary employees. Earlier this year, OSC requested and obtained several stays of probationary terminations from the MSPB, which have since expired. In those preliminary requests, OSC made certain claims that OSC has since repudiated in full after a careful and thorough examination of the legal issues. OSC has now reconsidered these complaints and attendant concerns within its jurisdiction and concluded that the PPP allegations are unfounded.

INTRODUCTION AND STANDARD OF REVIEW

Under 5 U.S.C. § 1204(f), the MSPB has sole discretion whether to grant or deny a petition to review an Office of Personnel Management (OPM) regulation unless the review is sought by OSC. In exercising that discretion, the MSPB considers the "the likelihood that the issue will be timely reached through ordinary channels of appeal, the availability of other equivalent remedies, the extent of the regulation's application, and the strength of the arguments against its validity." *Nat'l Treasury Emps. Union v. Off. of Pers. Mgmt.*, 76 M.S.P.R. 244, 249 (1997).

For purposes of this brief, OSC takes no position regarding the application of the first three factors in this case. Regarding the fourth factor—"the strength of the arguments against its validity"—OSC believes that petitioners' arguments against the validity of the implementation of OPM's regulations are contrary to the text, history, and purpose of the law, particularly the Civil Service Reform Act of 1978 (CSRA) and 5 C.F.R. §§ 315.800-.806. For this reason, OSC recommends that the MSPB reject this petition.

The core complaint made by this petition involves the petitioners' objection to the termination of probationary employees by federal agencies following OPM's issuance of guidance regarding probationary employees on January 26, 2025, which was subsequently modified in March (OPM Guidance), as well as the February 14, 2025 letter from the Chief Human Capital Officers Council (CHCO Letter). *See generally* Pet.

Petitioners make two arguments. First, petitioners argue that implementing agencies did not follow the procedures of 5 C.F.R. §§ 315.803 and .804 in terminating probationary employees. As a result, petitioners claim, the implementing agencies violated 5 U.S.C. § 2302(b)(12) because "such action[s] violate[d] any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title[,]" namely the regulations set forth in §§ 315.803 and .804.[2] Pet. at 1.

Second, petitioners argue that implementing agencies failed to follow the Reduction in Force (RIF) procedures laid out in 5 C.F.R. § 351. Petitioners claim that failure violates 5 U.S.C. § 2302(b)(12) by implicating merit system principles. Pet. at 1.

After a careful examination of these questions, OSC concludes that the OPM Guidance, the CHCO Letter, and the agencies' decisions to terminate probationers after receiving the OPM Guidance and CHCO Letter, did not violate the statutory and regulatory requirements as alleged and thus cannot constitute a PPP. To the contrary, OSC believes that OPM's efforts to encourage greater use by agencies of the probationary period is a welcome development that may help advance merit system principles.

ARGUMENT

OSC has made the following determinations in its analysis. First, 5 C.F.R. §§ 315.800-.806 provide a broad grant of agency discretion to terminate probationers, with very limited restrictions on the reasons for termination, such as discrimination. In particular, 5 C.F.R. § 315.803(a) provides a broad and independent source of authority for agencies to terminate probationers. These regulations derive from statutory provisions that provide immense discretion to the President and

[2] A violation of § 2302(b)(12) requires proof that "(1) a personnel action was taken; (2) the taking of this action violated a civil service law, rule or regulation; and (3) the law, rule or regulation violated implements or directly concerns a merit system principle." *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 579 (1993) (citations omitted).

to OPM to proscribe rules for dealing with probationers. Second, the history of the civil service in the United States indicates that the meaning of "probationary period" as understood by Congress and regulators throughout the years involves almost no rights to employment. Third, quite the opposite of petitioners' claims, federal agencies may have violated their obligations by failing to screen out *more* probationary employees over many years. The OPM Guidance petitioners challenge is consistent with a long history of encouragement by regulators to agencies that they utilize the probationary period more stringently. Fourth, the definition of RIF, which requires the elimination of positions, was not satisfied in these cases, thus the regulatory requirements involved in conducting a RIF do not apply.

OSC's interpretation of the governing statutes and regulations is guided by their text as well as the history of the "probationary period" in federal law as it relates to the civil service.

Interpreting a regulation proceeds in the same manner as interpreting statutory text: we first "look at its plain language and consider the terms in accordance with their common meaning," *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997) (citations omitted), and then proceed with other "'canons of interpretation' and tie-breaking rules to resolve the ambiguity." *Kisor v. Wilkie*, 588 U.S. 558, 628, (2019) (Gorsuch, J., concurring) (citations omitted). It is "a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.'" *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018) (citations omitted).

The critical term in the CSRA and its implementing regulations is "probationary period." "Probation" comes from the Latin *probatio*, *probation*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/probation#word-history (last visited May 7, 2025), which means "trying, proving" or "a trial, inspection, [or] examination." Charlton T. Lewis & Charles Short, *A Latin Dictionary* (1879), https://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0059:

entry=probatio. Ballentine's Law Dictionary defines "probationary status" in relevant part as "[a] person having a period of probation in a civil service position by way of a further test of his qualifications for appointment." *Probationary status, Ballentine's Law Dictionary* (3d ed. 1969).

A. UNDER 5 C.F.R. §§ 315.803(a) AND .804(a), AGENCIES HAVE THE RIGHT TO SUMMARILY TERMINATE ANY PROBATIONER FOR ANY REASON NOT OTHERWISE PROHIBITED BY LAW.

The CSRA forms the basis of the current law governing probationary employment. Unchanged since 1978 and currently codified at 5 U.S.C. § 3321(a), the relevant language gives the President a broad amount of discretion:

> The President may take such action, including the issuance of rules, regulations, and directives, as shall provide as nearly as conditions of good administration warrant for a period of probation—
>
> (1) before an appointment in the competitive service becomes final; and
>
> (2) before initial appointment as a supervisor or manager becomes final.

The implementing regulations are found at 5 C.F.R. §§ 315.800-.806. These regulations make clear that a probationary period is mandatory in the competitive service. Per 5 C.F.R. § 315.801(a), the first year of an employee's career appointment to the competitive service "*is* a probationary period[.]" (Emphasis added). And 5 C.F.R. § 315.802(a) makes clear that this period of probation is "*required* by § 315.801[.]" (Emphasis added).

The primary regulations at issue in the matter before the MSPB are 5 C.F.R. § 315.803(a) and 5 C.F.R § 315.804(a). Section 315.803(a) provides:

> The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his or her services during this period if the employee fails to demonstrate fully his or her qualifications for continued employment.

Section 315.804(a) provides:

> Subject to § 315.803(b), when an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why

> he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

The core language of §§ 315.803(a) and .804(a) has remained essentially unchanged since they were issued in 1963 by the Civil Service Commission before the CSRA was enacted, *see* Civil Service Regulations, 28 Fed. Reg. 9973, at 10052 (Sept. 14, 1963), even though the CSRA now constitute the governing statutory authority underlying §§ 315.803 and .804 and those regulations have had additions to their content over the years.

Per 5 C.F.R. § 315.803(a), agencies "*shall* utilize the probationary period as fully as possible" and "*shall* terminate [an employee's] services during this period if the employee fails to demonstrate fully his or her qualifications for continued employment." (Emphasis added).[3] Here, the directive to agencies is only to terminate, not to retain. As the MSPB explained, supervisors are "obliged to assure [themselves] that [probationers] had demonstrated fitness for continued employment in the Federal service." *Lewis v. Dep't of the Army*, 63 M.S.P.R. 119, 126 (1993).

