

**GRIEVANCE PURSUANT TO ARTICLE 8 OF THE LABOR AGREEMENT  
BETWEEN OCIJ, EOIR, DOJ AND NAIJ**

**Date:** May 11, 2020

**To:** Hon. Matthew Kaufman  
Assistant Chief Immigration Judge  
Office of the Chief Immigration Judge  
Executive Office for Immigration Review

**Grievant:** National Association of Immigration Judges (NAIJ)

**Grievant's Representative:** Mimi Tsankov, Eastern Region Grievance Chair  
National Association of Immigration Judges

**Matter Grieved:** The grievance is brought under Article 8.3 of the Collective Bargaining Agreement (CBA).

The Agency's actions have violated, misinterpreted, or misapplied a law, rule and/or other regulations affecting the conditions of employment of bargaining unit employees, including, but not limited to, a violation of 5 U.S.C. § 7103. Section 7103 permits the National Association of Immigration Judges (NAIJ or the "Association") to grieve any claimed violation, misinterpretation, or misapplication of the parties' CBA or any law, rule, or regulation affecting conditions of employment of Immigration Judges, with certain exceptions not applicable here. Section 7103 also permits NAIJ to grieve an unfair labor practice under 5 U.S.C. § 7116(a)(1) and (5) (failure to bargain in good faith).

First, the Agency violated CBA Articles 12 and 12.1, Safety and Health which state, in pertinent part, that "the Agency will, to the extent practicable, take actions necessary to minimize the risk of physical and health-related dangers to Immigration Judges whenever and wherever they are holding court."

The steps the Agency has taken to minimize such risks have been ineffective during the period of the Coronavirus Pandemic.

The Agency is required to solicit the Association's views on safety matters prior to making any major safety-related changes. It has failed to do so during the Coronavirus Pandemic.

The Agency is required to convene a joint safety committee that will monitor safety and security in the courts and recommend safety and security improvements. However, the Agency has failed to apply these measures. It has not created a committee to monitor safety at the courts during the Coronavirus Pandemic, and it has not engaged in discussions with NAIJ about ensuring the safety and security of the Immigration Judges.

Second, the Agency has failed to comply with CBA Article 12.2, Safety Inspections, by failing to request required safety and health inspections be conducted by the responsible organizations. In addition, if an inspection schedule has been prepared, the Agency has failed to furnish the Association with a copy.

Third, the Agency has failed to comply with CBA Article 12.4, Non-Detention Settings, when it failed to consult with and seek input from the Association regarding safety features in the Immigration Courts related to the Coronavirus Pandemic.

Fourth, the Agency engaged in an unlawful unfair labor practice when it failed to bargain the impact and implementation of the health and safety measures employed at the Immigration Courts during the Coronavirus Pandemic, including but not limited to the process by which courts are opened and closed during the Coronavirus Pandemic.

**Relevant Facts:**

The Immigration Court and the greater international community is in the midst of a rapidly evolving health crisis. Beginning with the creation of the White House Coronavirus Task Force on January 27, 2020 and the declaration of a public health emergency on January 31st, the federal government has been engaging executive, legal, and regulatory pandemic response procedures.<sup>1</sup> The World Health Organization has classified COVID-19 as a global pandemic, and as of May 11, 2020, the United States has at least 1,334,951 confirmed cases, and the virus has sickened and killed at least 79,699 individuals nationally.<sup>2</sup>

According to the Centers for Disease Control and Prevention (the “CDC”), COVID-19 spreads “mainly from person-to-person” between those “who are in close contact with one another (within about 6 feet)” and from contact with contaminated surfaces.<sup>3</sup> While the most common symptoms of COVID-19 include fever, cough, and shortness of breath, individuals can be asymptomatic and still have the virus and be contagious infecting others.<sup>4</sup> The CDC reports that some individuals are at a higher risk of illness or death, including “older” individuals, those who are immunocompromised, or those who have underlying health issues like asthma, chronic lung disease, HIV, heart conditions, diabetes, chronic kidney disease, and liver disease.<sup>5</sup> In order to reduce the spread of the virus, the CDC as well as state and local governments have mandated “social distancing,” regular disinfecting of “high touch” surfaces, and the use of face masks.

