UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGION

Department of Justice,	)	
Executive Office for Immigration	)	Case Nos. WA-CA-21-0146,
Review,	)	WA-CA-21-0147, and WA-CA-21-
Respondent,	)	0148 (Consolidated)
	)	
and	)	
	)	
National Association of Immigration	)	
Judges,	)	
Charging Party.	)	

ANSWER

The Department of Justice, Executive Office for Immigration Review (Respondent or Agency), by and through undersigned counsel, respectfully submits this Answer in response to the claims made in the Consolidated Complaint and Notice of Hearing ("ULP Complaint" or "Complaint") filed by the Regional Director in the above-captioned matter.

Procedural background. The Charging Party submitted charges herein to the FLRA in Case Nos. WA-CA-21-0146, WA-CA-21-0147, and WA-CA-21-0148 on or about March 4, 2021. Copies were served on the Respondent by the FLRA thereafter. The instant Complaint was issued on or about July 23, 2021, after several motions by both Parties had been filed post the Authority's November 2, 2020 ruling as discussed below.

On November 2, 2020, the Authority issued a "Decision and Order on Review" regarding the bargaining unit for Immigration Judges (IJs). *See* the Authority's "Decision and Order on Review" dated November 2, 2020 (the "2020 Authority Order" or the "2020 Order") attached hereto as Attachment 1. In its 2020 Order, the Authority made the following factual and legal findings and ordered as follows:

> [W]e find that IJs are management officials under [5 U.S.C.] § 7103(a)(11), and, therefore, are excluded from the bargaining unit pursuant to [5 U.S.C.] § 7112(b)(1). …
>
> **Order**
>
> We grant the Agency's application for review, vacate the RD's decision, find that IJs are management officials, and direct the RD to exclude IJs from the bargaining unit.

See Attachment 1 at 4 (emphasis in original) (footnote omitted).

On November 17, 2020, the Charging Party filed its Motion for Reconsideration and Stay in response to the 2020 Authority Order, which motion has not been granted and remains pending before the Authority. On November 24, 2020, the Agency filed its Opposition to the Motion for Reconsideration and Stay. On June 21, 2021, the Charging Party filed its Motion for Leave, Motion for Remand and for Stay. On June 25, 2021, the Agency withdrew its Opposition to the Motion for Reconsideration. On July 19, 2021, the Agency withdrew its Representation Petition.

As the Authority has not ruled on any filings post its November 2020 Order, the November 2020 Order remains in full force and effect. As a result of the Authority's November 2020 ruling, there are no longer any employees in the bargaining unit.[1] As there are no employees in the bargaining unit, in essence, NAIJ is defunct.

RESPONSES TO INDIVIDUAL CLAIMS IN THE COMPLAINT

Paragraph 1. "The Union filed the charges in Case Nos. WA-CA-21-0146, WA-CA-21-0147, and WA-CA-21-0148 on March 4, 2021, and copies were served on the Respondent."

Answer: Partly admitted and partly denied. As per the FLRA's press release dated March 24, 2021, "[o]n March 24, 2021, President Biden announced the appointment of Charlotte

[1] Immigration Judges were the only employees in the NAIJ bargaining unit.

A. Dye as the Acting General Counsel of the Federal Relations Authority." *See* the FLRA's "OGC News, Remarks, and Statements" on its internet page here: https://www.flra.gov/ogc_remarks; *see* Attachment 2. There was no General Counsel in place on March 4, 2021. Upon information and belief, an Acting General Counsel was serving in that role, but it is unclear whether the Acting General Counsel had the authority to accept and process ULP complaints. *See, e.g.*, 5 C.F.R. § 2423.8(a) and § 2423.10(a) (the Regional Director only has authority to act "on behalf of the General Counsel.").

Paragraph 2. "These cases are consolidated because it [sic] necessary to effectuate the purposes of 5 U.S.C. §§ 7101-7135 and to avoid unnecessary costs or delay pursuant to Section 2429.2 of the Rules and Regulations of the Federal Labor Relations Authority (the Authority)."

Answer: Partly admitted and partly denied. As noted above, upon information and belief an Acting General Counsel has been serving at the FLRA but it is unclear whether such Acting General Counsel had the authority to accept and process ULP complaints. *See, e.g.*, 5 C.F.R. § 2423.8(a) and § 2423.10(a) (the Regional Director only has authority to act "on behalf of the General Counsel."). Also, in bringing these charges and this Complaint, it appears the Charging Party (NAIJ) and the FLRA's Office of the General Counsel, are acting in contravention of the 2020 Authority Order and 5 C.F.R. § 2422.32(b)(2) as discussed herein.

