

**FEDERAL MEDIATION AND CONCILIATION SERVICE**

American Federation of Government Employees,  
AFL-CIO, Council 238,

FMCS Case Nos: 00490 and 05166  
GOP: Pretextual RIF and Unilateral  
Reclassification of Trial Periods

and

United States Environmental Protection Agency.

Arbitrator: Ira Cure

**Table of Contents**

<b>I.</b>	<b>Introduction and Summary of the Argument</b> .....	1
<b>II.</b>	<b>Procedural Background</b> .....	1
	<u>Joint Exhibits</u> .....	2
	<u>Union Exhibits</u> .....	2
<b>III.</b>	<b>Issue Statement</b> .....	3
<b>IV.</b>	<b>Argument</b> .....	3
	A. <u>Arbitrability is a Concern Committed to the Arbitrator</u> .....	4
	1. <i>The MCBA’s RIF Procedures are the Exclusive Procedure to Challenge the Agency’s Pretextual RIF</i> .....	7
	B. <u>The Agency Improperly Reclassified Employees that had Completed their Initial Trial Periods</u> .....	8
	1. <i>The Agency Illegally Altered Personnel Documents and Violated the Privacy Act</i> .....	9
	2. <i>The Agency Committed an Unfair Labor Practice</i> .....	10
	C. <u>The Agency Used Probationary Terminations as a Pretext to Avoid RIF Obligations</u> .....	11
	1. <i>The Agency’s Actions Violated the MCBA</i> .....	16
	2. <i>The Agency’s Actions Violated Applicable Federal Law</i> .....	17
<b>V.</b>	<b>Relief</b> .....	20
<b>VI.</b>	<b>Conclusion</b> .....	23

## FEDERAL MEDIATION AND CONCILIATION SERVICE

---

American Federation of Government Employees,  
AFL-CIO, Council 238,

FMCS Case Nos: 00490 and 05166  
GOP: Pretextual RIF and Unilateral  
Reclassification of Trial Periods

and

United States Environmental Protection Agency.

---

Arbitrator: Ira Cure

### Union Brief

#### **I. Introduction and Summary of the Argument**

Pursuant to the parties' agreement to submit this matter on written briefs in lieu of a hearing, the American Federation of Government Employees, AFL-CIO, Council 238 ("Union") respectfully submits this consolidated brief on behalf of the bargaining unit employees affected by the Agency's unlawful retroactive reclassification of their probationary status and its subsequent reduction-in-force and termination actions.

Although some employees were reinstated to administrative leave or returned to duty in response to (now expired) federal court injunctions, many remain adversely affected. Some were never fully reinstated, others are currently on administrative leave without receiving step increases or career-ladder promotions, and most have never been made whole. The Union seeks appropriate equitable and monetary remedies, including restoration, back pay with interest, and attorneys' fees under the Back Pay Act, 5 U.S.C. § 5596.

#### **II. Procedural Background**

This case arises from two separate, but related, grievances filed by the Union under the MCBA:

- **Grievance 1, *Unilateral Reclassification of Trial Periods*** (dated February 27, 2025): challenges the Agency's unilateral and retroactive reclassification of permanent employees to trial (probationary) status. The grievance alleges this action violates the MCBA and

applicable federal statutes, rules, regulations, and fundamental principles of fair labor practices, and resulted in multiple improper terminations and removals without just cause or due process.

- **Grievance 2, *Pretextual RIF*** (dated March 13, 2025): challenges the Agency's coordinated reduction in force (RIF) actions and adverse personnel decisions affecting employees whose probationary status had been unlawfully reclassified. The Union alleges that the Agency engaged in a pretextual RIF without meeting the statutory or contractual criteria, and that affected employees were improperly terminated or denied their due process rights. The Union alleges these actions violated the MCBA and applicable federal statutes, rules, regulations, and fundamental principles of fair labor practices.

Pursuant to the agreement of the Parties, the following briefing schedule was set:

- **Union's Opening Brief:** July 30, 2025
- **Agency's Response Brief:** August 23, 2025
- **Union's Optional Reply:** September 11, 2025 – upon notice by September 4, 2025. *Limited to issues raised in the Agency's Response.*
- **Agency's Optional Sur-Reply:** September 26, 2025 – upon notice by September 19, 2025. *Limited to new issues raised in Union's Optional Reply, if any.*

Joint Exhibits:

**Jx. 1** – Master Collective Bargaining Agreement (MCBA) between the American Federation of Government Employees, Council 238, and the U.S. Environmental Protection Agency, effective July 2024.

**Jx. 2** – Union Grievance of the Parties dated February 19, 2025, concerning the unilateral retroactive reclassification of bargaining unit employees' probationary periods.

**Jx. 3** – Union Grievance of the Parties dated February 26, 2025, concerning the Agency's implementation of a pretextual Reduction in Force (RIF) and the unlawful termination of employees.

**Jx. 4** – Agency's Response to the February 19, 2025 grievance concerning probationary reclassification, dated March 21, 2025.

**Jx. 5** – Agency's Response to the February 26, 2025 grievance concerning the pretextual RIF, dated March 28, 2025.

Union Exhibits:

**Ux. 1** – Information Request dated February 26, 2025, submitted pursuant to 5 U.S.C. § 7114(b)(4), concerning the Agency's unilateral and retroactive reclassification of bargaining unit employees' probationary status.

