BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
(Agency)

and

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES
INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, JUDICIAL COUNCIL 2
(Union)

Case No. WA-RP-19-0067

RESPONDENT'S MOTION FOR LEAVE, MOTION TO REMAND AND FOR STAY

Richard Bialczak
LAW OFFICES OF RICHARD BIALCZAK
48-18 Van Dam Street, 2nd Floor
Long Island City, NY 11101

Attorney for Union
National Association of Immigration Judges

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I. INTRODUCTION

The National Association of Immigration Judges (NAIJ or the Union) moves the Authority for leave to file this motion, for the reasons herein, and to remand the above-captioned matter to the Regional Director for further findings of fact and conclusions of law based on sweeping changes in the regulations and policies impacting the role of Immigration Judges since the closing of the record on January 8, 2020. Over the last 17 months, the Executive Office for Immigration Review (EOIR or the Agency) and the Attorney General engaged in multiple rulemakings altering the organization and authorities of the constituent parts of the Agency and severely limiting the ability, to the extent it ever existed, of Immigration Judges to influence policy through their decisions.

Specifically, the Attorney General issued a precedential decision altering the standard of review on appeals of Immigration Judge decisions to the Board of Immigration Appeals. Further, on May 27, 2021, the Principal Legal Advisor of U.S. Immigration and Customs Enforcement (ICE) issued a memorandum expressly directing ICE attorneys to ensure that ICE's new enforcement priorities are implemented in all civil immigration enforcement proceedings, including "deciding when and under what circumstances to execute final orders of removal." Finally, the Agency introduced what appears to be a new management position, the "Unit Chief Immigration Judge," which underscores the fact that Immigration Judges are not managerial employees. Each of these Agency actions took place after the record in this matter was closed and undercuts the Authority's decision that Immigration Judges have the ability to "influence policy." Therefore, the record presented to (and relied on by) the Regional Director and, in turn, the Authority, is now stale such that issuing a decision on NAIJ's pending Motion to Reconsider without further fact-finding would result in a deprivation of due process. *See, e.g., Berishaj v.*

Ashcroft, 378 F.3d 314, 317 (3d Cir. 2004), *abrogated on other grounds by Nbaye v. Att'y Gen. U.S.*, 665 F.3d 67 (3d Cir. 2011) (finding remand to update a stale administrative record necessary to ensure due process); James O. Freeman, *The Uses and Limits of Remand in Administrative Law: Staleness of the Record*, 115 U.Penn.L.Rev. 145 (1966) (collecting cases from the early era of the federal administrative state). For these reasons, NAIJ moves to remand the record to the Regional Director to allow her to assess the impact of these changes and to make further findings of fact and conclusions of law based on the status and role of Immigration Judges today, rather than their status and role in January 2020.

II. PROCEDURAL HISTORY

The Union was certified in 1979. The Agency first sought to decertify it in 1999. After a full hearing, the Regional Director dismissed the Agency's petition, finding that Immigration Judges are not management officials under the federal labor relations statute. *U.S. Dep't of Justice, Exec. Office for Immigration Review, Office of the Chief Immigration Judge and Nat'l Ass'n of Immigration Judges* ("*EOIR 2000*"), 56 FLRA 616, 622 (2000). The Agency appealed to the full Authority, which unanimously affirmed the Regional Director's decision. *Id.* In that decision, the Authority carefully distinguished between the role of BIA members (whose ineligibility to participate in a union was decided in a 1993 case, *U.S. Department of Justice, Board of Immigration Appeals ("BIA")*, 47 FLRA 505 (1993)) from that of Immigration Judges. A key distinction was the fact that BIA members can establish precedent while Immigration Judges cannot. *EOIR 2000*, 56 FLRA at 622. The role of Immigration Judges remains unchanged since those decisions were issued; they are trial level decision makers whose rulings only impact the respondent in that specific case, and even then not conclusively.

