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Trump DOJ Loses Push To Bust Up Immigration Judges Union

By Braden Campbell

Law360 (July 31, 2020, 1:44 PM EDT) -- A Federal Labor Relations Authority official on Friday rejected the Trump administration's bid to dismantle the National Association of Immigration Judges, saying a U.S. Department of Justice regulation scaling back oversight of the judges did not make them union-ineligible managers.

A 2000 FLRA decision upholding the fact-finders' organizing rights is still valid despite the DOJ limiting the Board of Immigration Appeals' leeway to overturn immigration judges' decisions, FLRA Washington office head Jessica Bartlett said Friday, citing the judges' continued inability to set policy.

"The IJs may not overturn BIA precedent or create their own precedent," Bartlett said. "That unchanged difference is the key difference that supported the [2000] authority finding the BIA members are management officials while the IJs are not."

Bartlett's decision may be appealed to the three-member panel that helms the FLRA, which has final authority to decide the dispute. The agency oversees labor relations between the federal government and its employees.

Friday's ruling is a setback to the Trump administration in its **ongoing feud** with the National Association of Immigration Judges, which has represented the judges who decide disputes over immigrants' legal status since 1979. The IJs work in the DOJ Executive Office for Immigration Review's internal courts, rather than the judicial branch.

The agency petitioned to decertify the union last August, arguing the judges **no longer have organizing rights** under the Federal Service Labor-Management Relations statute because they're managers, whom the law excludes. The DOJ argued a series of "factual and legal developments" have added managerial weight to the judges' authority since the FLRA's failed bid to dissolve the NAIJ in 2000, including two regulations strengthening their decisions.

Immigration judges decide status disputes in the first instance, but their rulings can be appealed to the BIA, which has precedent-setting power the IJs do not. In an effort to clear a case backlog, the DOJ in 1999 streamlined the review process by giving single BIA members the power to affirm IJs' decisions. The FLRA did not factor that regulation into its 2000 decision because it was finalized after briefing ended. The DOJ further strengthened IJs' decisionmaking in 2002, directing the BIA to review decisions for clear error rather than to analyze the facts anew.

Regional director Bartlett agreed with the DOJ that these changes undermined the FLRA's prior ruling. While the IJs' day-to-day duties "remain largely unchanged" from two decades

ago, the 2002 regulation "elevates the significance of the IJs' factual determinations" such that it calls the prior ruling on their status into question, Bartlett said.

But the answer remains the same, Bartlett said: The IJs are not managers. Under the FSLMRS, federal employees are managers if they formulate policy by creating, deciding or bringing about "general principles, plans or courses of an action for an agency." The IJs do not clear this bar because they don't make policy, even after the DOJ strengthened their authority, Bartlett said.

"Judges are inherently finders of fact and the IJs continue to make decisions based on the facts presented and in accordance with law, regulation, and precedential BIA decisions," she said. "The IJs have no authority to disregard statute or regulation."

NAIJ executive vice president, Judge Amiena Khan, applauded the decision Friday.

"IJs are not and have never been management officials," she said.

Latham & Watkins LLP attorney Margaret Tough, who represents NAIJ, said the ruling is "absolutely right."

"It follows past decisions under previous administrations and ensures the immigration judges' union can continue to protect its members and that its members can do their jobs," she said.

A DOJ spokesperson said Friday the agency disagrees with the decision and will appeal.

The DOJ is represented in-house by Adam Brill.

The National Association of Immigration Judges is represented by Richard Bialczak as well as Margaret Tough, Steve Bauer and Abigail Parr of Latham & Watkins LLP.

The case is U.S. Department of Justice Executive Office for Immigration Review v. National Association of Immigration Judges, case number WA-RP-19-0067, before the Federal Labor Relations Authority.

--Additional reporting by Kevin Penton and Suzanne Monyak. Editing by Alyssa Miller.

Update: This story has been updated with more details and with comments from Judge Amiena Khan and from an attorney for the NAIJ.