**Ux. 2** – Information Request dated February 26, 2025, submitted pursuant to 5 U.S.C. § 7114(b)(4), concerning the Agency's implementation of a pretextual reduction in force and the improper termination of probationary employees.

**Ux. 3** – Sworn Declaration of Union President Justin Chen.

**Ux. 4** – Sworn Declaration of Kristi J. Wells, EPA Director of Human Capital Operations, *Maryland et al. v. USDA et al.* (1:25-cv-00748-JKB), March 15, 2025.

### **III. Issue Statement**

The Union proposes the following issue statements:

Whether the Agency violated the Master Collective Bargaining Agreement and/or applicable laws, rules, policies and procedures when it retroactively reclassified bargaining unit employees and extended their probationary periods, removed or reassigned them without just cause or due process, and failed to fully restore affected employees. If so, what should the remedy be?

Whether the Agency violated the Master Collective Bargaining Agreement and/or applicable laws, rules, policies and procedures when it effectuated a Reduction In Force, removed bargaining unit employees under the pretext of performance actions, and failed to fully restore or make whole affected employees it eventually returned to work. If so, what should the remedy be?

Whether the Agency violated the Master Collective Bargaining Agreement and/or applicable laws, rules, policies and procedures when it failed to respond to lawful information requests submitted by the Union. If so, what the remedy should be?

If the Agency does not agree to the above issue statements, the Union respectfully requests that the Arbitrator articulate the issues. *See* JX-1, Art. 23, Sec. 6(A) (“if the parties are unable to agree on a joint stipulation of the issue(s), each party shall submit its statement of the issue(s) to the arbitrator at the opening of the hearing. In that situation, the arbitrator is empowered to articulate the issue(s).”).

### **IV. Argument**

This case arises from two interrelated grievances filed by the American Federation of Government Employees, Council 238 (“Union”) on behalf of affected bargaining unit employees at the Environmental Protection Agency (“Agency”).

In its responses to both grievances, the Agency raised arbitrability claims. The Parties’ Master Collective Bargaining Agreement (MCBA) expressly commits the question of arbitrability to the arbitrator.

A. Arbitrability is a Concern Committed to the Arbitrator

The MCBA provides: “If the parties are unable to agree on a joint stipulation of the issue(s), each party shall submit its statement of the issues(s) to the arbitrator... In that situation the arbitrator is empowered to articulate the issue(s).” Ux. 1, Art. 23, Sec. 6(A). This language is clear and controlling. Even if the Agency disputes the scope, timeliness, or continued relevance of the grievances, those questions must be resolved by the arbitrator, not through unilateral assertions by the Agency in its response to a grievance. Accordingly, to the extent the Agency raises any threshold objections to the arbitrability of these grievances, such as mootness or overbreadth, they are properly before the arbitrator for resolution.

In its response to the Union’s grievance alleging it had engaged in a pretextual RIF, the Agency claimed that the matters are resolved because it complied with a federal district court’s preliminary injunction by reinstating some affected employees and rescinding proposed removals. Jx. 5, and see *State of Maryland, et al., v. U.S. Dep’t of Agric.*, 1:25-cv-748, ECF 44 (D.Md. 2025), (temporary restraining order granted on March 14, 2025, subsequently lifted).

In granting the Union’s grievance “in part,” the Agency wrote: “Nonetheless, as of March 19, 2025, all individuals in a probationary period who were terminated from February 14, 2025, and February 21, 2025, were notified on March 16, 2025, that their terminations were rescinded. Jx. 5; and *State of Maryland*, ECF 52-1 at 2.

Partial reinstatement pursuant to court order does not render these grievances moot. First, the grievance process is distinct from judicial proceedings and remains unresolved. The court’s preliminary injunction was limited in scope: it temporarily halted removals and required interim reinstatement of certain employees. It did not resolve the contractual violations asserted here, nor

did it result in comprehensive make-whole relief through the negotiated grievance procedure. The Agency's actions continue to impose harm on bargaining unit members.

Moreover, [following a recent Supreme Court order](#), injunctions that had previously barred agencies, including EPA, from implementing reductions in force have been lifted, allowing the Agency to proceed with RIF actions once again. *See Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025) (holding that certain "universal injunctions" likely exceed the equitable authority that Congress has granted to federal courts). This development underscores the urgent need for contractual enforcement: the Supreme Court's ruling reinforces that legal uncertainty has returned.

Second, an unknown number of employees remain on paid administrative leave without receiving career-ladder promotions or step increases, and others have suffered termination or reputational harm related to their status. Ux. 3. The Union has received multiple credible reports from affected employees detailing these harms.<sup>1</sup>

Reinstatement alone does not extinguish a grievance when full relief has not been granted. The standard under the Back Pay Act, 5 U.S.C. § 5596, is whether the employee suffered an unjustified or unwarranted personnel action that resulted in the loss of pay, benefits, or employment status. The Agency's partial and opaque implementation of the court's (now expired) injunction does not provide the full relief to which bargaining unit employees are entitled under law and contract.