The structure of 5 C.F.R § 315.804(a) is conditional rather than mandatory. It provides that "*when* an agency decides to terminate an employee serving a probationary or trial period *because* his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it *shall* terminate his services by notifying him in writing as to why he is being separated . . . ."[4]

Sections 315.803(a) and .804(a) are separate grants of authority to agencies to terminate probationers. The operating assumption underlying petitioners' claim appears to be that

[3] The mandatory nature of the term *shall* in § 315.803 was also recognized by the MSPB in *Lewis v. Dep't of the Army*, 63 M.S.P.R. 119, 126 (1993). *See also McMillan v. Powell*, 526 F. Supp. 2d 51, 56 (D.D.C. 2007).

§ 315.803(a) provides general guidance, but procedures under § 315.804(a) must be followed for termination. This is a misinterpretation of both the text and history of these regulations. While § 315.804(a) provides for separation of a probationer for "unsatisfactory work performance or conduct" and § 315.805 provides for separation of a probationer for "conditions arising before appointment," § 315.803(a) is an independent basis for agencies to terminate probationers when an agency fails to determine probationers' fitness for the role or where probationers fail to demonstrate their qualifications, regardless of the reason for that failure.

This is clear from the fact that § 315.803(a) makes no reference to "work performance or conduct" in evaluating fitness. It merely demands that agencies utilize the probationary period to evaluate fitness and that probationers must demonstrate their qualification, and it directs agencies to terminate probationers who fail to do so. Fitness and qualification are incredibly broad assessments that give agencies a high degree of discretion regarding termination, and they are not exclusively questions of work performance and conduct, although those may well be the predominant questions.

Moreover, because the language of § 315.804(a) is conditional and not mandatory, a plain reading leads to the conclusion that agencies are not restricted only to terminating probationers for work performance or conduct. Rather, it is a directive for how termination should proceed *when* work performance or conduct fails to demonstrate a probationer's fitness for permanent employment. Section 315.805 presents an obvious alternative grounds for termination, but there are other grounds for termination related to of fitness or qualification that may not fit into §§ 315.804(a) or .805. For example, an agency may realize that it had not kept sufficient track of a probationer's performance to make a determination about permanent employment, but, for the same reason, it also could not make a negative determination about work performance or conduct. The agency might decide to release the probationer rather than risk giving permanent employment

to an unsuitable employee. Or, as another example, a supervisor might determine that there was nothing wrong with the work performance or conduct of a probationer, but that the probationer generated sufficient interpersonal friction with other members of the team that it was best to discontinue that individual's employment.

The second major point to note is that both §§ 315.803(a) and .804(a) place the burden on the probationer to "demonstrate his [or her] fitness or his [or her] qualifications for continued employment[,]" meaning that, upon termination, an agency would at most be obligated to inform the probationer that the agency has not seen enough such demonstration to warrant continued employment. The directive in § 315.803(a) that agencies "utilize the probationary period as fully as possible to determine the fitness of the employee" is an obligation that agencies must fulfill for the purpose of terminating unsuited probationers; it is not a grant of any rights to anyone.

This is a critical issue. The agency may even be at fault for the probationer's lack of demonstration of qualification or for the agency's inability to assess work performance or conduct—perhaps because the agency lacks adequate recordkeeping or examination procedures—but this does not create any rights for the probationer and places the agency under no obligations to the probationer. Rather, the agency has an obligation to the American people to ensure that probationers for whom it has not made a favorable suitability determination are not automatically entering the civil service.

The history behind § 315.803(a) illustrates that this regulation is intended to encourage agencies to utilize the probationary period to engage in *more* terminations. The core language of § 315.803(a), going back to at least the 1963 Civil Service Commission, nearly copies language from the 1949 version of this regulation, which provided:

> Probational appointment. (a) A person selected for other than temporary appointment shall be given a probational appointment. The first year of service under this appointment shall be a probationary period. *The agency shall utilize the*

> *probationary period as fully as possible to determine the fitness of each employee and shall terminate his services during such period if he fails to demonstrate fully his qualifications for continued federal employment.*

5 C.F.R. § 2.113 (1949) (emphasis added). This directive to terminate likely originated from the 1949 Commission's concerns about federal agencies inadequately using the probationary period to separate civil servants before they receive permanent appointments. The Commission explained in its annual report that "primary attention should be given to . . . [a] more conscientious use of the probationary period so that employees who do not show sufficient promise in their first year of service will be separated." U.S. Civ. Serv. Comm'n, *66th Annual Report Fiscal Year Ended June 30, 1949*, at 12 (1949) [for consistency and brevity, all subsequent citations to annual reports of the Civil Service Commission will list the title as the report number and "Annual Report," *e.g.*, *66th Annual Report*]; *see also* U.S. Civ. Serv. Comm'n, *65th Annual Report* 3 (1948) ("We recommend to the agencies- (1) A more conscientious use of the probationary appointment so that employees who do not show sufficient promise in their first year of service will be separated."). For comparison, the 1943 version of this regulation had no directive to terminate. *See* 5 C.F.R. § 7.2(3) (1943).

OSC concludes that agencies have the authority and discretion under § 315.803(a) to exercise the "right to summary termination," *U.S. Dep't of Just. v. FLRA*, 709 F.2d 724, 728 (D.C. Cir. 1983), of probationers for any reason related to fitness or qualification not otherwise prohibited by law. The Federal Circuit described the "protections provided to probationary employees" as "very narrow[.]" *Lewis v. Fed. Bureau of Prisons*, 93 F.4th 1381, 1385 (Fed. Cir. 2024) (quoting *Shaw v. United States*, 622 F.2d 520, 527 (Ct. Cl. 1980)). Probationers have rights to contest their terminations for whistleblower retaliation, discrimination on the basis of marital status, discrimination on the basis of race, color, religion, sex, national origin, age, disability, or

genetic information, or in cases where they were fired for partisan political reasons or for pre-appointment reasons. *See* U.S. Gov't Accountability Off., GAO-20-436, *Whistleblowers Office of Special Counsel Should Require Information on the Probationary Status of Whistleblowers* 5-7 (providing a general discussion of probationer rights). Also, a permanent employee fired as a probationer can prove that the probationary classification was a mistake. *See Henderson v. Dep't of the Treasury*, 2010 M.S.P.B. 108, ¶ 10 (2010). None of these exceptions seem to apply in the vast majority of recent probationary terminations. Outside of those categories, probationers have no other grounds upon which to contest termination.

B. A HISTORICAL ANALYSIS OF THE MEANING OF PROBATION IN THE CIVIL SERVICE INDICATES THAT PROBATIONERS HAVE NO EMPLOYMENT RIGHTS EXCEPT THOSE EXPLICITLY GRANTED BY STATUTE OR REGULATION AND THAT THE PROBATIONARY PERIOD SHOULD BE USED STRICTLY AS A TESTING PERIOD.

1. The early history of the civil service implied no employment rights and automatic termination of probationers unless agencies decide to reappoint a probationer for permanent service.

To know the "common meaning" of probation in the context of the CSRA and the older regulations that were preserved after the CSRA was enacted, we must look to an earlier period of time. As the MSPB has recognized: "Today's civil service laws trace their origin to the Pendleton Civil Service Act of 1883, 22 Stat. 403, which 'provided for the creation of a classified civil service and required competitive examination for entry into that service.'" *Dean*, 99 M.S.P.R. at ¶ 9 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 149 (1974)).

The Pendleton Civil Service Act of 1883 was the first major piece of legislation in the United States reforming the civil service. The law required "that there shall be a period of probation before any absolute appointment or employment aforesaid." An Act to Regulate and Improve the Civil Service of the United States, 22 Stat. 403, 404 (1863). It further required

> that notice shall be given in writing by the appointing power to said commission of the persons selected for appointment or employment from among those who have been examined, of the place of residence of such persons, of the rejection of any such persons after probation, of transfers, resignations, and removals, and of the date thereof, and a record of the same shall be kept by said commission.

Id.