All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

Paragraph 3. "The Respondent is an agency within the meaning of Section 7103(a)(3) of the Statute."

Answer. Admitted.

Paragraph 4. "The Union is a labor organization within the meaning of Section 7103(a)(4) of the Statute and is the certified exclusive representative of nationwide [sic] unit of employees (the unit)."

Answer: Denied. Due to the 2020 Authority Order, IJs are barred from being in a bargaining unit as they are management officials under 5 U.S.C. § 7103(a)(11) and 5 U.S.C. § 7112(b)(1). The 2020 Authority Order remains in full force and effect.

In addition, neither the Regional Director nor the FLRA's Office of the General Counsel has stayed (or can stay) the 2020 Authority Order.

All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

Paragraph 5. "At all times material, the following individuals held the position opposite their names and have been supervisors or management officials of the Respondent [EOIR] within the meaning of Section 7103(a)(10) ad (11) of the Statute and agents of the Respondent acting upon its behalf:

Charles Barksdale Acting Chief Counsel

Mary Cheng Acting Principal Deputy Chief Immigration Judge

James R. McHenry Director of Executive Office of [sic] Immigration Review

Answer: Partly admitted and partly denied. Undersigned counsel served in the role of Acting Chief Counsel from approximately December 2020 through June 2021. Mary Cheng served in the role of Acting Principal Deputy Chief Immigration Judge from approximately August 2020 through February 2021. James R. McHenry served in the role of Acting Director of the Executive Office for Immigration Review (EOIR) from approximately May 2017 through January 2018, and the role of Director of EOIR from approximately January 2018 through

January 2021. Some of the events alleged in the Complaint, however, took place outside of some of the foregoing timeframes, *e.g.*, issuance of the 2020 Authority Order on November 2, 2020, and certain Agency actions appropriately taken to comply with such 2020 Order.

All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

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Paragraph 6. "Respondent and the Union are parties to a successor collective bargaining agreement (CBA) covering employees in the bargaining unit described paragraph [sic] 4, which has been effective since October 15, 2006."

Answer: Denied. By operation of the 2020 Authority Order, IJs are no longer permitted to be in a bargaining unit and the Charging Party is no longer authorized to act as a union for IJs. *See* Attachment 1. As stated in the 2020 Authority Order at 4: "IJs are management officials under § 7103(a)(11), and, therefore, are excluded from the bargaining unit pursuant to § 7112(b)(1)." By operation of the 2020 Authority Order, the CBA is no longer associated with an existing bargaining unit and has no force or effect. In fact, in 2019, when discussing the Agency's then-pending representation petition with an arbitrator, a NAIJ officer admitted that, if the Agency were successful with its representation petition litigation, which it was, then "NAIJ would be dissolved" and the parties' "Collective Bargaining Agreement would be rendered null and void." *See* Attachment 3 (highlighting added in the attachment).

All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

Paragraph 7. "Since November 5, 2020, Respondent has been failing and refusing to honor and abide by the terms of the parties CBA described in paragraph 6."

Answer: Denied. By operation of the 2020 Authority Order, IJs are no longer permitted to be in a bargaining unit and the Charging Party is no longer authorized to act as a union for IJs. *See* Attachment 1. Moreover, as of November 2, 2020, the NAIJ CBA and all agreements between the Agency and NAIJ became "null and void" and NAIJ was effectively "dissolved" by the 2020 Authority Order. *See* Attachment 3.

All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

Paragraph 8. "By the conduct described in paragraph 7, Respondent has been repudiating the terms of the parties' CBA described in paragraph 6."

Answer: Denied. By operation of the 2020 Authority Order, IJs are no longer permitted to be in a bargaining unit and the Charging Party is no longer authorized to act as a union for IJs. *See* Attachment 1. Moreover, as of November 2, 2020, the NAIJ CBA and all agreements between the Agency and NAIJ became "null and void" and NAIJ was effectively "dissolved" by the 2020 Authority Order. *See* Attachment 3.

All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

Paragraph 9. "By the conduct described in paragraph 7 and 8, Respondent has been refusing to negotiate in good faith with the Union and violating Section 7116(a)(1) and (5) of the Statute."

Answer: Denied. By operation of the 2020 Authority Order, IJs are no longer permitted to be in a bargaining unit and the Charging Party is no longer authorized to act as a union for IJs. *See* Attachment 1. Moreover, as of November 2, 2020, the NAIJ CBA and all agreements

between the Agency and NAIJ became "null and void" and NAIJ was effectively "dissolved" by the 2020 Authority Order. *See* Attachment 3.