Even if every individual employee affected by the Agency's actions had been fully reinstated and made whole, which does not appear to be the case, the Union would still have

---

<sup>1</sup> The Union is currently unable to fully quantify the harm to affected employees because the Agency has not responded to information requests submitted pursuant to 5 U.S.C. § 7114(b)(4). Ux. 3. The Agency is in exclusive possession of critical records, including SF-50s, leave status logs, and personnel actions, that would establish the number of employees who missed career-ladder promotions, step increases, or other benefits.

standing to pursue these grievances. The Union has enforceable institutional rights under both the MCBA and the Federal Service Labor-Management Relations Statute (the Statute), including the right to:

- **Challenge Unilateral Changes** – Under 5 U.S.C. § 7116(a)(1) and (5), the Agency is prohibited from making unilateral changes to conditions of employment without notice and bargaining. The retroactive alteration of probationary periods and initiation of removals based on such changes represent clear violations.
- **Enforce the Performance and RIF Procedures** – Articles 17 (Performance, Section 7(B)) and 18 (Reduction in Force) of the MCBA guarantee due process and procedural protections in removals, including RIF actions. The Agency’s circumvention of these processes to carry out removals under the guise of *probationary status performance issues* undermines the contract’s core protections.
- **Ensure Transparency and Accountability** – The Union submitted formal information requests under 5 U.S.C. § 7114(b)(4) in an effort to determine which employees were affected, what changes were made, and what remedies are owed. The Agency’s failure to respond meaningfully impedes the Union’s ability to fulfill its representational duties.

The grievance procedure allows the Union to raise systemic violations that affect bargaining unit employees collectively. Even where some individual employees have been returned to duty through outside processes, the Union retains the right to seek remedies through arbitration for the broader legal and contractual harms its members have suffered.

The Union submitted formal information requests under 5 U.S.C. § 7114(b)(4) concurrently with each grievance, and those requests remain pending. Ux. 3. Despite the passage of time, the Agency never provided the requested information, nor did it address the issue in its grievance responses. This failure continues to impede the Union’s ability to determine the scope of harm and pursue appropriate remedies, and constitutes an ongoing statutory violation.

1. *The MCBA's RIF Procedures are the Exclusive Procedure to Challenge the Agency's Pretextual RIF*

The Union asserts a grievance under the negotiated grievance procedure that advances a theory of pretextual Reduction in Force (RIF). Jx. 2, Sec. II, No. 5. Section 7121(a) of the Statute provides that, except for limited matters set out in sections (d) and (e), the negotiated grievance procedure is to be the exclusive procedure for resolving all matters which fall within its coverage. RIF procedures are not included in those exceptions. Therefore, the Union must use the negotiated grievance procedure to challenge the RIF. *See also Fed. Union of Scientists & Eng'rs, NAGE Local R1-144*, 25 FLRA 964, 966 (1987).

Any question regarding the applicability of RIF procedures to affected employees is a threshold issue for an arbitrator to decide and was not a reasonable basis for the Agency to deny the grievance. *See Habdas v. Dep't of the Navy*, 84 M.S.P.R. 412, 416 (1999).

B. The Agency Improperly Reclassified Employees that had Completed their Initial Trial Periods

The Union's first grievance, filed February 19, 2025, challenges the Agency's unilateral retroactive reclassification of probationary periods for bargaining unit employees without notice, bargaining, or legal authority. Affected employees were initially assigned a one-year trial period, consistent with applicable law, regulations, and Agency interpretation thereof. Upon completion of the one-year trial period stated at the outset of their employment by the Agency, these employees acquired full bargaining unit rights and coverage under the MCBA, as well as other constitutionally protected interests in their employment.

*After* the employees had completed their one-year trial periods and were working under the auspices of full employment rights, the Agency informed them that they were now retroactively

subject to a longer, two-year trial period. The Agency implemented these changes without notice to the Union or an opportunity to bargain prior to implementation.

Under the MCBA, bargaining unit employees who complete their trial period are no longer considered probationary or trial employees, and they are entitled to procedural protections before discipline or removal. Similarly, under the Statute, 5 U.S.C. § 7103(a)(2), an “employee” includes individuals in an appropriate bargaining unit who are no longer serving a trial period. Once these employees completed the one-year trial period designated by the Agency and reflected in their official personnel records on hire, they attained “employee” status within the meaning of both the collective bargaining agreement (CBA) and the Federal Service Labor-Management Relations Statute (the Statute). As such, they became entitled to the full panoply of rights and protections that attach to bargaining unit employees, including just cause protections, due process protections, and grievance rights.

The Agency’s attempt to retroactively extend these trial periods, *after employees had already completed a trial period*, is an unlawful deprivation of their acquired rights. It is well-established that government employees are entitled to due process when they have a legitimate expectation in continued employment or statutory rights. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). The same principle applies here: once the employee has completed the trial period as formally established and documented, their status changed. The Agency cannot reach back in time to deny them those protections, simply because it wishes it had originally imposed a different trial period. To allow otherwise would permit agencies to strip employees of hard-earned rights under the guise of “correcting” a record, no matter how long ago those rights vested. That outcome would be flatly inconsistent with the principles of fairness, stability, and contract enforcement that undergird both the MCBA and the Statute.