The Pendleton Act was drafted by Dorman B. Eaton on behalf of Senator George H. Pendleton from Ohio,[5] and Eaton would later become "the first chairman of the more permanent commission formed as a result of the Pendleton Act of 1883." Van Riper, *supra* n.5, at 79. The ideas transmitted to Congress regarding the use of probation thus came principally from the influence of Eaton and his associates. *See generally* S. Rep. No. 47-576 (1882).

The Pendleton Act built upon earlier ideas and efforts for civil service reform. *See generally* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 Yale L.J. 1362, 1387-88 (2010).[6] Notably, in 1871, Congress passed a small appropriations rider authorizing

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[5] Paul van Riper describes the interactions:

> Senator George H. Pendleton, a distinguished Ohio Democrat and former vice-presidential candidate, had on December 15, 1880, introduced a new measure to reform the civil service. At first his proposal, based on Jenckes' earlier efforts, received scant attention. Then, in 1881, Dorman B. Eaton went to see Pendleton and proposed that a bill drawn up by the New York Civil Service Reform Association be substituted for the Senator's measure. Pendleton agreed and the new measure was placed before the Senate in January, 1881. No action was taken during the session; the politicians had yet to be convinced.

Paul van Riper, *History of the United States Civil Service* 94 (1958). Testifying before the Senate Committee on Civil Service and Retrenchment on May 15, 1882, regarding the Pendleton bill, George William Curtis—first chairman of the Civil Service Commission that predated the commission established by the Pendleton Act—verified Eaton's role:

> The Pendleton bill was drawn by a committee of the association in New York, of which Mr. Eaton is chairman. It was reported by them to the executive committee, of which Mr. Burt, who has been before you, is a member, of which I am a member, of which Mr. Eaton is a member, and various other gentlemen of all parties are members. We considered the bill carefully, and finally brought it substantially to the shape in which it was reported last year, and again presented this year by Mr. Pendleton.

S. Rep. No. 47-576, at 156 (1882).

[6] Representative Thomas Allen Jenckes of Rhode Island embarked upon an unsuccessful effort to pass civil service reform in the late 1860s and early 1870s, and in the process he examined "the civil-service systems of China, England, France and Prussia . . . ." Peter W. Schroth, *Section IV: Constitutional And Administrative Law: Corruption and Accountability of the Civil Service in the United States*, 54 Am. J. Comp. L. 553, 557-558 (Supp. Fall 2006); *see also* H.R. Rep. No. 40-47 (1868) (Report of Rep. Jenckes from the Joint Select Committee on Retrenchment to the U.S. House of Representatives). As Rep. Jenckes noted in this report, both Prussian and French civil service systems utilized probationary periods. *Id.* at 137, 174 ("The public service of Prussia being open to all classes of the population, every Prussian subject may become a supernumerary, or, in other words, enter the service upon probation, under conditions

President Grant "to appoint a commission which would prescribe rules for examining applicants." Ari Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement 1865-1883*, at 87 (1968). This was the first Civil Service Commission (the "Grant Commission"). President Grant appointed George William Curtis as its first chairman. *Id.* at 90. In 1873, Grant would replace Curtis with Eaton. *Id.* at 123.[7]

The Grant Commission produced its final report in 1874, "penned principally by Eaton" as chairman. Van Riper, *supra* n.5, at 82.[8] In that 1874 report, the Grant Commission explained its use of a probationary period for civil servants:

> But to give adequate opportunity for a complete practical test of character and business qualities, the original appointments . . . are at first made only for the *probationary* period of six months; and *if not found satisfactory and re-appointed at the end of that time, the appointees are then regarded as no longer in the service*.

U.S. Civ. Serv. Comm'n, *Report of the Civil Service Commission to the President* 35 (1874) (first emphasis in original).

After President Rutherford B. Hayes took office in 1877, "he requested Mr. Eaton personally to investigate the operation of the reformed system in England, and to prepare a report upon the results of his observation." George William Curtis, *Introduction* to Dorman B. Eaton, *Civil Service in Great Britain A History of Abuses and Reforms and Their Bearing Upon American Politics* iii (1880). Eaton made the following notes regarding probation in the English civil service:

> Probation. But it should be added that it has been at all times a part of the competitive system that those who won in competition should serve at least six

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and regulations which are stated in the annexed paper marked 'supernumeraries.'"); *id.* at 174 ("The probationary system exists in many branches of the [French civil] service, to which young men are, as it were, put in apprenticeship under the name of pupils, auditors, supernumeraries, attachés, aspirants, or auxiliaries.").

[7] From 1871 to 1873, this first Civil Service Commission undertook many efforts at civil service reform, several of which were implemented by President Grant, but Congress consistently failed to take action. *See generally* Hoogenboom, *supra*, at 91-122. By 1873, President Grant's support for the commission began to wane, and by March 18, 1873, Curtis resigned as chairman. *Id.* at 122.

[8] The Grant Commission did not survive much longer after Eaton took over. Also in 1873, "Congress failed to renew the Commission's modest appropriation, . . . and no funds were forthcoming in 1874." Van Riper, *supra* n.5, at 71.

> months on moderate pay, under probation, during which their ability and fidelity in business affairs could be tested *before they receive any actual appointment*.

Dorman B. Eaton, *Civil Service in Great Britain A History of Abuses and Reforms and Their Bearing Upon American Politics* 168 (1880) (emphasis added). As Van Riper noted, "[t]he Pendleton bill as reported to the Senate provided, basically, for the adoption of the British civil service system in the United States[,]" Van Riper, *supra* n.5, at 98, except for some differences unrelated to probation. *See generally id*. at 98-103.

The new Civil Service Commission demonstrated a similar understanding of probation. Led by Eaton, the Commission began to issue annual reports in 1884. In its first report, the Commission characterized the probationary period as follows: "The rules provide for a probationary service of six months before any absolute appointment can be made. *At the end of this time the appointee goes out of the service unless then reappointed*." U.S. Civ. Serv. Comm'n, *1st Annual Report* 29 (1884) (emphasis added); *see also* U.S. Civ. Serv. Comm'n, *3rd Annual Report* 36 (1886) ("it is beyond question true that we cannot be absolutely certain that a well-informed man of good habits will prove a good worker. A real test of the fact by doing the public work is precisely what the Merit System provides. That test is a probationary service of six months before an absolute appointment. If at its termination the appointing officer is not so well satisfied as to be willing to make an unconditional appointment, the probationer, is, by virtue of Rule 17, absolutely out of the service *without any action on the part of the Government*.") (emphasis added).

The evidence indicates that the general understanding of probation in the United States civil service at the time the Pendleton Act became law incorporated automatic termination at the end of the probationary period unless action was taken to re-appoint a probationer to permanent status. However, consideration must be given to subsequent developments between the Pendleton Act and the CSRA as well as the CSRA's implementing regulations.

2. The growth of civil service employment protections from the beginning of the 20th century to 1978 included a clear separation between permanent and probationary employee rights with nearly all rights reserved for permanent employees.

Unlike European civil service systems, the Pendleton Act did not place *any* restrictions on the President's ability to fire any civil servant at all, let alone a probationary civil servant. Van Riper, *supra* n.5, at 101-03. Senator Pendleton explained that he "sedulously avoided" having his legislation "interfere[] either with the question of tenure of office or removal from office." S. Rep. No. 47-576, at 147 (1882).