All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

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Paragraph 10. "On November 5, 2020, Respondent, by Cheng, sent an email to the entire bargaining unit stating that the CBA was no longer in effect, the Union could not represent employees before management, and the Union was not entitled to official time or to conduct activities in the workplace."

Answer: Denied. By way of clarification, upon information and belief, Judge Cheng advised the Agency's Assistant Chief Immigration Judges ("ACIJs") via email of the 2020 Authority Order. The ACIJs advised their direct report IJs of the same via email.

All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

Paragraph 11. "By the conduct described in paragraph 10, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7102 of the Statute and violating 7116(a)(1) of the Statute."

Answer: Denied. At all relevant times, the Agency has been obligated to comply with the 2020 Authority Order; the Agency has done so. *See* Attachment 1. All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

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Paragraph 12. "On December 1, 2020, Respondent implemented Enhanced Case Flow Processing."

Answer: Partly admitted and partly denied. A portion of a program termed Enhanced Case Flow Processing, which permitted IJs to address more filings via written orders issued from chambers as opposed to ruling in a crowded master calendar setting, was put in place in December 2020. This was a gradual continuation of existing Agency efforts to appropriately adapt immigration court proceedings to the exigencies of the national COVID-19 pandemic and thereby help protect its employees and members of the public.

All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

Paragraph 13. "The impact of the change described in paragraph 12 is substantial."

Answer: Denied. All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

CLAIM 14

Paragraph 14. "Respondent implemented the change in unit employees' conditions of employment described in paragraph 12 without providing the Union with notice and an opportunity to negotiate over the procedures and appropriate arrangements of the change."

Answer: Denied. First, any change, as alleged, was not substantial.

Second, as of December 2020, by operation of the 2020 Authority Order, IJs were no longer permitted to be in a bargaining unit and the Charging Party was no longer authorized to act as a union for IJs. *See* Attachment 1. Moreover, as of November 2, 2020, the NAIJ CBA and all agreements between the Agency and NAIJ became "null and void" and NAIJ was effectively "dissolved" by the 2020 Authority Order. *See* Attachment 3. Accordingly, there was no duty to bargain with NAIJ, as alleged, as no bargaining unit or CBA was in place as of November 2, 2020, or thereafter, including in December 2020.

Third, even without the 2020 Authority Order, the Agency had no duty to bargain over the change as alleged because it was undertaken pursuant to: 1) management's right to "determine the mission, budget, organization, number of employees, and internal security practices of the agency" under 5 U.S.C. § 7106(a)(1); 2) management's right to "assign" and "direct" employees under 5 U.S.C. § 7106(a)(2)(A); 3) management's right to "assign work" and "determine the personnel by which agency operations shall be conducted" under 5 U.S.C. § 7106(a)(2)(B); 4) management's right to "take whatever actions may be necessary to carry out the agency mission during emergencies" under 5 U.S.C. § 7106(a)(2)(D); and 5) management's right to take action based on compelling need under 5 U.S.C. § 7117. Furthermore, even if the Agency had a duty to bargain, it was a permissive subject of bargaining as it concerned "the technology, methods, and means of performing work" under 5 U.S.C. § 7106(b)(1), and the Charging Party did not seek to bargain and the Agency did not agree to bargain.

The Agency was not required to provide a notice regarding Enhanced Case Flow Processing as there was no bargaining unit for IJs in place based on the 2020 Authority Order.

All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

Paragraph 15. "By the conduct described in paragraphs 12 and 14, Respondent has been refusing to negotiate in good faith with the Union in violation of Section 7116(a)(1) and (5) of the Statute."

Answer: Denied. The Agency has at all relevant times been obligated to comply with the 2020 Authority Order; the Agency has done so. *See* Attachment 1. All defenses, all responses, and all background material set forth heretofore are incorporated by reference herein.

FIRST AFFIRMATIVE DEFENSE

LACK OF STANDING

As an affirmative defense, the Agency states that both the FLRA Office of the General Counsel and the Charging Party lack standing to bring the instant Complaint. Specifically, the Authority issued its 2020 Authority Order on November 2, 2020, as discussed above. As a result of the Authority's ruling that "IJs are management officials under § 7103(a)(11), and, therefore, are excluded from the bargaining unit pursuant to § 7112(b)(1)," there are no longer any employees in the bargaining unit. Since there are no employees in the bargaining unit by operation of the 2020 Authority Order, there are no employees on behalf of whom the Charging Party or the FLRA Office of the General Counsel can bring the instant ULP Complaint. Accordingly, the FLRA Office of the General Counsel and the Charging Party lack standing to bring the instant Complaint. The ULP Complaint should be dismissed on this basis alone.