1. *The Agency Illegally Altered Personnel Documents and Violated the Privacy Act*

Because the re-classification of full-fledged employees was improper, so was the alteration of their official personnel records. Improper alteration of official federal personnel records, including Standard Form 50 (SF-50), can implicate multiple federal laws and policies. The Privacy Act governs how federal agencies collect, maintain, use, and disseminate records about individuals. SF-50s are part of a system of records covered by the Privacy Act. 5 U.S.C. § 552(a). That subsection requires agencies to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 USC § 552a(e)(5). Changing the recorded trial period, particularly if it retroactively extends the period or alters its end date, does not assure fairness to individual employees. It punishes them for the Agency's change in its interpretation of the law's requirements.

Of note, the Agency does not admit to making a mistake in the initial grant of one-year trial periods to new hires in the excepted service. Jx. 5. It has as of yet offered no explanation as to how or why it changed its interpretation of the law and is now requiring two-year trial periods for new hires in Schedule A.

However, in its response to the Union's grievance, the Agency hypothesizes that "[i]f the Agency mistakenly noted the wrong trial period length in any documentation, any affected individual does not thereby gain rights they would not otherwise legally be entitled to." Jx.5, C. It further asserts that it is *required by statute* to deprive employees who completed the trial period set by the Agency of their rights. Statute cannot mandate a violation of these employees' due process rights under the U.S. Constitution. "If a party has a property right in continued employment, the State cannot not deprive him or her of this property without due process..."

*Loudermill*, 470 U.S. at 535. When the Agency purports to “correct” an error, that it has not even admitted that it made, in the placement of employees on a trial period without due process, it creates another error in depriving those employees of their constitutionally-protected rights.

Further, the Agency has also denied employees access to their electronic personnel files and other documents. Ux. 3. Union President Chen reports that the union has received reports of employees that are “unable to access their Official Personnel Folders (eOPFs) or verify their employment status” and this denial of information persists despite the employees “making multiple requests to regional HR offices.” *Id.* This is also a violation of the Privacy Act. 5 U.S.C. § 552a(d) requires that agencies such as the EPA must provide individuals with access to their own records upon request. This includes allowing the individual to review and obtain copies of the record in a comprehensible format. Agencies must also respond when individuals request amendments to their records. *Id.*

## 2. *The Agency Committed an Unfair Labor Practice*

5 USC 7114(b) establishes the requirement that agencies and unions negotiate in good faith. Even if retroactive changing of trial periods for existing employees is a management right, the Agency still had an obligation to notice the Union of the change and bargain over it. It failed to meet that obligation in violation of the MCBA and Statute.

An agency must give the union advance notice and a reasonable opportunity to request bargaining when it is going to exercise a management right that involves a change in working conditions of bargaining unit employees, and the impact or reasonably foreseeable impact is more than *de minimis*. *United States Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999); *Pension Benefit Guaranty Corp.*, 59 FLRA 48, 50 (2003). The Agency is required to bargain over procedures for implementing the change and appropriate arrangements for affected employees.

“Where such a change to conditions of employment falls within an agency’s exercise of a management right under § 7106 of the Statute, the agency is nevertheless obligated to notify the exclusive representative and negotiate over the impact and implementation of the change.” *Dep’t of Homeland Sec., Customs & Border Prot.*, 64 FLRA 989, 994 (2010); and *U.S. Dep’t of the Treasury, Internal Revenue Serv.*, 62 FLRA 411, 414 (2008).

If an agency does not give the union proper notice of the change and implements the change without bargaining, this is bad faith bargaining, and an unfair labor practice. *U.S. Dep’t of the Army, Lexington-Blue Grass Army Depot, Lexington, Ky.*, 38 FLRA 647, 661 (1990) (Agency failed to notify union about a RIF, *status quo ante* remedy awarded); 5 USC 7116 (a)(5). An agency's failure to maintain the status quo until the completion of bargaining violates the statute's good-faith bargaining requirement. 5 USC 7116 (a)(5); *Department of Health and Human Services*, 73 FLRA 315 (2022).

Because the Agency failed to bargain in good faith with the Union over its unilateral change to working conditions of individuals who completed their initial one-year trial periods, it has committed an unfair labor practice. Therefore, the Union’s requested remedy of a return to *status quo ante* so that the Parties may engage in good faith bargaining should be granted.

C. The Agency Used Probationary Terminations as a Pretext to Avoid RIF Obligations

The Union’s second grievance, filed February 26, 2025, challenges the Agency’s mass termination of employees under the guise of personnel actions. On January 20, 2025, EPA received a guidance memo from OPM instructing agencies to: “[i]dentify all employees on probationary periods” and “promptly determine whether those employees should be retained.” Ux. 4, *Declaration of Kristi J. Wells, EPA Director of Human Capital*. On February 11, 2025, [the President issued an Executive Order directing agencies to prepare for sweeping RIFs](#). “Agency

Heads shall promptly undertake preparations to initiate large-scale reductions in force (RIFs), consistent with applicable law.” Exec. Order No. 14210, “Implementing the President’s “Department of Government Efficiency” Workforce Optimization Initiative”, [90 Fed. Reg. 9669](#), Sec. 3(C). Between February 14<sup>th</sup> and February 21<sup>st</sup>, the EPA terminated approximately 419 probationary employees for the same reason – *poor performance*. Ux. 4.