In 1897, President William McKinley issued an Executive Order to modify the rules of the civil service to protect employees against removal except for "just cause." *See generally* H. Manley Case, *Federal Employee Job Rights: The Pendleton Act of 1883 to the Civil Service Reform Act of 1978*, 29 How. L.J. 283, 288-89 (1986).[9] The Civil Service Commission recognized later that this rule "gave rise to misunderstandings and complaints that it operated to keep inefficient persons in the service and made it a difficult thing to get rid of undesirable employees." U.S. Civ. Serv. Comm'n, *22nd Annual Report* 147 (1905). For this reason, President Theodore Roosevelt clarified in 1902 that that "just cause" was "intended to mean any cause, other than one merely political or religious, which will promote the efficiency of the service[,]" U.S. Civ. Serv. Comm'n, *18th Annual Report* 58 (1902), and in 1905 he formally replaced the "just cause" rule with a "such cause

[9] McKinley issued Executive Order 101 on July 27, 1897, which provided: "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense." Exec. Order No. 101 (1897). He updated this language on May 29, 1899 as follows:

> No removal shall be made from the competitive classified service except for just cause and for reasons given in writing; and the person sought to be removed shall have notice and be furnished a copy of such reasons, and be allowed a reasonable time for personally answering the same in writing. Copy of such reasons, notice, and answer, and of the order of removal shall be made a part of the records of the proper department or office; and the reasons for any change in rank or compensation within the competitive classified service shall also be made a part of the records of the proper department or office.

Exec. Order No. 119 (1899). The Civil Service Commission published this new rule in its annual report to Congress in 1901. U.S. Civ. Serv. Comm'n, *18th Annual Report* 37 (1902).

as will promote the efficiency of the service" rule. *See* U.S. Civ. Serv. Comm'n, *22nd Annual Report* 147 (1905).[10]

The Civil Service Commission initially recognized the McKinley and Roosevelt rules as applying to probationers if they were fired before the end of their probationary period. U.S. Civ. Serv. Comm'n, *17th Annual Report* 291 (1901); U.S. Civ. Serv. Comm'n, *18th Annual Report* 129. However, in the 1910 case of *Ruggles v. United States*, the Court of Claims rejected the notion that probationers had any cognizable legal rights under the rules or the Pendleton Act:

> The claimant's contention that because he had passed a civil-service examination and, pursuant to the rules prescribed by the Executive, had been appointed for a probationary period of six months, therefore his discharge prior thereto was a violation of such rule, can not be sustained, as neither the statute authorizing appointments nor the rules promulgated by the Executive governing the same cast upon the Government the obligation to continue the employment of such an [sic] one when his services are not needed, much less when he is incompetent for the performance of the duties for which he was appointed. Such rules, though effective to regulate the conduct of subordinates subject to executive authority, may at the will of the Executive be rescinded; consequently it has been held that no vested right is acquired by the incumbent of an office by virtue of such regulation.

45 Ct. Cl. 86, 88 (1910) (citations omitted). The Court of Claims would later reinforce the *Ruggles* decision in the 1955 case of *Nadelhaft v. United States*:

> In short, we are of the opinion that a probationary appointee acquires no right to the office, that is to say, a right protected by the Lloyd-La Follette Act, as amended. His right to the office and protection by this Act only accrues after the probationary period has expired and his appointment becomes permanent.
> . . .
> Thus, the only thing necessary to do to remove a probationary appointee is merely to tell him why you are removing him. The provision for notice of the charges, for time to file an answer and affidavits, and for a written decision on the dispute, is inapplicable to a probationary appointee.

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[10] The Executive Order was issued on October 17, 1905, and then promulgated as a rule on November 17, 1905. That rule provided in relevant part:

> No person shall be removed from a competitive position except for such cause as will promote the efficiency of the service. When the President or head of an Executive Department is satisfied that an officer or employee in the classified service is inefficient or incapable and that the public service will be materially improved by his removal, such removal may be made without notice to such officer or employee, but the cause of removal shall be stated in writing and filed.

Id. at p. 71.

. . .

> So, it seems to us that both in reason and according to the law and regulations a probationary appointee may be removed at any time until he has demonstrated his fitness to hold the position . . . .

132 Ct. Cl. 316, 319-21 (1955).

The Lloyd-La Follette Act of 1912 created the first legislative codification of protection against removal for civil servants, providing that "no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service" and with certain due process requirements as well. Ch. 389 § 6, 37 Stat. 539, 555 (1912).[11] This was a significant change.

However, the Civil Service Commission took the passage of the Lloyd-La Follette Act as well as the *Ruggles* decision as an opportunity to clarify that the removal rules first established in 1897 should never have been treated as creating any serious limits on removing civil servants from employment. *See* U.S. Civ. Serv. Comm'n, *29th Annual Report* 21 (1913) ("The rules have at all times left the power of removal as free as possible, providing restraints only to insure its proper exercise.").[12] Regarding probationers, the Commission quoted the above passage from *Ruggles*

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[11] The full text is as follows:

> That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges proferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same . . . ..

[12] The Commission elaborated on this point:

> On July 27, 1897, under the constitutional authority of the President, the rules were amended to require that before removal written charges should be filed with the head of the department, of which charges the accused should have full notice and to which he should have an opportunity to make defense. The courts declined to take cognizance of this provision and held that punishment for its violation rested solely with the President on the ground that the rule was not one which derived efficacy from the civil-service act. Thus the rule did not create any legal interest and could not be invoked by an employee before the courts. Appointing officers, therefore, are entirely free to make

that probationers have no cognizable rights in their employment, *id.* at 96, and that the Lloyd-La Follette Act's protections did not apply to probationers at all:

> The commission holds that the probationary period required by law preliminary to permanent appointment is an essential part of the examinations held by the commission to ascertain the fitness of applicants. The first six months of service being regarded as probationary, *section 6 of the act of August 24, 1912, is not regarded as applying to probationers*. The existing practice under section 1 of Rule VII is not changed by the act, and *a probationer may be separated from the service at any time during or at the expiration of the probationary period without further formality than a written notification setting forth the reasons in full*.

Id. at 112 (emphasis added). Over the next decade, the Commission repeated its citation of *Ruggles* and its assertion regarding the Lloyd-La Follette Act several times, possibly to emphasize the point. *See, e.g.*, U.S. Civ. Serv. Comm'n, *30th Annual Report* 91 (1914); U.S. Civ. Serv. Comm'n, *33rd Annual Report* 48, 66 (1916); U.S. Civ. Serv. Comm'n, *38th Annual Report* 52, 75 (1921).

By 1922, the Commission had shifted completely to the view that too few probationers were being terminated and that agencies were not adequately using the probationary period as a screening mechanism. U.S. Civ. Serv. Comm'n, *39th Annual Report* xxi (1922) ("The proportion of failures on probation seems small to the commission, being only about one-half of 1 per cent. This may indicate that appointing officers do not in all cases fully scrutinize the conduct and capacity of the probationers and perform the duty of dropping those found unsuitable."); *see also infra* Section (C)(2) (providing a fuller quote). Consistent with that concern, over the next couple of decades, the Commission maintained the view, embodied in its regulations, that probationers

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> removals for any reasons relating to the interests of good administration, and they are made the final judges of the sufficiency of the reasons. No examination of witnesses or any trial or hearing is required except in the discretion of the officer making the removal. The rule is merely intended to prevent removals upon secret charges and to stop political pressure for removals. The commission is without authority to interfere, so long as the procedure required by the rule is followed, unless it is charged, with offer of proof, that a removal has been made for political or religious reasons or that unequal penalties have been imposed.

U.S. Civ. Serv. Comm'n, *29th Annual Report* 22 (1913).

had virtually no protection from removal at all.[13] The Commission would repeat its complaint about agencies' inadequate use of the probationary period to screen out probationers several times, including in 1929, 1934, 1948, and 1949. *See infra* Section (C)(1); *see also supra* Section (A).

At the same time, the Commission shifted away from automatic termination absent reappointment, so that probationers would be considered permanent if not affirmatively terminated. 5 C.F.R. § 7.1(c) (1938) (A probationer's "retention in the service beyond the probationary period confirms his absolute appointment" so long as his service rating was satisfactory). This regulation would later disappear, but the practice was left in place.

