Immigration Judges Union Survives, For Now

Federal Labor Relations Authority regional director rejects arguments by the Justice Department that immigration judges are managers and therefore their union should be decertified.

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IMMIGRATION UNIONS

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A Federal Labor Relations Authority regional director last week reaffirmed that federal immigration judges are not management officials and therefore can unionize, rejecting an effort by the Justice Department to decertify the National Association of Immigration Judges.

Last year, the Justice Department announced that it would seek to bust the vocal immigration judges union, arguing that circumstances had changed since the FLRA last reviewed—and upheld—the judges' eligibility to bargain collectively in 2000. At a hearing in January, attorneys for the department argued that although immigration judges' duties remain entirely nonsupervisory in nature, changes to how the Board of Immigration Appeals may review the judges' decisions elevate their work to influencing agency policy, making them management and thus ineligible to unionize.

Last week, FLRA D.C. Regional Director Jessica Bartlett rejected those arguments, as well as a theory that the *Lucia v. Securities and Exchange Commission* Supreme Court decision had a bearing on immigration judges' collective bargaining status. The *Lucia* decision held that some administrative law judges are inferior officers under the Constitution and require presidential appointments rather than competitive hiring.

A key argument made by Justice Department officials was that judges in the Executive Office of Immigration Review now receive more deference to their factual findings than when the FLRA last reviewed whether they are managers in 2000. But Bartlett said the change in deference is not enough to justify decertifying the union.

“The deference granted to [immigration judges'] factual findings [does] not turn judges into management officials,” she wrote. “The facts exist, are presented to the judges in the form of evidence, and can later be superseded by new or previously unknown evidence, or can be subject to re-examination by order of the [Bureau of Immigration Appeals] . . . Even in the unusual circumstances where the facts may influence a future decision, they remain subject to review, and as such, the added deference now granted to the [immigration judges'] finding of facts does not create a scenario where the [judges] are creating or influencing agency policy.”

The focal point of who is and is not eligible to bargain collectively at the Executive Office of Immigration Review is whether the employee shapes policy or merely implements it.

“The [Bureau of Immigration Appeals] has a right to overturn its prior precedent and to make new precedent,” Bartlett wrote. “The [immigration judges] may not overturn [bureau] precedent or create their own precedent. That unchanged difference is the key difference that supported the [FLRA] finding the [Bureau of Immigration Appeals] members are management officials while the [immigration judges] are not. That difference has not changed since the 2000 authority decision, and that difference supports the continued upholding of the conclusion that [immigration judges] do not make policy, but instead, only assist in the implementation of agency policy.”

Bartlett also rejected the Justice Department’s “novel” theory that *Lucia v. SEC* applies to immigration judges.

"*Lucia* addressed administrative law judges at the Securities and Exchange Commission, not Department of Justice immigration judges, who are appointed under different statutory schemes, and are subject to differing levels of performance review, supervision and termination," the decision stated. "No precedent was presented to support the conclusion that *Lucia* was intended to or does apply to [immigration judges] . . . Indeed, *Lucia* is totally silent on the issue, and thus, fails to stand for the proposition for which the agency asserts it."

The Justice Department has 60 days to request that the full FLRA board review this decision. But at least for now, officials at the National Association of Immigration Judges said they are "pleased" with the decision.

"With the public facing a health crisis and desperate for courtroom safety, the Department of Justice and [Executive Office of Immigration Review] have focused limited resources on litigating a matter already decided two decades ago," said union president Ashley Tabaddor. "It's time to drop this decertification action and other efforts to silence judges and instead to focus on the important work of our courts."

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