A. Petition, Hearing, and Briefing

The Agency filed the current Representation Petition on August 13, 2019, asserting that certain "factual and legal developments" since 2000 indicated that Immigration Judges should be "excluded from forming or joining a labor organization." EOIR Representation Petition ("Petition") at 4. Specifically, the Agency alleged that "IJs should be precluded from forming or joining a labor organization. . . based on recent developments in the nature of the IJ position." Petition at 1. The Authority's Notice of Representation Hearing was issued on November 5, 2019. The representation hearing was held at FLRA headquarters on January 7-8, 2020, before Hearing Officer William D. Kirsner. Six witnesses testified and numerous exhibits were entered into the record.

B. Regional Director Decision

On July 31, 2020, the Regional Director issued her decision, denying the Agency's petition and concluding that pursuant to Authority precedent, and based on the full record before her, Immigration Judges are not management officials within the meaning of the federal labor relations statute. RD at 24. In a 25-page decision, she considered—and ultimately rejected—the Agency's arguments that purported "legal changes" had rendered Immigration Judges "management officials."

C. Authority Decision

The Agency submitted an Application for Review on September 4, 2020. *See* Agency App. at 15-16. The Union filed its opposition on September 23, 2020. *See* Union Opp. at 7-8. On November 2, 2020, the FLRA granted the Agency's application for review but without allowing the supplement briefing the Union had requested under 5 C.F.R. § 2422.31(g). 71 FLRA 1046 (2020) ("Decision") at 1046. In two short paragraphs, it decided that its own precedent was

wrongly decided and thus warranted reconsideration. The only case it discussed was *EOIR 2000*, maintaining that *EOIR 2000* "failed to recognize the significance of Immigration Judge decisions and how those decisions influence Agency policy." *Id.* at 1048. Overturning its precedent, the Authority found that Immigration Judges "influence" the policy of the Agency, just as Board Members do, "by interpreting immigration laws when they apply the law and existing precedent to the unique facts of each case." *Id.* It rejected the Union's argument distinguishing Immigration Judges from Board Members, writing that NAIJ's argument "is akin to arguing that district court decisions do not shape the law while appellate decisions do." *Id* at 1049. It found this "distinction" to be "nonsensical." *Id.* The FLRA then vacated the RD's decision and found that Immigration Judges are management officials and thus excluded from the bargaining unit. *Id.*

Member DuBester sharply dissented. *Id.* He cited a recent case from the D.C. Circuit reminding the FLRA that "a fundamental norm of administrative procedure requires an agency to treat like cases alike" and that, if an agency neglects to do so, it "acts arbitrarily and capriciously." *Id.* (citing *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 883 (D.C. Cir. 2020)). Rejecting the "sophistry" of the majority's decision, he then pointed out that the majority did not base its reconsideration of *EOIR 2000* "upon any change found by the RD. . . [n]or does [the majority] find that the RD erred by applying *EOIR* to dismiss the Agency's petition, or. . . that the RD erred in any other respect." *Id.* at 1050. Rather, it erroneously found that *EOIR 2000* is "in conflict" with *BIA*. *Id.* Member DuBester explained that no conflict existed because the Authority in *BIA* found that Board Members were management officials because they "have the power to issue the *final administrative ruling* in a case, and to bind the [IJs], District Directors of the INS, as well as the State Department" through their issuance of rulings in cases. *Id.* (citing *EOIR 2000*, 56 FLRA at 622). Immigration judges have no such authority.

Member DuBester also pointed to the Regional Director's "extensive" factual findings regarding the differences between the duties and responsibilities of Immigration Judges and Board Members and noted that the majority took no issue with the Regional Director's factual findings. *Id.* at 1051. He highlighted the fact that the majority did not even discuss, never mind distinguish, the "litany" of cases upon which the Regional Director made her decision. *Id.* at 1050. He also explained how the FLRA was well aware of the 1993 *BIA* decision when it decided *EOIR 2000*, and discussed it in detail in the latter decision. *Id.* at 1051. Member DuBester wrote that the majority "does not even attempt to reconcile its conclusion" with long-standing Authority precedent or with the Regional Director's "careful" distinctions. He closed:

> Based on the conclusory nature of the majority's analysis, along with the facetious manner in which it reconciles its decision with Authority precedent precluding collateral attacks on unit certifications, it is abundantly clear that the majority's sole objective is to divest the IJs of their statutory rights.

Id. at 1052.