The Veterans Preference Act of 1944 expanded civil service protections beyond the Lloyd-La Follette Act to preference eligible federal employees, but it explicitly excluded probationers. Pub. L. No 78-359, § 14, 58 Stat. 387, 390 ("No permanent or indefinite preference eligible, *who has completed a probationary or trial period employed in the civil service* . . . shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service . . . .") (emphasis added). President John F. Kennedy expanded these protections beyond preference eligibles, but did not extend the protections to probationers. *See* U.S. Civ. Serv. Comm'n, *79th Annual Report* 15 (1962).

At the end of 1957, the Civil Service Commission did initiate a limited expansion of appeal rights to probationary employees. *See* 22 Fed. Reg. 10025, at 10029 (December 14, 1957); *see also* U.S. Civ. Serv. Comm'n, *75th Annual Report* 4 (1958); 5 C.F.R. § 9.103 (1960).[14] However, in

[13] For example, the Commission provided the following in its 1938 regulations: "Probationer; charges not necessary. A probationer may be separated from the service at any time during or at the expiration of the probationary period without further formality than a written notification setting forth the reasons in full." 5 C.F.R. § 12.101(b) (1938).

[14] The next year, the Civil Service Commission noted "[t]here was a 104 percent increase in appeals of separated or demoted career nonveteran employees, suspended career employees and separated probationary employees" and that this "was the direct result of the Commission's action, effective February 16, 1958, extending appellate rights to new employees during their one-year probationary period." U.S. Civ. Serv. Comm'n, *76th Annual Report* 49 (1959).

1962, the Commission revoked the entire Part offering such protections. *See* Civil Service Regulations, 27 Fed. Reg. 4755, at 4759 (May 19, 1962). In 1963, the Commission issued the new version of the regulations at 5 C.F.R. §§ 315.800-.807 with the much more limited rights of appeal still recognized today—for terminations involving improper discrimination or terminations for matters arising before employment. *See supra* Section (A) (citing Civil Service Regulations, 28 Fed. Reg. 9973, at 10052 (Sept. 14, 1963)).

In 1973, the Commission noted that "[t]hree courts during the past year have held that probationary employees do not have sufficient property interests in their positions to give rise to a constitutional right to a hearing[.]" U.S. Civ. Serv. Comm'n, *90th Annual Report* at 58 (1973) (citing *Sayah v. United States*, 355 F. Supp. 1008 (C.D. Cal. 1973); *Jenkins v. U.S. Post Office*, 475 F.2d 1256 (9th Cir. 1973); *Heaphy v. U.S. Treasury Dep't*, 354 F. Supp. 396 (S.D.N.Y. 1973)).

By the time the CSRA passed in 1978, the common understanding of "probation" and the "probationary period" in the civil service included a significant degree of flexibility on the part of the regulating and employing agencies. The practice of automatically admitting probationers to the permanent service upon completion of the probationary period was in place, but not without complaint from the Civil Service Commission that agencies needed to use the probationary period more aggressively to screen out probationers. Nothing in subsequent developments created a lasting change from the understanding in 1955 that "the only thing necessary to do to remove a probationary appointee is merely to tell him why you are removing him." *Nadelhoft v. United States*, 132 Ct. Cl. 316, 320 (1955). Agency discretion was paramount. *See also Toohey v. Nitze*, 429 F.2d 1332, 1334 (9th Cir. 1970) ("Dismissal from federal employment is largely a matter of executive agency discretion. Particularly is this true during the probationary period.").

3. The legislative history of the Civil Service Reform Act of 1978 reflects that Congress understood the probationary period to be fully subject to agency discretion and did not change the substance of the law governing it.

The Senate Committee for Government Affairs explained in its report on the CSRA the importance of preserving agency discretion to remove probationers:

> The 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. It is inappropriate to restrict an agency's authority to separate an employee who does not perform acceptably during this period.

S. Rep. No. 95-969, at 45 (1978). Multiple courts relied on this language in interpreting the CSRA's application to probationers. *See infra* Section (B)(4). As the United States Court of Appeals for the District of Columbia Circuit explained, the CSRA "left essentially unchanged the provision authorizing a probationary period[.]" *U.S. Dep't of Just. v. FLRA*, 709 F.2d 724, 727 (D.C. Cir. 1983).

In addition, one of the primary purposes of the CSRA was to reduce the delays and the burdens of removing a civil servant who proved to be an "unsatisfactory worker[.]" H.R. Rep. No. 95-1403, at 3-4 (1978); *see also id*. at 2 (President Carter stated along with his request to Congress for passage of the CSRA: "the [civil service] system has serious defects. It has become a bureaucratic maze which neglects merit, tolerates poor performance, permits abuse of legitimate employee rights, and mires every personnel action in redtape [sic], delay, and confusion."); *id*. at 108 (the Comptroller General of the United States recognized that "[o]ne of the major purposes of H.R. 11280 is to make it easier to remove employees for misconduct, inefficiency, and incompetence."). If Congress intended to make it easier to terminate employees in the CSRA, it is not likely to have intended to make it more difficult to terminate probationers.

This Senate Report and surrounding context support the conclusion that Congress did not expand any rights for probationers in the CSRA and that probationary periods in the federal civil

service, as understood by Congress at the time and subsequently by the Office of Personnel Management when it preserved the regulations of the Civil Service Commission, grants no inherent rights to probationers and a great deal of discretion by agencies to remove them at will.

4. Post-1978 federal court decisions and legislative amendments to the CSRA support the conclusion that agencies have broad discretion to dismiss probationers and that probationers are subject to summary dismissal with limited rights of appeal.

Many court decisions following enactment of the CSRA support the conclusions that agencies have broad discretion to dismiss probationers and that probationers are subject to summary dismissal with limited rights of appeal. The D.C. Circuit elaborated the point:

> [Congress] saw summary terminations as essential to an effective and efficient service, and it has repeatedly acted to preserve the agencies' discretion summarily to remove probationary employees. We detect no retreat from this position in the Civil Service Reform Act of 1978 or in the OPM regulations that implement the congressional mandate.

U.S. Dep't of Just. v. FLRA, 709 F.2d 724, 730 (D.C. Cir. 1983). The court concluded that Congress intended for the probationary period to include agencies' right to summary termination:

> Congress could have allowed probationary employees, like tenured employees, to challenge their terminations, but expressly declined to do so. The substantial protections that Congress made available only to tenured employees indicate that Congress recognized and approved of the inextricable link between the effective operation of the probationary period and the agency's right to summary termination.

Id. at 728. The Federal Circuit Court of Appeals reached the same conclusion:

> We think that the legislative history of the [Civil Service] Reform Act entirely forecloses the possibility that probationary employees have some sort of unspecified private right of action in the Claims Court under the Act to seek judicial review of their removals. The policy of denying probationary employees the right to challenge such terminations was explicitly outlined in the Senate Report accompanying the Act[.]

United States v. Connolly, 716 F.2d 882, 886 (Fed. Cir. 1983) (citation omitted).[15]

[15] The Federal Circuit continued: "Because Congress could have permitted probationers to challenge removals, but expressly declined to do so, we find it incongruous to suppose that appellee has an implied private right of action under the Civil Service Reform Act to seek judicial review of his dismissal." *Id*.

