

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

Date: July 8, 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) because the Agency's actions have violated, misinterpreted, or misapplied a law, rule and/or other regulations affecting the conditions of employment, including but not limited to, committing an unfair labor practice under 5 U.S.C. §§ 7116(a)(1) and (5), failure to bargain-implementing before I&I bargaining is complete regarding:

- a) the Agency's implementation without notice and impact and implementation bargaining of a series of policy changes beginning March 17, 2020, described below; and
- b) the Agency's refusal to negotiate the impact and implementation of the anticipated return to normal procedures.

Facts: On March 17, 2020, the Agency notified the NAIJ that due to the COVID-19 pandemic health crisis it would be implementing a mandatory telework policy effective immediately at the Seattle Immigration Court, whereby all employees would be evacuated and teleworking indefinitely. The email referenced two NAIJ communications to the Agency supporting telework generally due to emerging health concerns. The Agency's notification marked a change in conditions of employment and/or working conditions as it ordered that evacuated employees would be "assigned to perform any work considered necessary or required to be performed during the period of the evacuation without regard to the grades or titles of the employees." It set forth that "The nature and scope of duties may include: drafting

and issuing decisions in cases already heard, resolving pending motions, assessing aged cases to determine status and issuing applicable scheduling or other orders, reviewing evidentiary submissions for pending cases, and assisting other immigration courts nationwide with such duties.”

The next day, March 18, 2020, the Agency released Policy Memorandum 20-10 entitled “Immigration Court Practices During the Declared National Emergency Concerning Covid-19 Outbreak” (hereinafter PM 20-10). PM 20-10 implemented significant changes to a wide range of Immigration Judges’ conditions of employment and/or working conditions applicable during the COVID-19 outbreak, including the following:

- Access to and utilization of telework assignments;
- The assignment to non-detained dockets and detained dockets;
- The utilization of weather and safety leave;
- The circumstances underlying EOIR operational status decisions including when courts would be closed and reopened for in-person hearings by Immigration Judges;
- The manner in which equipment and work would be made available and assigned;
- The assignment of Immigration Judges to telework assignments or in-person assignments; and
- a host of other new conditions of employment and/or working conditions.

The next day, March 19, 2020, the NAIJ filed a demand to bargain the impact and implementation of PM 20-10, and, notwithstanding the pandemic emergency conditions, offered nine detailed and specific proposals for Agency consideration.

On March 23, 2020, the Agency denied the demand to bargain on multiple grounds, including the management right to assign work and assign employees, 5 USC § 7106(a)(2)(A)-(B); the lack of a telework provision in the Collective Bargaining Agreement; and claimed consent and waiver.

On March 31, 2020, the NAIJ reiterated its demand to bargain over the ongoing massive impact of PM 20-10, and the resulting changes to conditions of employment and/or working conditions of Immigration judges as a result of the new policy, including:

- That the issuance of a new nationwide work-from-home order was *per se* not *de minimis* where heretofore Immigration Judges had never engaged in telework on such a large scale;
- That the NAIJ had not waived its right to bargain and, on the contrary, had asserted it;
- That with schools closed throughout the country and judges caring for young children, this would impact implementation of the policy;
- That a procedure for provision of Agency laptops was not provided;
- That Immigration Judges engaging in telework would have access to reduced resources, technical and administrative assistance, printing assistance, and other types of administrative support; and
- Other additional questions about impact and implementation.

Throughout April 2020, the NAIJ and the Agency exchanged a series of emails in which the NAIJ continued to identify changes in the conditions of employment and/or working conditions of Immigration Judges that necessitated bargaining, to which the Agency repeatedly refused to bargain. For example, on April 3, 2020, the NAIJ notified the Agency of continuing serious health and safety breaches at the Immigration Courts including lack of access to personal protective equipment and a safe and healthy environment, among other concerns. Yet, on April 6, 2020, citing among other reasons, lack of resources, the Agency reiterated its refusal to bargain, and failed to address the impact on the conditions of employment and/or working conditions of Immigration Judges working at Immigration Courts in-person, and through telework.

On April 7, 2020, the NAIJ replied, emphasizing the serious health and safety concerns present based on the work assignments, and the unreasonable failure of the Agency to provide notice of and an opportunity to bargain impact and implementation of openings and

closings of courts, the safety precautions being considered at the courts, the failure to comply with CBA Article 12 Safety and Health notifications, reporting, and inspections, and disparate work assignments during the pandemic.

Concerned about the Agency's failures to bargain and the lack of willingness to share pertinent data, on April 8, 2020, the NAIJ filed a Request for Information regarding the Agency's actions regarding court closures, weather and safety leave grants and denials, processes for court cleaning, weather and safety leave protocols during the Covid-19 pandemic, and the grant and denial of reasonable accommodations requests. This request was denied on May 6, 2020 citing, in part, lack of a particularized need and the confidentiality of certain information even though the request was specific, detailed, and related to conditions of employment and/or working conditions during the pandemic.