In its grievance, the Union asserts that these actions constituted a pretextual Reduction in Force (RIF), not based on performance or even budgetary considerations, and that the affected employees were improperly denied their procedural rights. The Agency implemented these actions without adhering to applicable RIF procedures, including those under 5 C.F.R. Part 351, and without regard to applicable MCBA procedures and federal law.

After federal courts issued temporary injunctions enjoining further removals, some affected employees were reinstated to duty. Ux. 5. However, many employees remain on indefinite administrative leave, and have not received career-ladder promotions, step increases, or full back pay to which they are entitled. Ux. 3.

An agency may terminate a probationary employee for poor performance only after giving the employee a fair opportunity to succeed. “[T]he employer . . . must honestly be dissatisfied with the probationer’s conduct or performance after giving him a fair trial on the job.” *McGuffin v. Soc. Sec. Admin.*, 942 F.3d 1099, 1102 (Fed. Cir. 2019) (emphasis added) (internal citations and punctuation omitted). The Civil Service Reform Act (CSRA) established uniform standards governing federal employee terminations based on performance, 5 U.S.C. §§ 4303(a), 7513(a), and procedures for layoffs or reductions in force (RIFs), 5 U.S.C. § 3502.

Declarations from Union President Justin Chen and additional public sources show that probationary employees across the federal government, including at the EPA, received nearly

identical, boilerplate termination notices claiming “inadequate performance;” many despite prior positive feedback from supervisors. Ux. 3, *see also* [\*AFGE, et. al. vs OPM, et. al.\*](#), 3:25-cv-01780-WHA, ECF 18-1, pg. 4 (N.D.Ca 2025) (Ex Parte Motion for Temporary Restraining Order); *and* *AFGE, AFL-CIO v. Trump*, 139 F.4th 1020 (9th Cir. 2025) (“President's Executive Order directing large-scale RIFs in federal agencies likely violates the constitutional separation of powers as the President lacks statutory authority for such actions.).

For example, [in a redacted affidavit filed in federal court](#), an EPA probationary employee described being placed on administrative leave on February 6, 2025, after five weeks of work, and then receiving a termination email while still on leave. *See State of Maryland v. United States Department of Agriculture*, 1:25-cv-00748, ECF 33-17 (D.Md. 2025). The notice stated only that the employee had “failed to demonstrate fully [their] qualifications for continued employment,” without citing any specific performance or conduct issues. *Id.* The employee reports receiving no performance evaluations and no negative feedback during their few weeks at the EPA. *See State of Maryland* ECF No. 33-1, Ex. 1, ¶¶ 4–6.

Such actions violate 5 C.F.R. § 315.804, which requires agencies to provide written notice identifying the specific inadequacies in performance or conduct that justify separation. *Id.* at (a). The regulation also clarifies that probation ends at the close of the employee’s scheduled tour of duty on the day before their one-year anniversary, meaning the agency must act before that time if it intends to rely on probationary status. *Id.* at (b). Trial period employees are entitled to the same requirements. 5 C.F.R. § 316.304.

By contrast, when separating employees due to a RIF, agencies must follow detailed procedures including retention preferences, consideration of tenure and veteran status, advance notice requirements, and compliance with negotiated agreements such as the MCBA. *See* 5 U.S.C.

§ 3502; 5 C.F.R. §§ 351.402, 351.801; *see also* Jx. 1, Art. 17 (Performance), Sec. 4(f); *and* Article 18 (Reduction in Force and Transfer of Function).

It is undenied that agencies have discretion to terminate probationary employees for performance or conduct issues. However, that justification may be challenged where it is evident it is a pretext for an impermissible motive. As the FLRA has explained, an employer's stated justification may be set aside if it is not the real reason for the agency's action. *Letterkenny Army Depot*, 35 FLRA 113, 120 (1990). In *Indian Health Serv., Crow Hosp.*, 57 FLRA 109, 114 (2001), the Authority rejected the agency's purported performance-based justification for terminating two probationary nurses, finding that the real motive was retaliation for protected activity. Similarly, the MSPB has long held that agencies may not evade adverse action procedures by mischaracterizing a termination as something it is not, such as a reorganization or a performance-based probationary removal, when in reality the motive is to effect mass removals without due process. *Losure v. Interstate Commerce Comm'n*, 2 M.S.P.R. 195, 200 (1980).

Although the President, through his Executive Order, told agencies, including the EPA, to undertake RIF preparations "consistent with applicable law" the EPA *instead* chose to terminate large swaths of probationary employees using boilerplate language, without any individualized review or performance documentation, and chose to deny that a RIF occurred. *State of Maryland*, 00748, ECF 33-17. The Agency's actions are contrary to its duties under the law.

The EPA, and other agencies, publicly acknowledged that the mass firings of newly-hired probationers were driven by compliance with the Executive Order and OPM instructions:

- [The Hill – "EPA Fires Over 400 Probationary Employees"](#)
- [GovExec – "See Which Federal Agencies Are Firing New Hires"](#)
- [EHS Leaders – "EPA Cuts Cause Confusion and Criticism"](#)

These terminations were not the product of genuine dissatisfaction with performance after a fair trial period, as required under *McGuffin v. SSA*, 942 F.3d 1099, 1102 (Fed. Cir. 2019), but instead were part of a centralized, top-down campaign to quickly eliminate employees whose positions were viewed as expendable under the administration’s policy goals. The uniformity, timing, and lack of individualized review underscore that these were not true probationary terminations, but RIFs.