In 2013, the United States Court of Appeals for the Fourth Circuit explained that "Congress has provided for a probationary period since it created the modern civil-service system with the 1883 Pendleton Act." *Nat'l Treasury Emps. Union v. FLRA*, 737 F.3d 273, 276 (4th Cir. 2013) (citations omitted). The court further noted that "Congress's continuing belief in the importance of a probationary period was reflected in the passage of the Civil Service Reform Act of 1978" and that "[a]s the term "probationary" implies, employees so designated are on probation and *subject to summary dismissal*." *Id*. (emphasis added). The Fourth Circuit explained why limited rights of appeal granted to probationers in select matters did not imply any broader rights of appeal:

> This does not mean, however, that Congress intended for the same *remedies* to be available to probationary and non-probationary employees. This is reflected in the numerous ways that the law treats probationary and non-probationary employees differently. For example, probationary employees are explicitly excluded from the protections against demotion or removal for unacceptable performance under 5 U.S.C. § 4303. These protections include written notice thirty days in advance of the adverse employment action, representation "by an attorney or other representative," and a final written decision. Probationary employees are not afforded the full rights that non-probationary employees have to appeal a removal or demotion for unacceptable performance to the MSPB. Similarly, probationary employees do not possess the protections granted to non-probationary employees against removals for such reasons "as will promote the efficiency of the service." As the D.C. Circuit has recognized, "The substantial protections that Congress made available only to tenured employees indicate that Congress recognized and approved of the inextricable link between the effective operation of the probationary period and the agency's right to summary termination."

Id. at 276-77 (emphasis in original) (citations omitted). This understanding of the CSRA was reinforced in many other cases in different courts. *See, e.g.*, *Nat'l Treasury Emps. Union v. FLRA*, 848 F.2d 1273, 1275 (D.C. Cir. 1988) ("Congress affirmatively intended agencies to retain the power to summarily terminate probationary employees. Congress . . . had been aware of the pre-existing system permitting summary firing, but had done nothing to alter it in the CSRA.") (citation omitted); *EEOC v. FLRA*, 744 F.2d 842, 853 n.2 (D.C. Cir. 1984) ("The right to dismiss probationary employees is reserved to management[.]"); *Schroeder v. United States*, 10 Cl. Ct.

801, 803 (1986) ("The otherwise comparable situation of probationary employees, who could also sue for back pay in the Court of Claims prior to enactment of the CSRA, was distinguished, in part, on the basis that the legislative history 'revealed the intent of Congress not to grant a cause of action under the CSRA to probationary employees[.]'" (citations omitted)); *Allen v. Dep't of the Air Force*, 694 F. Supp. 1527, 1529 (W.D. Okla. 1988) ("Because Congress could have permitted probationers to challenge removals, but declined to do so, it would be incongruous to conclude that a probationer has an implied private right of action to seek judicial review of his or her dismissal.") (citation omitted); *Harris v. Moyer*, 620 F. Supp. 1262, 1265 (N.D. Ill. 1985) ("A probationary employee has limited and fragile protectable interests in his employment and the manner of its termination, as the courts have noted in a variety of contexts[.]") (citations omitted).

In 1990, Congress passed the Civil Service Due Process Amendments and extended full appeal rights to non-preference eligibles in the excepted service. Pub. L. No. 101-376, § 2(a), 104 Stat. 461, 461. Here, once again, was an opportunity for Congress to expand the rights of probationers, but Congress demonstrated no intent to do so.[16]

5. Based on the text and history of the probationary period in the federal civil service, OSC concludes that statutes and regulations should be interpreted to maximize agency discretion and that only rights explicitly granted to probationers should be recognized.

Analyzing the history and precedents involved, OSC has come to a few general conclusions about the meaning and implications of the probationary period in the laws and regulations governing the United States Civil Service.

[16] The Federal Circuit issued two decisions holding that the 1990 Amendments did apply to probationers who had fulfilled a year or more of service. *See Van Wersch v. Dep't of Health and Hum. Servs.*, 197 F.3d 1144 (Fed. Cir. 1999); *McCormick v. Dep't of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002). However, as the MSPB explained, this was "the result of poor statutory construction rather than congressional intent." U.S. Merit Sys. Prot. Bd., *What is Due Process in Federal Civil Service Employment?* 36 (May 2015). The MSPB even developed a report for the President and Congress dealing with the legal challenges created by *Van Wersch* and *McCormick*. *See* U.S. Merit Sys. Prot. Bd., *Navigating the Probationary Period After* Van Wersch *and* McCormick (2006).

First, since the enactment of the Pendleton Act in 1883 and through the CSRA in 1978 and beyond, Congress has never understood the probationary period to include any inherent rights against removal, and whether to grant any rights to probationers was a matter left to the discretion of the President and the Civil Service Commission or its descendant agency—OPM.

Second, in passing the Pendleton Act, Congress likely understood the probationary period to include automatic termination in the absence of reappointment. Nevertheless, Congress enacted the CSRA in 1978 when the common understanding of probation allowed for automatic transition into permanent appointment absent removal, and Congress granted extremely broad discretion to the President to make rules governing the probationary period. Thus, it can be concluded that Congress's understanding of probation is sufficiently broad to allow for either automatic termination or automatic appointment.

Third, the Civil Service Commission tried various formulations of the rules governing the probationary period over the years, including some that expanded the rights of probationers. However, it generally retreated from those experiments and repeatedly came to the conclusion that agencies were not terminating enough probationers. The Commission never treated probationers as having any inherent rights to employment, and its default position was to conclude that "a probationer may be separated from the service at any time during or at the expiration of the probationary period without further formality than a written notification setting forth the reasons in full." 5 C.F.R. § 12.101(b) (1938). This fact should shape our interpretation of the regulations that were created by the Commission and Congress's affirmation of that view in the CSRA.

Fourth, this view of probation is consistent with the ordinary understanding of probation in employment outside the civil service, where it is frequently characterized as at will employment. *See* Joseph A. Seiner, *Sensible Just Cause*, 103 B.U.L. Rev. 1295, 1333 n.201 (2023) (citing a list of cases where probationers are characterized as "at will" employees); *see also* Martha S. West,

The Case Against Reinstatement In Wrongful Discharge, 1988 U. Ill. L. Rev. 1, 22 n.111 (1988) ("Probationary employees are the only unionized employees whom the 'just cause' limitation on discharge generally does not cover."); Jena Donofrio, *Recent Development: Public Employment: Demotion, Constitutional Law: First Amendment -- Association: Ross v. Clayton County, 173 F.3d 1305 (11th Cir. 1999)*, 29 Stetson L. Rev. 965, 966 (2000) ("[P]robationary employees are typically thought to lack property interests in their employment because they are 'at will' employees without a legitimate claim to continued employment."). At will status incorporates "the rebuttable presumption that employers and employees may terminate the employment relationship at any time and for any reason." Andrea J. Johnson, *Reclaiming Our Time: Ending the Use of Employment Contracts that Shorten the Statute of Limitations for Title VII Discrimination Claims*, 31 Geo. Mason L. Rev. 725, 731 (2024). This is a natural association because "[s]ince the late nineteenth century, the 'at-will' rule has been the basic foundation of American employment law." Jonathan Fineman, *Cronyism, Corruption, and Political Intrigue: A New Approach for Old Problems in Public Sector Employment Law*, 8 Charleston L. Rev. 51, 57 (2013).

Taking these points together, OSC concludes that the CSRA and 5 C.F.R. §§ 315.803-.804 should be interpreted in a manner consistent with the maximization of agency discretion and with the presumption that only rights explicitly granted to probationers by law should be recognized.

C. FEDERAL AGENCIES MAY HAVE ENGAGED IN SYSTEMIC VIOLATIONS OF 5 C.F.R. § 315.803(a) BY FAILING TO USE THE PROBATIONARY PERIOD TO SCREEN OUT UNSUITED EMPLOYEES

OSC has concluded agencies may well be in violation of 5 C.F.R. § 315.803(a), but for opposite reasons than those claimed by petitioners. Rather, agencies appear to have failed to abide by the regulatory mandate to use the probationary period as a tool to screen out inadequate or unsuitable probationers. Indeed, these violations have been ongoing and systemic for a very long time, and petitioners' request for relief would likely compel agencies to continue these violations.

1. Reports from the MSPB, GAO, and OPM indicate that agencies do not adequately utilize the probationary period to remove unsuitable probationers.

