UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

INTERESTED TERMINATED PROBATIONARY EMPLOYEE - DOT,
Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency,
and

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
CB-1205-25-0027-R-1

DATE: October 29, 2026

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Debra D'Agostino, Esquire, Ricardo Pitts-Wiley, Esquire, Joanna Friedman, Esquire, and Heather White, Esquire, Washington, D.C., for the petitioner.

D. Black, Esquire, Eyana Esters, Esquire, Michele Bloom, Esquire, Alex Ehler, Esquire, and Allison Kidd-Miller, Esquire, Washington, D.C., for the Office of Personnel Management.

Eric Michael Knapp, Esquire, Washington, D.C., for the Department of Transportation.

Charles N. Baldis, Esquire, Washington, D.C., for the U.S. Office of Special Counsel as amicus curiae.

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

BEFORE

James J. Woodruff II, Chairman
Henry J. Kerner, Vice Chairman

FINAL ORDER

The Office of Special Counsel (OSC) has filed a request to reopen the Board's June 18, 2026 decision denying the petitioners' request for regulation review in *Interested Terminated Probationary Employee – DOT v. Office of Personnel Management*, MSPB Docket No. CB-1205-25-0027-U-1, Final Order (June 18, 2026). *Interested Terminated Probationary Employee – DOT v. Office of Personnel Management*, MSPB Docket No. CB-1205-25-0027-R-1, Request to Reopen File, Tab 1. OSC seeks reconsideration of the Board's rejection of the brief OSC submitted as amicus curiae, arguing that it was entitled to file the amicus brief pursuant to its statutory authority under 5 U.S.C. § 1212(c). Upon further consideration, we hereby REOPEN this case pursuant to 5 C.F.R. § 1201.118, VACATE our June 18, 2026 final decision, and SUBSTITUTE the following decision.

The petitioner, an interested probationary employee terminated from the Department of Transportation (DOT), requests that the Board review under 5 U.S.C. § 1204(f) whether 10 Federal agencies, including DOT, invalidly implemented Office of Personnel Management (OPM) regulations when they terminated the petitioner and thousands of similarly situated employees during

their probationary periods on and shortly after February 14, 2025.[2] For the reasons discussed below, we DENY the request for regulation review.

BACKGROUND

On January 20, 2025, OPM issued a memorandum to agency heads directing them to identify "all employees on probationary periods, who have served less than a year in a competitive service appointment, or who have served less than two years in an excepted service appointment" and to "promptly determine whether those employees should be retained at the agency." *Interested Terminated Probationary Employee – DOT v. Office of Personnel Management*, MSPB Docket No. CB-1205-25-0027-U-1, Request File (RF), Tab 1 at 18-20. On January 28, 2025, OPM sent an email to all Federal employees titled "Fork in the Road," offering a "deferred resignation" program and stating that "the majority of federal agencies are likely to be downsized," including through reductions in force and furloughs. *Id.* at 22-24. Approximately 2 weeks later, on February 14, 2025, the Chief Human Capital Officers (CHCO) Council emailed the agency CHCOs and Deputy CHCOs, stating that "[w]e have asked that you separate probationary employees that you have not identified as mission-critical no later than end of the day Monday, 2/17" and attaching a template letter. *Id.* at 5, 26-27. According to the petitioner,

[2] The request for regulation review was submitted on behalf of 55 interested individuals who were terminated during their probationary periods from 1 of 10 employing agencies: Department of Commerce, Department of Energy, Department of Health and Human Services, Department of Homeland Security, U.S. Agency for International Development, Department of the Interior, DOT, Department of the Treasury, Department of Veterans Affairs, and Department of Agriculture. *Interested Terminated Probationary Employee – DOT v. Office of Personnel Management*, MSPB Docket No. CB-1205-25-0027-U-1, Request File (RF), Tab 1 at 1, 15-16. The Board grouped the interested individuals by employing agency and docketed separate requests for regulation review for each group, resulting in a separate regulation review request for each agency alleged to have invalidly implemented the regulations. RF, Tab 2 at 1. The instant request, *Interested Terminated Probationary Employee – DOT v. Office of Personnel Management*, MSPB Docket No. CB-1205-25-0027-U-1, has been docketed on behalf of the interested individual terminated from DOT identified by Exhibit 1 of the request for regulation review. *Id.*; RF, Tab 1 at 15-16.