III. DISCUSSION

Under the Authority's regulations, "[a]fter a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for doing so, may move for reconsideration of such final decision or order." 5 C.F.R. § 2429.17. A motion for reconsideration must "state with particularity the extraordinary circumstances claimed" and "shall be supported by appropriate citations." *Id.* These circumstances include where a moving party has established, in its motion for reconsideration, that evidence, information, or issues crucial to the decision had not been presented to the Authority. *U.S. Environmental Protection Agency*, 61 FLRA 806, 807 (2006) (citing *U.S. Dep't of the Air Force, 375th Combat Support Group, Scott Air Force Base, Illinois*,

50 FLRA 84, 86-87 (1995)). The Authority's regulations also separately permit a party to file for leave to file other papers, such as a motion for remand. 5 C.F.R. 2429.26(a). The Authority considers motions for remand separate and distinct from already filed motions for reconsideration when those circumstances arise. *See, e.g., U.S. Department of Interior*, 34 FLRA No. 77 (1990) (considering motion for reconsideration and latter filed motions for remand based on allegations of new evidence).

The evidence and information submitted below is all newly developed since the record closed on January 8, 2020, and since the Regional Director issued her decision in this matter on July 31, 2020. Even as one arm of the Department of Justice was arguing before this Authority that Immigration Judges exercise independent judgment and discretion such that their decisions necessarily influence policy, the Attorney General and the Director of the Agency were engaging in rulemakings severely constraining that independence and discretion. The full magnitude of these changes, proposed and final, is evident by simply reviewing the Agency's latest regulatory agenda. *See* Office of Management and Budget, Office of Information and Regulatory Affairs, Spring 2021 Agency Rule List, U.S. Department of Justice/Executive Office for Immigration Review.[1] The EOIR Regulatory Agenda lists twenty-six pending or anticipated rulemakings. Many of these directly impact the roles and authorities of Immigration Judges, including numerous rulemakings finalized in the last two months of the prior administration. The scope and scale of these proposed rulemakings itself would justify remand to develop the factual record. Three particular changes, however, are directly relevant to the Authority's decision and require remand.

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[1] https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1100&csrf_token=94BEAB9DBDC3432FB68F7F4537CC6E14777238C7C0AA393AD393FA810FA43D9E07D5447371FB2103ECCC884457163FFF5B7F (accessed on June 16, 2021).

A. The Attorney General Increased the Scope of Review of Immigration Judge Decisions Since the Closing of the Record

Neither the Regional Director nor the Authority has considered the impact on Immigration Judge authority of the Attorney General's precedent decision in *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G., September 24, 2020), which alters the procedures and standards of review of Immigration Judge decisions. Changes in the Board's standards of review played a critical role in the Authority's 2020 decision and in fact was the stated basis behind the Agency's initiation of the Petition. *See* U.S. DOJ, Executive Office for Immigration Review (*EOIR 2020*), 71 FLRA 1046 (2020) (noting the Regional Director's finding that the standard of review of Immigration Judge findings of fact was changed from *de novo* to a deferential clear error standard). Based in substantial part on this change, the Regional Director, and in turn the Authority, found a change in circumstances warranting reconsideration and a new review of whether the bargaining unit is properly constituted.

The Attorney General decided *Matter of A-C-A-A-* while this matter was under consideration by the Authority (and long after the evidentiary record in this matter was closed). In that decision, the Attorney General mandated that when reviewing appeals of Immigration Judge grants of asylum, the Board of Immigration Appeals may not rely on stipulations of the parties or failures to address an element of a claim for asylum; rather, the Board should undertake an independent analysis of all the elements, even when the appellant did not raise the issue on appeal. This holding created a new basis for review of an Immigration Judge's ruling and changed over thirty years of unbroken Board of Immigration Appeals precedent. *See, e.g., Matter of Edwards*, 20 I&N Dec. 191, 196 n.4 (BIA 1990) (issue not raised on appeal deemed waived); *Matter of Cervantes,* 22 I&N Dec. 560, 561 n.1 (BIA 1991) (same); *Matter of Gutierrez*, 19 I&N Dec. 562, 565 n.3 (BIA 1988) (same); *Matter of G-G-S-*, 26 I&N Dec. 339

(BIA 2014) (issue raised by the appellant in his notice of appeal, but not pursued in his brief on appeal, deemed waived).