In 2005, the MSPB reported to the President and to Congress that federal agencies were failing to use the probationary period to assess and remove probationers. *See generally* U.S. Merit Sys. Prot. Bd., *The Probationary Period: A Critical Assessment Opportunity* (2005). In conducting a survey of agency supervisors, the MSPB found that "survey responses indicated that even though supervisors are aware that the probationer's appointment is not final, supervisors tend to treat their probationers as fully appointed Federal employees, with all the rights and responsibilities that implies." *Id.* at 33. The MSPB identified a cultural problem, explaining that "[t]he message being sent by supervisors, human resources staff, and agency cultures overall is that the probationary period is a mere formality." *Id.* The problem was a systemic one, as "supervisors expressed frustration at the lack of agency support for the full use of the probationary period, and even a number of probationers were perturbed by what they saw as agencies' failure to use the probationary period to remove marginal and poor performers." *Id*. The report noted that agencies should shift away from the assumption that probationers must automatically receive permanent appointment: "Until the probationary period has been completed, a probationer is still an applicant for an appointment, with the burden to demonstrate why it is in the public interest for the Government to finalize an appointment to the civil service for this particular individual." *Id.* at i. The MSPB reaffirmed the 2005 report in a 2019 research brief, noting that the "MSPB found that supervisors are sometimes reluctant to remove a probationer who is not performing well in the position, even though it is easier to remove a probationer than an employee with a final appointment." U.S. Merit Sys. Prot. Bd., Research Brief, *Remedying Unacceptable Employee Performance in the Federal Civil Service* 4 (June 18, 2019).

In 2010, the MSPB made a similar finding regarding the use of probationary periods for supervisors: "The extremely low probationary failure rate among Federal supervisors suggests that many agencies are allowing many novice supervisors to continue in a supervisory role despite observable evidence that they will not be successful in that role." U.S. Merit Sys. Prot. Bd., *A Call to Action: Improving First-Level Supervision of Federal Employees* 26 (2010) ("Data from OPM's Central Personnel Data File indicates that Federal managers are making little use of the probationary period. For example, in Fiscal Year 2009, Federal agencies hired approximately 31,000 new supervisors, but took fewer than 200 actions due to new supervisors' failure to successfully complete the probationary period. . . . For FY 2009, approximately one half of one percent of new supervisors were either reassigned to a non-supervisory position or were separated."). The MSPB repeated these findings in 2019. *See* U.S. Merit Sys. Prot. Bd., Research Brief, *Improving Federal Leadership Through Better Probationary Practices* (May 2019).

The concerns expressed by the MSPB were not new. The Civil Service Commission expressed much the same complaint, including in its 1922, 1929, 1934, 1948, and 1949 Annual Reports. *See infra* Section (C)(2) (citing U.S. Civ. Serv. Comm'n, *39th Annual Report* xxi-xxii (1922)); U.S. Civ. Serv. Comm'n, *46th Annual Report* 35 (1929) ("There is need to impress upon appointing officers . . . that the appointment in the first instance is merely provisional . . . The probationer does not need to be kept during the entire six months but only so long as to satisfy the appointing officer that he is not worthy of ultimate retention . . . the small percentage of those dropped during or at the end of probation . . . is not conclusive since appointing officers may be passive in not giving sufficiently close observation . . ."); U.S. Civ. Serv. Comm'n, *51st Annual Report* 22-23 (1934) ("In furtherance of the Commission's contention that the probationary period is a part of the examination process, it is urged that civil-service rule VII be amended to provide that a definite administrative report be made to it, 1 month before the end of the probationary

period, upon the quality of service rendered by the probationer, if he has not been earlier separated."); *see supra* Section (A) (citing U.S. Civ. Serv. Comm'n, *65th Annual Report* 3 (1948) and U.S. Civ. Serv. Comm'n, *66th Annual Report* 12 (1949)).

In 2015, the Government Accountability Office (GAO) issued a report on the federal workforce. GAO interviewed Chief Human Capital Officers and found that federal "[a]gencies may not be using the supervisory probationary period as intended." U.S. Gov't Accountability Off., GAO-15-191, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance* 9 (2015). GAO found that "supervisors are often not making performance-related decisions about an individual's future likelihood of success with the agency during the probationary period." *Id*. at 11. Two primary reasons were offered: "(1) the supervisor may not know that the individual's probationary period is ending, and (2) the supervisor has not had enough time to observe the individual's performance in all critical areas of the job." *Id.*[17] GAO concluded that the probationary period needed to be "more effectively used by agencies. . . . [I]mproving how the probationary period is used could help agencies more effectively deal with poor performers." *Id.* at 29.

To this day, inadequacy in the civil service has not been adequately addressed. OPM's 2024 Federal Employee Viewpoint Survey showed that 40 percent of federal employees reported that poor performers in their units would usually "[r]emain in the work unit and continue to

[17] Chief Human Capital Officers further explained to the Government Accountability Office that there are reasons why the probationary period might not be sufficient for certain evaluations, including:

> • the occupation is complex and individuals on a probationary period spend much of the first year in training before beginning work in their assigned areas,
> • the occupation is project based and an individual on a probationary period may not have an opportunity to demonstrate all of the skills associated with the position, and
> • individuals on a probationary period often rotate through various offices in the agency and supervisors have only a limited opportunity to assess their performance.

U.S. Gov't Accountability Off., GAO-15-191, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance* 12 (2015).

underperform[.]" *OPM FEVS Dashboard*, U.S. Office of Personnel Management (last visited May 8, 2025), https://www.opm.gov/fevs/reports/opm-fevs-dashboard/ (showing results of the 2024 Federal Employee Viewpoint Survey). The next highest percentage—21 percent—answered "Do Not Know[.]" *Id.* A mere 61 percent agreed that "[n]ew hires in my work unit (i.e. hired in the past year) have the right skills to do their jobs." *Id*. Only 47 percent agreed that "[i]n my work unit, differences in performance are recognized in a meaningful way." *Id.*

OSC believes that the warnings of the Civil Service Commission in 1922, 1929, 1934, 1948, and 1949, as well as the admonitions of the MSPB in 2005 and 2019, and GAO in 2015, still hold true today and that, over the past several decades, agencies have consistently failed to abide by the current mandate in § 315.803(a) to "utilize the probationary period as fully as possible" and to terminate the services of those probationers who fail to prove themselves.

2. The systemic failure by agencies to effectively utilize the probationary period to remove unsuitable probationers is likely a violation of 5 C.F.R. § 315.803(a), and the OPM Guidance appears to be an attempt to correct that violation.

This failure by agencies implicates the merit system principles. In particular, the requirement for agencies to use the probationary period and to terminate unsuitable probationers is designed to "guard[] the service against the incompetent or the otherwise unfit." U.S. Civ. Serv. Comm'n, *39th Annual Report* xxi (1922). Thus, the systemic failure to fulfill these mandates implicates 5 U.S.C. § 2301(b)(5), which provides that "[t]he Federal work force should be used efficiently and effectively" and 5 U.S.C. § 2301(b)(6), which provides that "[e]mployees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards."

For this reason, OSC supports the portion of the OPM Guidance regarding agency use of the probationary period. This guidance appears to be an effort to bring agencies into compliance

with 5 C.F.R. § 315.803(a). Indeed, the very first citation in that document is to the MSPB's 2005 report discussed above. Pet. Ex. 2, at 1.