"[b]eginning that very day, February 14, 202[5], upon receipt of this email, agencies terminated the interested persons and thousands of similarly situated probationers." *Id.* at 6. The petitioner noted that the termination notices were all similar and cited, as examples, notices from four different agencies issued February 14-20, 2025. *Id.* at 6-9.

On March 7, 2025, the petitioner filed the instant request for regulation review, arguing that the agencies, including DOT, invalidly implemented OPM regulations at 5 C.F.R. §§ 315.803(a), 315.804(a) (2025) in conducting the government-wide probationary terminations. RF, Tabs 1, 17. These provisions, as they existed at the time of the challenged terminations, provided:[3]

> 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.

5 C.F.R. § 315.803(a);

> 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.

5 C.F.R. § 315.804(a).

The petitioner argues that the agencies violated these provisions by: (1) failing to conduct the individualized assessments required by 5 C.F.R. § 315.803(a) to determine whether each probationary employee "fail[ed] to

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[3] On April 24, 2025, President Trump issued Executive Order 14284 declaring the regulations at 5 C.F.R. part 315, subpart H, which includes 5 C.F.R. §§ 315.803-315.804, "inoperative and without effect." Exec. Order No. 14284, Strengthening Probationary Periods in the Federal Service, 90 Fed. Reg. 17729 (Apr. 24, 2025). OPM formally eliminated these provisions by final rule on June 24, 2025. Strengthening Probationary Periods in the Federal Service, 90 Fed. Reg. 26727, 26729 (June 24, 2025).

demonstrate fully his or her qualifications for continued employment"; and (2) terminating probationary employees for reasons not permitted under 5 C.F.R. § 315.804(a)—namely, to downsize the Federal workforce, rather than for an individual's "work performance or conduct during this period [that] fails to demonstrate his fitness or his qualifications for continued employment." RF, Tab 1 at 4-6, Tab 16 at 7-13. The petitioner further argues that the *en masse* termination of probationary employees amounted to an unlawful reduction in force, taken without regard to the requirements of 5 C.F.R. part 351. RF, Tab 1 at 4-8. Lastly, he argues that the agencies' actions constituted a prohibited personnel practice under 5 U.S.C. § 2302(b)(12).[4] *Id.* at 9-10.

In its opposition to the petitioner's request for regulation review, OPM argues that the request must be dismissed for lack of jurisdiction or, in the alternative, for failure to meet the Board's prudential criteria for review.[5] RF, Tab 12. DOT incorporates OPM's arguments by reference and additionally argues that the request must be dismissed as moot because DOT canceled the February 2025 probationary terminations and reinstated the affected employees with back

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[4] Under 5 U.S.C. § 2302(b)(12), it is a prohibited personnel practice to take personnel action that violates a law, rule, or regulation implementing, or directly concerning, a merit system principle. The petitioner asserts that 5 C.F.R. §§ 315.803-315.804 and 5 C.F.R. part 351 are regulations that directly concern the merit system principles, including 5 U.S.C. § 2301(b)(5) ("The Federal work force should be used efficiently and effectively"); (b)(6) ("Employees 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"); and (b)(8)(A) ("Employees should be (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes").