Agencies are not free to avoid the mandatory requirements of the RIF statute and regulations, even when pursuing ostensibly legitimate policy objectives. The Federal Circuit has held that an agency “did not have the authority to implement a system for implementing RIFs contrary to the title 5 RIF framework mandated by Congress.” *James v. Von Zemenszky*, 284 F.3d 1310, 1321 (Fed. Cir. 2002). Nor can the agency avoid the regulatory framework by labeling the action something else. *McClure v. FEMA*, 32 M.S.P.R. 672, 676 (1987); *Moody v. DOJ*, 2009 MSPB LEXIS 1917, \*7. It is the agency’s burden to prove that its action complied with RIF rules. *Carter v. SBA*, 23 M.S.P.R. 309, 311–12 (1984); *Losure*, 2 MSPR 195. Importantly, the RIF rules apply to probationary employees. 5 C.F.R. § 351.202.

In short, the probationary terminations at the EPA were pretextual. They were the first wave of a government-wide RIF undertaken without regard for the legal protections afforded to employees, even those serving a trial or probationary period. The Agency’s use of performance language was a fiction designed to sidestep the procedural and substantive rights guaranteed by Title 5, the CSRA, the MCBA, and the APA.

When an agency fails to conduct a RIF in accordance with Part 351, the MSPB will order cancellation of the separation and appropriate relief. *Losure* at 203 (“We find, therefore, that the

agency's decision to separate Ms. Losure was not authorized by 5 C.F.R. Part 351, and that she is entitled to cancellation of her separation.").

*1. The Agency's Actions Violated the MCBA*

Article 18 of the MCBA sets forth detailed procedures that the Agency must follow when conducting a Reduction in Force (RIF), including situations involving reorganization, lack of work or funds, and other systemic reductions. Jx. 1. These procedures apply regardless of whether the affected employees are in the competitive or excepted service (Art. 18, Sec. 11), and explicitly cover probationary employees under applicable law and regulation.

The MCBA mandates that before executing any RIF, the Agency must:

- Provide at least 90 days' notice to the Union and 60 days' notice to affected employees (Sec. 3 and Sec. 5);
- Attempt to mitigate adverse impacts through attrition, reassignment, hiring freezes, and early retirement (Sec. 2);
- Prepare and share retention registers (Sec. 4);
- Offer reassignment to alternative positions where possible (Sec. 6);
- Prioritize displaced employees for reemployment and retraining opportunities (Sec. 10 and Sec. 14);
- And ensure all affected employees are informed of their grievance and appeal rights, including to the MSPB when prohibited personnel practices are implicated (Sec. 5).

The Agency violated each of these requirements. No formal RIF was announced. The Union was not consulted. No retention registers were prepared. No alternatives were explored. No reassignment offers were made. The terminations were issued *en masse* with boilerplate language influenced by OPM guidance, bypassing the procedural safeguards negotiated in Article 18.

Employees in a probationary or trial period are covered by Article 18, which incorporates rights under 5 CFR Part 351. *See* 5 CFR §§ 351.202, 351.203, and 351.504 (defining the scope of coverage, including probationers in Tenure Group II as “competing employees,” and requiring that

all such employees be evaluated under the RIF process, including service computation and competitive level assignment).

The MCBA exists to ensure fairness, transparency, and due process in exactly this kind of scenario. The Agency's failure to follow its terms not only violated contractual obligations, it denied employees their rights under federal law and further undermined confidence in the integrity of the civil service.

## 2. *The Agency's Actions Violated Federal Law*

The Union's grievance of the Agency's pretextual RIF alleged that the Agency's actions violated applicable federal law, including statutory and regulatory provisions governing reductions in force, due process, and fair treatment of employees. Jx. 3. The Environmental Protection Agency has a duty to act consistent with the Administrative Procedures Act (APA). *Cnty. Voice v. United States EPA*, 878 F.3d 779, 781 (9th Cir. 2017). An arbitrator may review an agency's actions pursuant to the APA. *Int'l Fed'n. of Profl & Tech. Eng'rs Ass'n of Admin. Law Judges Judicial Council No. 1*, 66 FLRA 763, 766 (Arbitrator did not err in finding the grievance over APA claim was substantively arbitrable).