While *Matter of A-C-A-A-* did not ostensibly change the clear error standard of review, it nevertheless created something of a hybrid standard in which the Board of Immigration Appeals must undertake an independent analysis of even those facts that were not contested before the Immigration Judge, even if the appealing party did not raise that issue on appeal. This is not a deferential standard of review. More critically, it certainly wasn't the standard relied on by the Agency in bringing the Petition or by the Authority in granting it. Understanding the impact of *Matter of A-C-A-A-* on the ability of Immigration Judges to "influence policy" by their findings of fact requires a full analysis by the Regional Director. The Authority would deny the Union due process and a fundamentally fair hearing if it issues a final decision in this matter without developing the record on the meaning and impact of *Matter of A-C-A-A-*.

B. Recent Guidance Has Altered and Severely Limited the Expectation that Immigration Judge Orders will be Enforced without Further Review, which has Rendered Immigration Judge Decisions No Longer Conclusive.

Recent guidance issued by Immigration and Customs Enforcement (ICE) has diminished the importance of Immigration Judge decisions in a way that severely undercuts the Authority's prior analysis. In concluding that Immigration Judges exercised management authority, the Authority relied on the concept that an Immigration Judge's ability to impact an individual respondent is akin to that of a trial court judge. Indeed, in its November 2, 2020 decision, the Authority explicitly compared Immigration Judges to trial courts and determined that, as a result, an individual Immigration Judge will "influence policy" in making case-by-case determinations. On its face, this comparison is erroneous for the reasons described in the Union's pending Motion for Reconsideration. However, as a result of a May 27, 2021 ICE guidance, the

comparison is even less relevant. Effective that date, an Immigration Judge's removal "order" is no longer conclusive. Rather, in addition to any appeal to the BIA, the effectiveness of any Immigration Judge order of removal is left to the discretion of ICE.

The ICE guidance makes clear that Immigration Judges are making mere factual determinations and legal conclusions—*i.e.,* that based on their determinations, the law may or more not subject an individual to removal—and then the policy determination as to whether to remove the noncitizen is made by ICE. Moreover, nothing in the guidance suggests that these ICE officials should defer to the findings of the Immigration Judge. As a result, the key determinant in the Authority's ruling with respect to Immigration Judges has been removed subsequent to the Authority's decision: Immigration Judges do not decide whether an individual respondent is to be removed; they merely advise as to whether the law permits them to be removed.

The record in this case was developed (and closed) under a very different set of circumstances and expectations. It was understood at that time that all parts of an Immigration Judges orders would be executed forthwith. *See, e.g.,* ICE Acting Director Thomas Homan, Written Testimony Before the House Committee on Appropriations, Subcommittee on Homeland Security, "Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request," https://www.dhs.gov/news/2017/06/13/written-testimony-ice-acting-director-house-appropriations-subcommittee-homeland (accessed on June 18, 2021) ("Under prior enforcement priorities, approximately 345,000, or 65 percent, of the fugitive alien population were not subject to arrest or removal. President Trump's EOs have changed that. As a result, ICE arrests are up 38 percent since the same time period last year, charging documents issued are up 47 percent, and detainers

issued are up 75 percent. Thus far in this fiscal year, through May 15, 2017, ERO has removed 144,353 aliens from the United States and repatriated them to 176 countries around the world; these are aliens who posed a danger to our national security, public safety, or the integrity of the immigration system."). Given this fundamental change in the nature of Immigration Judge orders, the Authority should remand this matter back to the Regional Director for further fact-finding

C. The Agency Has Hired "Unit Chief" Immigration Judges That May Affect Immigration Judge Duties and Responsibilities

The Agency's announcement of a new type of management Immigration Judge position requires further fact-finding. The Agency announced openings for a newly-created "Unit Chief Immigration Judge" position on September 2, 2020. *See* https://www.justice.gov/legal-careers/job/unit-chief-immigration-judge (Announcement) (accessed on June 16, 2021). New Unit Chief Immigration Judges (UCIJs) were selected and announced on May 6, 2021. *See* https://www.justice.gov/eoir/file/1392116/download. The Agency has not been forthcoming with details regarding the scope of the new UCIJ position, and the announcement merely notes that they will have some supervisory functions. The announcement also notes that they will also be responsible for "Directing management activities assigned by the Assistant Chief Immigration Judge." *See* Unit Chief Immigration Judge Announcement.