SECOND AFFIRMATIVE DEFENSE

LACK OF LEGAL AUTHORITY

As an affirmative defense, the Agency states that neither the FLRA Office of the General Counsel nor the Charging Party have legal authority to bring the ULP Complaint. First, to the Federal Service Labor Management Relations Statute ("Statute"), only the Authority has the power to "determine the appropriateness of any unit." 5 U.S.C. § 7112. The Authority made such determination in its 2020 Authority Order, excluding IJs from the bargaining unit due to their status as management officials under 5 U.S.C. § 7103(a)(11). *See* Attachment 1 at 4. Accordingly, neither the FLRA Office of the General Counsel nor the Charging Party have legal authority to bring the ULP Complaint. Along these lines, the 2020 Authority Order concluded with the following order to the Regional Director: "we … direct the RD to exclude IJs from the

bargaining unit." Although the RD has not formally revoked the NAIJ cert as a BU that does not and cannot constitute a stay of the 2020 Authority Order. *See, e.g.*, 5 U.S.C. § 7123(a)(2) and (c); 5 C.F.R. § 2429.17; 5 C.F.R. § 2422.32(b)(2). As the Authority has held: "a prior certification of exclusive representation" has no effect on the Authority's role as the sole, non-appealable decision-maker as to whether or not a bargaining unit is appropriate under 5 U.S.C. §§ 7112(b)(1) and 7123(a)(2). *Nat. Assoc. of Agricultural Employees & DHS/CPB*, 61 F.L.R.A. 545, 548 (Apr. 18, 2006).

Second, in its 2020 Authority Order, the Authority found (as had the Regional Director) that there was a substantial change in the bargaining unit as the Agency had asserted in its representation petition:

> [W]e note that the RD found that a substantial change existed in this case … Further, the Union did not file an application for review to challenge … those findings.

See Attachment 1 at 2 (footnote omitted). In light of the above, the Regional Director is obligated to, but has failed to, revoke the unit's certification under 5 C.F.R. § 2422.32(b)(2). In sum, neither the FLRA Office of the General Counsel nor the Charging Party have legal authority to bring the ULP Complaint as, by doing so, they are acting in contravention of 5 C.F.R. § 2422.32(b)(2).

Lastly, it is respectfully submitted that it is not consistent with the purposes of the Statute for the FLRA's Office of the General Counsel to fail to comply with the 2020 Authority Order and 5 C.F.R. § 2422.32(b)(2), as discussed above, and for such inaction on their part to serve as the basis to claim that the Agency has committed the alleged ULPs. *See, e.g.*, 5 U.S.C. § 7101.

THIRD AFFIRMATIVE DEFENSE

THE AGENCY WAS, AND IS, LEGALLY OBLIGATED TO COMPLY WITH THE 2020 AUTHORITY ORDER

As an affirmative defense, the Agency states that at all times stated or referenced in the Complaint, the Agency was legally obligated to comply with the 2020 Authority Order. Although the Charging Party filed a motion requesting that such 2020 Order be stayed, the Authority has not granted that motion. Therefore, the 2020 Order was in full force and effect during all relevant times noted in the Complaint, and continuing to the present. Accordingly, the Agency has been (and is) barred from treating IJs as members of a bargaining unit, or as non-management officials capable of being in a bargaining unit, since November 2, 2020, by operation of the 2020 Authority Order. *See* Attachment 1.

FOURTH AFFIRMATIVE DEFENSE

THE AGENCY WAS, AND IS, LEGALLY BARRED FROM RECOGNIZING THE CHARGING PARTY AS A UNION REPRESENTING IJS, AND TRANSMITTING UNION DUES, BASED ON THE ANTI-DEFICIENCY ACT

As an affirmative defense, the Agency states that at all times stated or referenced in the Complaint, the Agency was legally barred from treating the Charging Party (NAIJ) as a union and, thereby, collecting union dues and transmitting union dues to the Charging Party. During all times referenced in the Complaint, if the Agency had treated the Charging Party as a union, and transmitted union dues to the Charging Party on that basis, the Agency would have been in violation of the 2020 Authority Order and, consequently, in violation of the Anti-Deficiency Act. *See* Attachment 1; *see, also,* 31 U.S.C. § 1341.

Respectfully submitted,

Date: August 31, 2021

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CERTIFICATE OF SERVICE
CASE NOS. WA-CA-21-0146, WA-CA-21-0147, AND WA-CA-21-0148

I hereby certify in accordance with 5 C.F.R. § 2423.21(a) and § 2429.27 that this Answer was served on August 31, 2021, via the FLRA's e-filing system, and via electronic mail (as indicated) and Federal Express, on the following recipients. This filing was also submitted by facsimile to the Chief Administrative Law Judge.

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Date: August 31, 2021

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