The OPM Guidance and the CHCO Letter are a natural extension of a December 13, 2023 memorandum issued by OPM advising "agencies to periodically remind supervisors and managers about the value of the probationary period." Memorandum from Kiran A. Ahuja, Dir., U.S. Off. of Pers. Mgmt., to Heads of Executive Departments and Agencies 1 (Dec. 13, 2023), https://chcoc.gov/sites/default/files/Maximizing%20Effective%20Use%20of%20Probationary%20Periods.pdf. OPM suggested that a "notice to supervisors could occur 4 months prior to expiration of the probationary period, and then again 1 month prior to expiration of the probationary period, or any other time intervals the agency determines appropriate[,]" and that "[w]hen doing so, agencies should also advise a supervisor to make an affirmative decision regarding the probationer's fitness for continued employment or otherwise take appropriate action." *Id.* OPM also explained that "removing probationary employees based on conduct and performance issues is less cumbersome as they are not entitled to most of the procedures and appeal rights granted to employees who have completed probationary periods." *Id.* at 3.

The OPM Guidance bears a striking resemblance in purpose and design to the letter circulated from the Civil Service Commission to agencies in 1920:

> In the belief that the business capacity and fidelity of probationers should be more thoroughly scrutinized, the commission, on October 28, 1920, addressed the following circular letter to the departments:
>
> > The small number of persons dropped from the service during or at the end of probation has convinced the commission that the reason underlying the requirement of a probationary period has not received the consideration its importance deserves and that this very essential practical test has not guarded the service against the incompetent or the otherwise unfit as it should. The practice prevailing in some of the bureaus and offices of requiring a definite report and recommendation from the probationer's immediate superior and not permitting the appointment to become absolute passively is doubtless of some effect.

> This is in harmony with the finding and recommendation of the Congressional Joint Commission on Reclassification of Salaries. The following is quoted from this report:
>
> > "The commission believes that a more thorough and effective use should be made of the probationary period and that the law should be so changed that probationary appointments could become permanent only by a definite administrative decision.
> >
> > "*Recommendation 17 (b)*.—The commission therefore recommends that administrative officials be required to submit to the Civil Service Commission such reports regarding the efficiency of probationary appointees as the commission may require and that no permanent appointment be made except on certificate by the commission that the employee has satisfactorily passed his probationary period."
>
> The commission desires to impress very forcibly upon the departments the fact that no probationary appointment should be allowed to become absolute unless the character of service and conduct of the probationer have been entirely satisfactory and the department can certify unconditionally that his retention is believed to be in the interest of the service.
>
> It seems that this matter should preferably be handled administratively and that legislation is unnecessary. Rule XIII, section 1, requires every nominating and appointing officer to report in detail to the commission in such manner as it may prescribe all changes in the service under his authority.
>
> The commission requests under this authority report of each absolute appointment over a certificate that the character of service and conduct of the person during probation were entirely satisfactory and that his retention in the interest of the service is believed to be warranted.

U.S. Civ. Serv. Comm'n, *39th Annual Report* xxi-xxii (1922).

D. THE TERMINATIONS OF PROBATIONERS IN THESE CASES DO NOT REQUIRE THE APPLICATION OF REDUCTION IN FORCE RULES BECAUSE THEY DO NOT MEET THE DEFINITION OF A REDUCTION IN FORCE.

Petitioners argue that the terminations were intended to "implement a de facto RIF[] without following the requisite RIF laws and regulations[.]" Pet. at 10. Petitioners are wrong.

In 2024, the Federal Circuit Court of Appeals explored the definition of a RIF in *Tippins v. United States*. 93 F.4th 1370 (Fed. Cir. 2024). There, the U.S. Coast Guard had selected enlisted service members for involuntary retirement through Active Duty Enlisted Career Retention Screening Panels allowed by the then-applicable provisions of 14 U.S.C. § 357. *Id.* at 1371.[18] Several enlisted service members sued because the Coast Guard did not follow the procedures laid out in that statute. *Id.* at 1371. The government argued that the Coast Guard did not need to follow those procedures because its actions were a RIF, which was excepted under § 357(j). *Id.* at 1372.

Addressing this legal question, the Federal Circuit made a number of findings. First, the court recognized that "reduction in force" was a well-established term in the civil service: "We have consistently defined a 'reduction in force' as an 'administrative procedure by which agencies eliminate jobs and reassign or separate employees who occupied the abolished positions.'" *Id.* at 1375 (citing *Welch v. Dep't of the Army*, 323 F.3d 1042, 1046 (Fed. Cir. 2003); *James v. Von Zemenszky*, 284 F.3d 1310, 1314 (Fed. Cir. 2002); *Huber v. Merit Sys. Prot. Bd.*, 793 F.2d 284, 286 (Fed. Cir. 1986). Second, the court explained: "We have clarified that a reduction in force 'is not an adverse action against a particular employee, but is directed solely at a position within an agency.'" *Tippins*, 93 F.4th at 1375 (citing *Welch*, 323 F.3d at 1046; *James*, 284 F.3d at 1314; *Huber*, 793 F.2d at 286). Third, the court examined additional statutes and cases from the Federal, First, Sixth, and Eighth Circuits and concluded: "Those authorities provide compelling evidence that the phrase 'reduction in force,' as commonly understood, does not cover the mere separation of personnel from positions to be refilled." *Tippins*, 93 F.4th at 1376; *see also id*. at 1378 ("[The government's] cases do not address what occurred here—the emptying of positions simply to fill them with other service members. As previously noted, such action cannot, as a matter of law,

[18] Section 357 was repealed in 2016. *Tippins*, 93 F.4th at 1372 n.1.

constitute a 'reduction in force' . . . . The government further argues that the term 'reduction in force' even in the civilian context does not exclude mere termination of personnel. We disagree.").

In support of their constructive RIF claim, petitioners cite as evidence the January 28, 2025, OPM email to federal employees titled "Fork in the Road," which offered deferred resignation and noted that federal agencies were likely to be downsized, including through RIFs. Pet. at 5; *id.* Ex. 3, at 1-3. But this email was a broad discussion of administration goals regarding the federal workforce. It included discussion of return-to-work policies, improving performance evaluations, enhanced standards regarding misconduct, as well as shrinking, expanding, or consolidating certain portions of the federal workforce. *See generally id*. Ex. 3, at 1-3. In that discussion, it listed possible options for downsizing agencies, which included RIFs. It offered no directives to agencies regarding the use of RIFs.

More importantly, the January 28, 2025 email made no mention of probationers or the probationary period. Likewise, the portion of the OPM Guidance covering probationers made no mention of RIFs, *id.* Ex. 2, at 1-3, nor did the CHCO Letter, *id.* Ex. 4, at 1-2. Petitioners cannot simply set these things next to each other and assert that a relationship exists. The only connection between them appears to be that they all came from OPM.

Simply put, all of the evidence presented to support the claim that these terminations of probationers were constructive RIFs is superficial and cannot withstand scrutiny. The circumstantial fact that the administration had a policy goal of downsizing the federal government does not suffice. The fact that the administration has initiated RIFs in other contexts does not establish anything about these probationary terminations. Even if these terminations were "mass terminations" or conducted pursuant to broader policy goals, they are not RIFs.

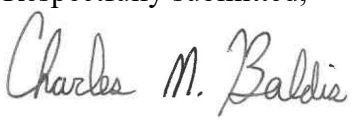
In the present case, petitioners have not made a claim that any positions were eliminated or restructured in conjunction with the probationary terminations as is required in the definition of

a RIF. Thus, it seems these terminations were simply the agencies utilizing their authorities to remove probationers in accordance with 5 C.F.R. § 315.803(a) and 5 C.F.R. § 315.804(a).

CONCLUSION

OSC recommends that the MSPB reject the petition because Petitioners' argument improperly treats 5 C.F.R. §§ 315.803(a) and .804(a) as a grant of rights to probationers. Petitioners' argument is inconsistent with the history, purpose, and plain text of these regulations and the underlying statute. On the contrary, OSC concludes that the policies being pursued by OPM to address insufficient use of the probationary period by agencies is appropriate and consistent with current regulations and the historic understanding of probation. OSC also recommends that the MSPB reject the claim that agencies have effectuated a constructive RIF without following the appropriate regulations because the definition has not been met.

Respectfully submitted,



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