The Union is channeled by the Statute (5 USC 71, *et. seq.*) into bringing claims such as these via the negotiated grievance procedure. *See Md. v. U.S. Dep't of Agric.*, Nos. 25-1248, 25-1338, 2025 U.S. App. LEXIS 8407, \*1 (4th Cir. Apr. 9, 2025) (statutory scheme precluded challenge to terminations of thousands of federal probationary employees across federal agencies following Executive Order 14210); *Am. Foreign Serv. Ass'n v. Trump*, No. 1:25-cv-352, 2025 WL 573762, at \*7 (D.D.C. Feb. 21, 2025) (statutory scheme precluded challenge to placement on administrative leave of thousands of employees of the United States Agency for International Development (USAID) because "the alleged injuries on which plaintiffs rel[ied] in seeking

injunctive relief flow[ed] essentially from their members' existing employment relationships with USAID"); *Nat'l Treasury Emps. Union v. Trump*, No. 25-cv-420, 2025 U.S. Dist. LEXIS 30592, at \*5-8 (D.D.C. Feb. 20, 2025) (statutory scheme precluded challenge to terminations of thousands of probationary employees, anticipated RIFs, and deferred-resignation program across federal agencies following three executive orders, including Executive Order 14210); *Am. Fed'n of Gov't Emps., AFL-CIO v. Ezell*, No. 25-cv-10276, 2025 U.S. Dist. LEXIS 25269, \*2 (D. Mass. Feb. 12, 2025) (statutory scheme precluded challenge to deferred-resignation program across multiple agencies).

Under the APA, a reviewing adjudicator must set aside any agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 USC § 706(2)(A). A federal court has found that the OMB/OPM memorandum and approvals of agency RIF plans, like the ones effectuated by the EPA, likely violated the APA as actions in excess of statutory authority. *AFGE, AFL-CIO v. Trump*, 139 F.4th 1020 (9th Cir. 2025).

The APA also requires federal agencies to engage in “reasoned decision-making,” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020), meaning an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted); 5 U.S.C. §706(2)(A); *Kalispel Tribe of Indians v. U.S. Dep’t of the Interior*, 999 F.3d 683, 688 (9th Cir. 2021).

The EPA has [publicly stated](#) that it was following orders from OPM and the President’s Executive Order when it made its decision to terminate probationary employees. However, the

President's Executive Order required the EPA to follow *all applicable laws* in carrying out its mandate to reduce the federal work force. *See* EO 14210.

The EPA's decision not to follow RIF procedures, even though the President's Executive Order calls for the Agency to prepare a widescale RIF, is *at least* arbitrary and capricious. It is entirely lacking in reasoned decision-making, contrary to lawful authority, and invalid on that basis. *See, e.g., Drs. for Am. v. Off. of Pers. Mgmt., Case No. CV 25-322 (JDB)*, at \*8 (D.D.C. Feb. 11, 2025) (“[Plaintiff’s] arbitrary and capricious argument is simple: the agencies’ removal decisions were “completely unreasoned” and thus were not the product of reasoned decision-making. ... The Court agrees that [Plaintiff] has demonstrated a likelihood of success on the merits as to this claim.”).

Federal courts have found that the evidence presented establishes that OPM knew its ordered termination notices were false. *AFGE, et. al. vs OPM, et. al.*, 3:25-cv-01780-WHA, ECF 45, pg. 8 (N.D.Ca. 2025) (A “mountain of evidence” presented by plaintiffs shows that OPM unlawfully directed widescale RIFs at agencies across the government, including the EPA) *and* pg. 9 (“Plaintiffs have marshalled significant evidence from numerous agencies stating that they were acting at the direction of OPM.”).

The EPA knew or should have known the termination notices it sent to hundreds of employees were predicated on a false rationale. The Agency, like the many others across the government also complicit in this deception, knew it did not conduct individualized performance reviews on each employee. Far from reasoned decision-making, the Agency's actions constitute violations of the APA's prohibition on arbitrary and capricious actions. Consistent with 5 U.S.C. § 706, the Union requests the Agency's actions be set aside and held as unlawful.

## V. Relief

The Authority may require an agency to take any remedial action it considers appropriate to carry out the policies of the Statute. 5 U.S.C. § 7105(g)(3). The Statute provides the Authority with wide discretion to craft a remedy. The Authority may “take any remedial action it considers appropriate to carry out the policies of this chapter.” *Id.* Moreover, under 5 U.S.C. § 7118(a)(7), if the Authority determines that an agency has engaged in, or is engaging in an unfair labor practice, then the Authority will issue an order requiring the parties to renegotiate in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect. *National Treasury Employees Union v. Federal Labor Relations Authority*, 856 F.2d 293, 295 (D.C. Cir. 1998) (“... in cases where an agency unlawfully effects a unilateral change in working conditions, the Authority, like the NLRB, should restore the status quo ante whenever possible...”).

Arbitrators are empowered to order the same remedies as the Authority in arbitrating grievances involving unfair labor practice allegations. *NTEU and Federal Deposit Insurance Corporation*, 48 FLRA 566, 570 (1993) (“[A]n arbitrator is empowered to fashion the same remedies in the arbitration of a grievance alleging the commission of an unfair labor practice as those authorized under section 7118 of the Statute.”). An arbitrator's remedial authority is limited only by the grounds for exceptions contained in 5 U.S.C. 7122: the remedy must not violate federal law or regulations, nor can it be deficient on the limited grounds applied by federal courts in the private sector.

The Authority has found that a *status quo ante* remedy is required to effectuate the purposes and policies of the Statute and prevent rendering meaningless the statutory duty to bargain in good

faith. *Dept. of Navy, Naval Underwater Systems Center, Newport, Rhode Island and Federal Union of Scientists and Engineers/NAGE, Local R1-144*, 30 FLRA 697, 701(1987); *United States Army Adjutant General, Publication Center, St. Louis, Missouri and AFGE Local 2761*, 35 FLRA 631, 634-35 (1990); *Long Beach Naval Shipyard Long Beach, California and Federal Employees Metal Trades Council*, 17 FLRA 511, 527 (1985).

