Government Executive

Trump Administration Makes Its Case to Break Up Immigration Judges' Union

By Eric Katz
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The Trump administration argued in an executive branch court on Tuesday that the duties of immigration judges housed within the Justice Department have grown more important in the last two decades, elevating the judges to management and therefore rendering them ineligible to form a union.

The Justice lawyers and their first witness—James McHenry, the director of the Executive Office of Immigration Review, which employs the nation's 400 immigration judges—faced pointed questions from an attorney with the Federal Labor Relations Authority who oversaw the hearing and questioned whether the judges actually set department policy. The administration first announced in August it would attempt to decertify the National Association of Immigration Judges, bringing the case to FLRA to argue the employees are not eligible to collectively bargain.

Union representatives argued at Tuesday's hearing that their members' duties have not fundamentally changed since 2000, when the Justice Department last attempted to decertify the union. FLRA rejected the Justice Department's argument that year that immigration judges make policy through the issuance of decisions, noting the judges do not set precedent and their rulings are often appealed and reviewed. FLRA also said the immigration court system was established specifically so judges do not maintain any management duties to enable them to focus on hearings.

The arguments followed a similar path on Tuesday, though Justice attorneys and McHenry said several changes to Executive Office of Immigration Review policy and relevant precedents created an opening for a new FLRA ruling. William Krisner, the regional attorney for FLRA's Washington office who presided over the hearing, said Tuesday morning the authority would first have to determine if anything had changed since 2000 before ruling on the merits of the case. William Brill, a Justice attorney, pointed to a 1999 streamlining effort by the department that enabled the immigration appeals board within the review office to simply affirm a judge's ruling without issuing a separate opinion as one such change. The change was not presented during the previous FLRA case, Brill said, and was amplified in 2002 when EOIR again shifted course to allow just one board member to affirm a judge's ruling.

Facing Brill's questioning, McHenry said the "factual day-to-day" of immigration judges' work has not changed since 2000 but the "legal significance of those duties" had been overhauled.

Legal changes have "fundamentally recast the nature and importance of immigration judge duties," McHenry said.

Richard Bialczak, an attorney for the union, rejected the argument, saying Justice's claims were nothing more than a retread.

The Trump administration is "raising the same arguments and hoping for a different outcome," Bialczak said. "There's no factual basis for it. The Department of Justice simply does not want to deal with a vocal union that asserts its rights."

Brill also argued immigration judges' workload increasingly involves issuing decisions that cannot be appealed to the Executive Office of Immigration Review's board. While immigrants can appeal those cases to the federal circuit, Brill and McHenry said the judge's initial ruling represents the department's official position. Immigration judges collectively issued about 280,000 decisions in fiscal 2019, about 38% of which could not be appealed to the Board of Immigration Appeals.

Justice also pointed to *Lucia v. SEC*—a 2018 Supreme Court case that dictated that administrative law judges must be appointed by the president or a designated official, rather than hired normally—as relevant to immigration judges. The Executive Office of Immigration Review employees are administrative judges, not administrative law judges, but McHenry said their "duties and functions are very similar."

"It's difficult to conceive someone who needs to be appointed by the head of an agency but does not make management decisions," Brill said.

Margaret Tough, another attorney for the union, countered that *Lucia* had no bearing on immigration judges, who are appointed by the attorney general and have been dating back prior to 2000. She and Bialczak said the judges are now under stricter oversight by management, facing new performance evaluations, quotas for their annual caseload and a restriction on speaking publicly. On cross examination, McHenry noted the judges can face discipline if their rulings are not up to acceptable standards and the board can remand cases back to them. Under their performance standards, judges cannot exceed a pre-set remand rate.

Upon follow-up questioning from Kirsner, the FLRA attorney, McHenry conceded the judges "are not supervisors."

"Immigration judges are at the bottom of the org chart so they don't supervise anything," McHenry said, noting they cannot hire or fire anyone.

Tough highlighted that the Executive Office of Immigration Review has hired additional supervisory judges and under McHenry created the Office of Policy, which the agency director said was launched to "ensure better coordination of policy making within the agency." He added, however, that adjudicatory policy making remained the sole power of immigration judges and their supervisors cannot influence the judges' rulings.

Kirsner repeatedly sought more information on immigration judges' power to set precedent. Generally speaking, their rulings do not influence more than the case at hand. Kirsner also clarified that unless there is a remand, their work on a case is finished after they issue a decision. Justice attorneys noted various statements in which the union suggested immigration judges should be removed from the executive branch and placed into an independent court, but Kirsner rejected them as irrelevant.

FLRA is expected to continue to hear from witnesses through Thursday before issuing a decision on the union's fate later this year.

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