[5] OSC submitted an amicus brief recommending that the Board deny the petitioner's request for review on the merits. RF, Tab 7. We accept this brief under 5 U.S.C. § 1212(c)(1), which authorizes OSC to participate "as a matter of right" in this proceeding. We deny the petitioner's motion to strike the amicus brief as unauthorized under 5 U.S.C. § 1212(h)(1). Although the petitioner correctly notes that that section applies to OSC amicus briefs before a court rather than the Board, OSC's section 1212(c)(1) authority authorizes its participation here. Therefore, we have accepted OSC's brief into the record. However, because we deny the petition on threshold grounds, we do not reach the arguments raised by OSC.

pay, including the petitioner. RF, Tab 13. The petitioner concedes that "it appears" most of the agencies, including DOT, have canceled the challenged probationary terminations and provided all the relief he was seeking. RF, Tab 16 at 4-5.

ANALYSIS

Under 5 U.S.C. § 1204(f), the Board has original jurisdiction to review rules and regulations issued by OPM and to declare such provisions invalid on their face or invalidly implemented by any agency. *Tabradillo v. Office of Personnel Management*, 93 M.S.P.R. 257, ¶ 3 (2003). The Board will declare a regulation "invalidly implemented by any agency, if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to violate section 2302(b)." 5 U.S.C. § 1204(f)(2)(B).

The petitioner seeks regulation review pursuant to 5 U.S.C. § 1204(f)(1)(B), which provides that an "interested person" may request regulation review. The term "interested person" has not been defined in the statute or in the relevant regulations. *Jones v. Office of Personnel Management*, 107 M.S.P.R. 115, ¶ 8 (2007); 5 C.F.R. §§ 1203.1-1203.22. However, the Board has interpreted the plain meaning of that term to signify that the petitioning person must have an interest in having the Board review the regulation or rule in question because it has some applicability to him or her. *Jones*, 107 M.S.P.R. 115, ¶ 8. Thus, the question of whether a petitioner is an "interested person" is a "standing" issue. *Id.*, ¶ 9 (citing *Senior Executives Association v. Office of Personnel Management*, 67 M.S.P.R. 643, 648 (1995)).

As noted above, DOT stated in its response to the petitioner's request for regulation review that the February 2025 probationary terminations at issue have been canceled, and the affected employees reinstated with back pay. RF, Tab 13. In support, DOT provided a declaration under penalty of perjury from the Assistant

Secretary for Administration attesting that DOT rescinded all 775 probationary terminations effected in February 2025 and that, as of March 24, 2025, most of the affected employees had been returned to active duty or had elected to take voluntary leave, while 92 had tendered voluntary resignations. RF, Tab 13 at 65-67. DOT additionally provided evidence specifically showing that it canceled the petitioner's probationary termination, paid him back pay, and reinstated his health benefits enrollment. *Id.* at 69-72. The petitioner replied that, based on declarations provided by agency officials in *Maryland v. U.S. Department of Agriculture*, No. 25-cv-00748 (D. Md.), "it appears these agencies [including DOT] have all rescinded the terminations of probationary employees done *en masse* on or shortly after February 14, 2025." RF, Tab 16 at 4-5. The petitioner further conceded that, "to the extent the agencies have rescinded in full the terminations of probationary employees executed *en mass* [sic] on or shortly after February 14, 2025, the agencies have provided the relief sought in the [request for regulation review]." *Id.* at 13.

Since the record reflects, and the parties appear to agree, that the probationary termination underlying this request for regulation review has been rescinded, the alleged invalid implementation of the regulations is no longer applicable to the petitioner. As such, he does not qualify as an "interested person" entitled to request Board review of OPM's regulations under 5 U.S.C. § 1204(f)(1)(B). We therefore find that the petitioner does not have standing to request regulation review in this case, and his petition must be denied on that basis. *Cf. Jones*, 107 M.S.P.R. 115, ¶ 8.

ORDER

The petitioner's request for regulation review is denied. Title 5 of the Code of Federal Regulations, section 1203.12(a) (5 C.F.R. § 1203.12(a)).

FOR THE BOARD:

Gina K. Grippando

Gina K. Grippando
Clerk of the Board

Washington, D.C.