The Privacy Act authorizes recovery of actual damages if the court determines that an agency acted in a manner which was intentional or willful. 5 USC § 552a(g)(4). To recover damages in an action under §552a(g)(1)(C), a plaintiff must establish four elements: (1) he has been aggrieved by an adverse determination, (2) the agency failed to maintain his records with the degree of accuracy necessary to assure fairness in the determination, (3) the agency's reliance on the inaccurate records was the proximate cause of the adverse determination, and (4) the agency acted intentionally or willfully in failing to maintain accurate records.

An award of back pay is authorized under the Back Pay Act when an arbitrator finds that an unjustified and unwarranted personnel action resulted in the loss or the reduction of a grievant's pay, allowances, or differentials. *Department of Veterans Affairs, James A. Haley VAMC, Tampa, Fla.*, 73 FLRA 47 (2022). A violation of the Statute constitutes "an unjustified or unwarranted personnel action," one of the requirements of a back pay award under the Back Pay Act. Thus, the agency's statutory violation of failing to bargain in good faith over a new uniform policy supported the award of back pay to technicians who had spent their own money on uniforms. *Department of the Air Force, 11th Wing, Joint Base Andrews, Md.*, 72 FLRA 691 (2022). The restoration of leave lost because of an unjustified or unwarranted personnel action is a proper remedy under the Back Pay Act. *Social Security Administration*, 63 FLRA 661 (2009). Denials of promotions, temporary promotions, and career ladder promotions have also all been found to be remedial pursuant to the

Back Pay Act. *See DVA Cleveland Regional Office*, 59 FLRA 248 (2003); *Federal Energy Regulatory Commission*, 58 FLRA 596 (2003); *Equal Employment Opportunity Commission*, 18 FLRA 312 (1985).

Because the Agency has failed to respond to the Union's information requests under 5 U.S.C. § 7114(b)(4), the Union is not yet in possession of the records necessary to quantify all individual and collective harm. Accordingly, the Union requests that the Arbitrator retain jurisdiction and direct the Agency to produce information as a prerequisite to finalizing monetary or personnel-specific remedies. Subject to the production of that information, the Union seeks the following relief:

**1. Declaratory Relief**

- A finding that the Agency violated the MCBA and 5 U.S.C. §§ 7114 and 7116 by:
  - Failing to engage in RIF procedures;
  - Falsely classifying tenured employees as probationary;
  - Denying employees earned promotions, step increases, and other benefits;
  - Engaging in unwarranted and unjustified personnel actions;
  - Failing to respond to the Union's § 7114 information requests.

**2. Injunctive and Equitable Relief**

- An order prohibiting the Agency from further use of retroactive probationary reclassification as a basis for termination;
- A direction to correct all affected personnel records to reflect accurate employment status, promotions, and trial periods;
- Restoration of eOPF access and network privileges for employees on administrative leave to any that have been denied;
- Reconsideration of promotion eligibility for any employee denied a career ladder promotion while on leave or retroactively classified as probationary;
- Reinstatement or fair consideration for Pathways Program participants terminated or denied conversion based on administrative leave status.

**3. Monetary Relief**

- Full make-whole relief under the Back Pay Act for any affected employee denied:
  - Step increases;
  - Career ladder promotions;

- Accrued annual or sick leave;
  - Conversion to permanent status or Pathways entitlements;
  - Restoration of any lost retirement or service credit.
4. **Remedial Process and Retained Jurisdiction**
- Authorization for the parties to submit affidavits, supplemental briefing, or a request for a hearing on the scope of relief;
  - Retention of jurisdiction by the Arbitrator to resolve any disputes over the scope or calculation of remedies.
5. **Attorneys' Fees and Costs**
- An award of attorneys' fees and costs under 5 U.S.C. § 5596(b) based on the Agency's unjustified and unwarranted personnel actions, including its failure to respond to the Union's information requests and failure to bargain.
  - An award of attorneys' fees and costs under any other applicable federal statute.
6. Any other relief deemed necessary in the interest of justice by the Arbitrator.

**VI. Conclusion**

The Union respectfully requests that the Arbitrator sustain both grievances in full and issue an award ordering comprehensive, systemic relief to address the Agency's violations of the Master Collective Bargaining Agreement (MCBA) and applicable laws.

Respectfully submitted,

  
 \_\_\_\_\_  
 Suzanne Summerlin  
 Attorney for AFGE C. 238  
 Email: [Suzanne@SummerlinLabor.com](mailto:Suzanne@SummerlinLabor.com)  
 Phone: 202-322-6796

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of July, 2025, a true and correct copy of the Union's Reply Brief in this matter was served via electronic mail upon the following:

Bianca Ponce de Leon  
 Attorney Advisor  
 U.S. Environmental Protection Agency  
 Office of General Counsel  
 General Law Office  
 Washington, D.C.  
[poncedeleon.bianca@epa.gov](mailto:poncedeleon.bianca@epa.gov)