The conditions at the Immigration Court make it particularly susceptible to COVID-19 spread, including the following: the

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<sup>1</sup> Philip A. Wallach and Justus Myers, The Brookings Institution, Report: The federal government’s coronavirus response—Public health timeline (March 31, 2020), <https://www.brookings.edu/research/the-federal-governments-coronavirus-actions-and-failures-timeline-and-themes/>).

<sup>2</sup> Johns Hopkins University of Medicine, Dashboard by the Center for Systems Science and Engineering, Coronavirus Resource Center, <https://coronavirus.jhu.edu/map.html>.

<sup>3</sup> Ctrs. for Disease Control and Prevention, How COVID-19 Spreads, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

<sup>4</sup> *Id.*; Ctrs. for Disease Control and Prevention, Symptoms of Coronavirus, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

<sup>5</sup> *Id.*

courtrooms are “enclosed” and can be in a crowded environment; employees share files, documents, and working spaces without disinfection between use; and the Agency has not provided ample Personal Protective Equipment to ensure a safe environment. EOIR has also not adhered to recommended social distancing practices.

EOIR has refused to implement many of the most fundamental safety precautions recommended by the Occupational Safety and Health Administration (“OSHA”) in *Guidance on Preparing Workplaces for COVID-19*, including “Steps All Employers Can Take to Reduce Workers’ Risk of Exposure to SARS-CoV-2.” Of those recommended guidelines, EOIR has, in many instances, failed to:

- implement good hygiene and infection control practices including providing staff and the public with tissues, masks, gloves, hand sanitizer, and other personal protective equipment;
- establish policies and practices, such as flexible worksites and flexible work hours, to increase the physical distance among employees;
- develop policies and procedures for prompt identification and isolation of sick people;
- develop policies and procedures for employees to report when they are sick or experiencing symptoms of COVID-19; and
- develop, implement, and communicate about workplace flexibilities and protections such as actively encouraging sick employees to stay home, and ensuring that sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.

EOIR has also refused to follow CDC guidance on cleaning EOIR workspaces after COVID-19 exposure incidents as set out in the CDC’s *Cleaning and Disinfection for Community Facilities*. For example, the CDC recommends waiting a minimum of 24 hours before beginning cleaning and disinfection, but often EOIR space is cleaned and reopened within 24 hours of a symptomatic individual’s last contact with the space.

Notwithstanding the emergent nature of the pandemic, the Agency has disavowed any duty to bargain the concerns NAIJ has raised and to follow the provisions of the CBA after-the-fact, by providing requested information, or negotiating over the impact of the Agency's actions. The Agency asserts that "it is management's right to determine the internal security practices of the Agency, and maintain appropriate facility management, to help protect the Agency's employees, contractors, detainees and visitors from spread of the pandemic. 5 USC § 7106(a)(1)" The Agency has failed to take prompt, appropriate and sufficient action to ensure the health and safety of the Immigration Judges, and this has created a dangerous environment placing their health, safety and lives at risk. It has continued to operate the detained courts by claiming that "EOIR's current operational status is largely in line with that of most federal courts across the country, which have continued to receive and process filings and to hold critical hearings, while deferring others as appropriate."

EOIR's refusal to close detained courts and non-detained courts causes a cascade of social interaction that puts all of the Immigration Judges at risk. It requires judges and court staff to continue to travel to courthouses and work shoulder-to-shoulder in hearings. Interpreters continue to fly around the country to attend court sessions. Detainees are moved by security officers within detention facilities and are frequently brought in large groups into courtrooms or wait in large groups outside courtrooms in order to enter courtrooms individually. Immigration attorneys continue to travel to courthouses and wade through security lines to attend hearings. Families of respondents continue to travel to immigration courthouses to see their loved ones and to attempt to serve as witnesses in their hearings. Paper is passed back and forth amongst all the parties appearing in court, as legal briefs, court orders, reams of paper evidence, and paper court files get passed from hand to hand every day in our largely paper-based immigration courts.

Many of the courts are in areas with known high concentrations of coronavirus infections and where there are local and state-wide travel restrictions in place, such as New York, New Jersey, Illinois, Miami, California, and others. From West Coast to East Coast, court after court has had to grapple with incident reports of COVID-19 exposure or positive test results of staff and the public. Examples include the Los Angeles, San Francisco, Aurora (Colorado), Elizabeth (New Jersey), Varick (New York), Krome (South Florida), Seattle, Conroe (Texas), LaSalle (Louisiana), Fishkill (New York), Ulster (New York), Boston, Newark, and San Antonio Immigration Courts.