With multiple judges concerned about the Agency's failures to protect the health and safety of the immigration judges, and the failure of the Agency to assign work fairly and consistently, on May 4, 2020, the NAIJ filed a grievance alleging that the Agency had not fairly granted leave to bargaining unit members who had requested it. On May 11, 2020, the NAIJ filed a grievance regarding the Agency's response to the pandemic from a health and safety perspective, arguing that the Agency had failed to ensure the health and safety of the bargaining unit members. These grievances remain pending.

As the nation endured the impact of the pandemic, and courts were at varying times opened and closed, on May 21, 2020, the NAIJ demanded to bargain the impact and implementation of the Agency's changes to the conditions of employment and/or working conditions regarding the reopening of Immigration Courts at which Immigration Judges would be required to appear in person on a range of issues, including adherence to safety protocols, access to telework assignments, granting of weather and safety leave, access to laptops, and others which, in total, included 16 separate and detailed proposals. That request would remain pending until the present, and on June 12, 2020, the Agency explicitly stated it would not bargain the impact and implementation of any aspects of its actions. This management posture appears to be an outlier, as we are aware that other agencies, such as the Environmental

Protection Agency, are actively engaging in bargaining the return to normal operations.¹

With respect to the pending request for information, given the continued failure of the Agency to provide transparency and information as requested through the request for information, on May 25, 2020, the NAIJ notified the Agency it would accept redacted information, and offered eight pages of detailed data regarding the basis of the particularized need, including specific serious health and safety concerns at courts around the country, the lack of transparency about health and safety information, the lack of access to adequate protective equipment, the applicability of Occupational Health and Safety Administration standards and the failure to follow such requirements, and the failure to grant reasonable accommodations when required. That request remains pending.

On June 4, 2020, the Agency indicated it would *discuss* working conditions and/or conditions of work, but, as was made clear on June 12, 2020, it *would not bargain* implementation of the changes to conditions of employment and/or working conditions of Immigration Judges. On June 15, 2020, the parties agreed to meet in the context of a joint safety committee (JSC) under article 12 of the parties' Collective Bargaining Agreement. The JSC meetings are on-going. Yet, the Agency has failed to provide requested information to the NAIJ regarding the conditions of employment and/or working conditions of the Immigration Judges, and has forced the NAIJ to provide "recommendations" without the benefit of full and complete information.

The Agency is under an obligation to bargain the impact and implementation of changes to conditions of employment and/or working conditions. The Office of Management and Budget (OMB) guidelines, M-20-13, Updated Guidance on Telework Flexibilities in Response to Coronavirus, instructs agency heads to have the flexibility to develop appropriate protocols for their operations during a period referred to as outside of "normal operations" and "changing conditions." An effective working relationship between the parties entails timely exchange of information and good faith consideration of NAIJ's input as the Agency responds to the pandemic.

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<https://federalnewsnetwork.com/workforce/2020/07/with-majority-of-epa-regional-offices-starting-to-reopen-union-prepares-to-bargain-over-reentry-plans/>

To date, the Agency has both failed to provide information requested and refused to bargain the far-reaching impact on conditions of employment/working conditions which have been occurring as the Agency has moved to close and reopen courts during the COVID-19 pandemic. The Agency has failed to solicit the Association's views on conditions of employment/working conditions (*see AFGE v. FLRA*, 961 F.3d 452 (D.C. Cir. 2020) (overturning the FLRA's spurious distinction between the two terms) *prior to* making significant changes.

Notwithstanding the emergent nature of the pandemic, and the Agency's *acknowledgement that its actions represent a change in "working conditions"* 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. EOIR has refused to act in good faith in its dealings with the NAIJ even though NAIJ has been proactive in seeking assistance and health and safety assurances from the Agency, including through formal and informal means, multiple email requests, requests for information, and telephonic requests, to no avail. The Agency's responses generally lack specificity and clarity and are not comprehensive.

The OMB guidance "Aligning Federal Agency Operations with the National Guidelines for Opening Up America Again," M-20-23, acknowledges that there are collective bargaining obligations when agencies decide to return to normal operations from the current posture of telework maximization, and recall employees to their office worksite. The OMB encourages agencies to communicate with employees and the appropriate union representatives as soon as possible regarding these plans. It recommends that agencies coordinate any such communications with offices of human resources, equal opportunity, and general counsel to address compliance questions including agency requirements pursuant to collective bargaining agreements and employee requirements regarding return-to-work directives. Agency officials should coordinate with offices of human resources, facilities, and other appropriate stakeholders to determine the appropriate time period to

transition back to normal operations. Despite this guidance, the Agency has failed to comply.

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 responses to the pending requests for information;
2. Grievant seeks to have the Agency engage in bargaining the impact and implementation of the changes to conditions of employment and/or working conditions of the Immigration Judges; and
3. Grievant seeks to have any and all additional and/or alternative remedies that may be appropriate.

Request for a Hearing: Yes

Date: July 8, 2020

Ashley Tabaddor

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