

Trump's mass probationary firings were illegal, judge concludes, but he won't order re-hirings

This story was written by Eric Katz and published in the Government Executive on September 15.

The mass firing of newly hired and promoted federal employees that the Trump administration ordered earlier this year was unlawful, a federal court ruled in a final decision issued on Friday, though agencies will not face a new mandate to re-hire all impacted staff.

The Office of Personnel Management illegally required the roughly 25,000 firings throughout government, U.S. District Judge William Alsup said, denying the Trump administration's argument that each agency acted on its own. The ruling comes months after the [Supreme Court knocked down](#) Alsup's previous preliminary injunction on the firings, though the judge said the justice' decision was nebulous and did not prevent his final order.

Alsup castigated the Trump administration for both its actions and its presentation before the court, saying it obfuscated key information. OPM's directive to fire employees in their probationary periods was unlawful, he said, as were "the means used to enforce terminations."

The record submitted by the government "is a sham," Alsup said. "It does not facilitate judicial review: It frustrates it."

Alsup likened the government's approach to walking him through a forest while blindfolded.

After reviewing extensive documentation and testimony made available by the plaintiffs and some Trump administration officials, Alsup said it was clear agencies were required to ask OPM for direction on whom to fire, whom to exempt and when to carry out the dismissals.

The government has repeatedly argued that OPM did not direct agencies to take any action but merely provided guidance they could follow. Alsup rejected that argument, citing extensive evidence that agencies were directly following OPM's orders in carrying out the firings.

"OPM's directive unlawfully exceeded its own powers and usurped and exercised powers reserved by Congress to each individual relief defendant agency," the judge said.

Internal communications within OPM brought to light during the litigation showed, for example, the agency's officials approving exemptions "from any guidance to terminate probationary employees."

Alsup also suggested the Trump administration's argument that the fired employees, and the unions who represent them, should take their cases to special bodies for civil servants—namely the Federal Labor Relations Authority, Merit Systems Protection Board and Office of Special Counsel—insincere considering President Trump's efforts to undermine them. The president has fired leaders of those agencies, and his administration has argued in court at least some of their existences are unconstitutional.

"In sum, the administrative schemes have stopped doing as much work as before (FLRA), have stopped doing any work at all (MSPB), or have started working for the other side (OSC)," Alsup said.

Federal employees and nonprofit groups [launched a lawsuit](#) against OSC last week arguing it is neglecting its duties regarding fired probationary workers. They added that Trump has installed a "White House loyalist" to lead the agency.

Normally, Alsup said, his findings would require the Trump administration to return all probationers to their jobs. He noted the Supreme Court has specifically rejected such relief, however, and "too much water has now passed under the bridge." Some employees have found new jobs, while some agencies have engaged in reorganizations that have eliminated the roles altogether.

"The terminated probationary employees have moved on with their lives and found new jobs," Alsup said. "Many would no longer be willing or able to return to their posts."

Instead, the judge once again ordered agencies to, by Nov. 14, send letters to all fired probationary employees that state "you were not terminated on the basis of your personal performance." Alsup previously ordered similar letters, but agencies included additional language stating they disagreed with the judge's decision and were only issuing the correspondence at his direction.

"Corrective notices shall not contain further statements from each agency concerning the validity of this court's ruling or the agency's opinions on this court's ruling," Alsup said.

"There is no need to lard the letters with such distractions."

The Trump administration last month told a federal appeals court it was considering [sending new letters](#) to fired employees to notify them that they were, in fact, fired for cause.

He also ordered agencies to make clear in employees' personnel records that they were not fired for performance and to no longer take direction from OPM on employee dismissals. Any employee who was fired, re-hired and re-fired over the course of the court battle—such as those as the departments of Health and Human Services, Commerce and Housing and Urban Development—should not have their second firing made retroactive to the first, the judge said.

Many of the terminated workers were rehired while injunctions were in place, and only some agencies re-fired them after the Supreme Court's ruling came down. Last week, an appeals court in Maryland sided with the Trump administration in ordering another case involving probationary employee firings be dismissed.