EOIR has refused to act in good faith and has failed to provide pertinent data in response to the NAIJ's requests for information about health and safety practices at the court. For example, on April 20, 2020, the NAIJ requested that the New York Varick Immigration Court be closed based on health and safety concerns. The Agency's most recent response dated April 23, 2020, fails to provide full data and transparency about the health and safety practices at that court. More broadly, the Agency has failed to identify what standard it is using to determine when a court should be open. The Agency does not explain what it means when a court is "deep cleaned" but remains open, or when a court should be closed and for how long. Repeatedly, the EOIR has failed to provide timely and complete information to the impacted individuals. This mode of operation has contributed to both the increased risk of exposure and actual exposure to COVID-19 and the spread of the virus within the community. Moreover, the Agency has offered laptop and telework opportunities to only a subset of Immigration Judges, rendering those not provided with these resources and assignments subject to unsafe conditions.

NAIJ has been proactive in seeking assistance and health and safety assurances from the Agency, including through formal and informal means, including through multiple email requests, formal requests for information, and telephonic requests, to no avail. The Agency's responses generally lack

specificity and clarity and are not comprehensive. Given this lack of transparency and access to health and safety information, Immigration Judges have expressed the following concerns about how their health and safety has been and will be ensured in the workplace given:

- The failure to maintain social distancing in the courthouse building, the courtrooms, and in the inner office locations;
- The fomenting of infection risk by requiring judges to utilize un-monitored and unsafe elevators and building common areas where social distancing is not observed in order to reach the courtroom and their workspaces;
- The failure to provide sufficient personal protective equipment, including adequate masks and gloves to all Immigration Judges, staff, and visitors to the building, including respondents, interpreters, etc.
- The failure to ensure that court employees and visitors are not symptomatic, and/or COVID-19 positive;
- The failure to notify Immigration Judges whether other court employees and visitors are not symptomatic, and/or COVID-19 positive;
- The failure to consider transportation alternatives since public transportation has been reserved for “essential” workers, and the local/state authorities have not deemed immigration court employees to be “essential.”
- The failure to acknowledge that anyone travelling from a home to an immigration court would not be engaging in “essential” travel, and all parties would be in violation of the local stay-at-home order. Moreover, the schedules for public transportation have been significantly modified and there are fewer metro trains and buses available for use. One judge’s request for reimbursement for alternative safe travel costs in order to travel within New York City during the height of the pandemic was denied.
- Some courts are located near areas that have been designated as quarantine facilities.

**Remedy Sought:**

A full make-whole remedy including but not limited to the following:

1. Grievant seeks to have the Agency provide complete and comprehensive historical data about the decision-making processes that have led to the opening and closing of all of the Immigration Courts during the Coronavirus Pandemic, and specifically the period from January 30, 2020 to the present;
2. Grievant seeks to have the Agency close all courts in order to minimize the risk of physical and health-related dangers to Immigration Judges whenever and wherever they are holding court;
3. Grievant seeks to have the Agency comply with CBA Article 12.1, Safety and Health, and solicit the Association's views on safety matters prior to making major safety-related changes;
4. Grievant seeks to have the Agency comply with CBA Article 12.1, Safety and Health, and convene a joint safety committee that will monitor safety and security in the courts and recommend safety and security improvements;
5. Grievant seeks to have the Agency comply with CBA Article 12.2, Safety Inspections, and provide a safety and health inspection by the responsible organizations, and if an inspection schedule has been prepared, Grievant seeks to have the Agency furnish a copy;
6. Grievant seeks to have the Agency comply with CBA Article 12.4, Non-Detention Settings, and consult with and seek input from the Association regarding safety features in the Immigration Courts;



7. Grievant seeks to have the Agency bargain over the impact and implementation of the process by which courts are opened and closed during the Coronavirus Pandemic and during any health and safety emergency.
8. Grievant seeks to have the Agency provide financial reimbursement to affected Immigration Judges for any and all medical related costs associated with COVID related illness due to exposure from their court responsibilities during the Coronavirus Pandemic.
9. Grievant seeks to have any and all additional and/or alternative remedies that may be appropriate.

**Request for a Hearing:**      Yes

May 11, 2020

*A. Ashley Tabaddor*

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Hon. A. Ashley Tabaddor  
President  
National Association of Immigration Judges