Needless to say, the record before this Authority is completely lacking in information regarding the nature of the UCIJ duties and how they will affect other Immigration Judges, who will now be subject to UCIJ's "directing management activities" of some undisclosed nature. What is clear is that, because the position description for ordinary line Immigration Judges who are part of the NAIJ bargaining unit makes no reference to such "management activities," these

new managerial Immigration Judge employees will be governing aspects of the immigration court management, in contrast to unit members. In order to understand the impact of this new position on other Immigration Judges, the Authority must remand the case to the Regional Director for additional fact-finding.

IV. CONCLUSION

Based on the foregoing, the Union respectfully requests that the Authority remand this matter to the Regional Director for the purpose of building a factual record to determine whether: (1) new policies and guidance broaden the authority of the BIA over decisions of Immigration Judges; (2) new policies and guidance render Immigration Judge decisions advisory in nature, even before appeals to the BIA; and (3) new management employees within EOIR have effectively rendered Immigration Judges non-managerial even under the new standard announced by this Authority in its November 2, 2020 decision.

REQUEST FOR STAY PENDING RULING ON THIS MOTION

The Union respectfully requests that the Authority stay its proceedings on the pending Motion for Reconsideration while considering this Motion to Remand and For Stay and, if granted, during the pendency of hearings before the Regional Director.

REQUEST FOR STAY OF EXECUTION OF ANY FLRA ORDER PENDING JUDICIAL REVIEW

In the event the Authority denies both the Union's Motion to Remand and for Stay and its previously filed Motion for Reconsideration, the Union respectfully requests that the Authority stay the execution of any Order and direction to the Regional Director to allow the Union to seek review of the FLRA Order in a court of competent jurisdiction. Failure to grant such a stay will result in irreparable harm to the Union by (1) interfering in its ability to negotiate over the return of employees to the office after the unprecedented pandemic, as ordered by the current

administration in its memorandum dated June 10, 2021[2] (agencies must file phased reopening entry plans by July 19, 2021 and reopen subject to negotiations), an issue that has dominated the working conditions of the Union's members for the last 16 months; and (2) causing the loss of members, member dues, and the resulting ability to carry out the Union's mission.

REQUEST FOR ORAL ARGUMENT

The Union respectfully requests oral argument on this Motion to Remand and For Stay.

Richard Bialczak

LAW OFFICES of RICHARD BIALCZAK
48-18 Van Dam Street
Long Island City, New York 11101

[2] Memorandum from the Heads of Executive Departments and Agencies, *Integrating Planning for A Safe Increased Return of Federal Employees and Contractors to Physical Workplaces with Post-Reentry Personnel Policies and Work Environment* (June 10, 2021) https://www.whitehouse.gov/wp-content/uploads/2021/06/M-21-25.pdf.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NAIJ's (UNION) MOTION FOR LEAVE, MOTION TO REMAND AND FOR STAY were served this 21st day of June, 2021 on the following recipients via commercial delivery and email:

Brandon Bradley
Chief, Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW, Docket Room, Suite 200
Washington, DC 20424-0001
Service via Commercial Delivery
Courtesy Copy Via Facsimile

Jessica Bartlett
William Kirsner
Federal Labor Relations Authority
1400 K Street NW, Second Floor
Washington, DC 20424-0001
JBartlett@flra.gov
Wkirsn@flra.gov

Adam W. Brill
Charles B. Barksdale
Executive Office of Immigration Review
U.S. Department of Justice
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041
Adam.Brill@usdoj.gov
Charles.Barksdale@usdoj.gov

Melissa McIntosh
Counsel for and President of
Association of Administrative Law Judges
4740 12th Ave. N.
St. Petersburg, FL 33713
judgemelissamcintosh@gmail.com

Julia Turner
Assistant General Counsel
AFGE, AFL-CIO
80 F Street, NW
Washington, D.C. 20001
julia.turner@afge.org

Richard Bialczak

LAW OFFICES of RICHARD BIALCZAK
48-18 Van Dam Street
Long Island City, New York 11101