DOJ Tries to Silence the Voice of the Immigration Judges—Again!

The Second Attempt to Decertify the National Association of Immigration Judges

by Judge Amiena Khan and Judge Dorothy Harbeck

Judge Amiena Khan is the executive vice president of the National Association of Immigration Judges (NAIJ) and serves as the co-chair of the NAIJ Vulnerable Populations Committee. Judge Khan was appointed by Attorney General Eric Holder in December 2010. She is seated at the New York Immigration Court and is a member of the New York State Bar. Judge Khan is the programs chair of the FBA Immigration Law Section and is also a member of the National Association of Women Judges. Judge Dorothy Harbeck, an immigration judge in New York City, is the secretary/treasurer of the NAIJ. She is also an adjunct professor of law at Columbia and Rutgers. She is a fellow of the Federal Bar Foundation, is on the Executive Board of the FBA Immigration Law Section, and is a member of the bar in New Jersey and New York.

The 2019 DOJ Petition for Decertification

In August 2019, the Department of Justice (DOJ), in a veiled attempt to silence the voice of the immigration judges (IJs), filed a petition with the Federal Labor Relations Authority (FLRA) to decertify the National Association of Immigration Judges (NAIJ).[1] The NAIJ—originally certified in 1979 as the recognized representative for collective bargaining for all U.S. IJs—is a voluntary association that represents and speaks for the interests of the nation's 440 IJs. The NAIJ was formed with the objectives of promoting independence and enhancing the professionalism, dignity, and efficiency of the immigration courts. DOJ asserts that IJs should be reclassified as "management officials." This would mean IJs could no longer unionize, be part of a collective bargaining unit, or speak independently.

NAIJ serves as the only voice of the IJs who cannot speak out without prior express permission of DOJ's Executive Office for Immigration Review (EOIR).[2] NAIJ serves to afford transparency and accountability. The immigration courts are not independent courts under Article I or Article III of the Constitution. They are wholly contained within DOJ. Without a union, IJs have no protection against the politicization of the process and their decisions. Without transparency, the integrity of the process is in jeopardy. Without a union, the IJs cannot protest policy measures, such as the imposition of quotas and performance measures; the IJs cannot contest the numerous policies enacted by EOIR that encroach upon and undermine the independent decision-making ability of the IJs; and the IJs will not be able to rally against the effective speedup of the workforce, placing due process and fundamental fairness of the proceedings at risk.

How the Process Works

The burden to show that IJs are management officials is on the moving party (i.e., DOJ). The FLRA regional director (RD) has opened an investigation into the NAIJ, seeking information about its responsibilities. DOJ can submit factual and legal arguments in support of its petition. The RD can then issue a decision or request a hearing to solicit more information. Either party can appeal the RD's decision to the full FLRA board.

The Unsuccessful 2000 Attempt to Decertify the Immigration Judges' Union

This current effort follows a similar, and unsuccessful, strategy pursued by DOJ to decertify the immigration judges' union approximately 20 years ago. In September 2000, the FLRA's RD rejected DOJ's argument, and the full FLRA upheld the RD's decision on appeal. In that prior decertification attempt,[3] the FLRA rejected DOJ's argument that IJs make policy through the issuance of decisions, noting that the trial court level IJs do not set precedent and that their rulings are often appealed and reviewed. The FLRA also said that the immigration court system was established specifically so that IJs do not maintain any management duties to enable them to focus on hearings.

The FLRA also ruled that there is a distinct difference between the trial level IJs and the appellate level Board of Immigration Appeals (BIA) members.[4] The description of the duties of the IJ were described in the 2000 decertification attempt:

> The daily routine of an Immigration Judge involves hearing and deciding cases that arise from the operation of the INS.[5] A court's jurisdiction to decide these cases is determined at the time a case is filed. After filing, the cases are randomly assigned by the court administrator to an individual Judge and placed on a Judge's calendar on his or her master calendar day. At that time, the Judge hears presentations from the parties and their attorneys, identifies the issues, and advises individuals as to their right to

representation. The Judge also sets time frames and briefing schedules, as well as the date for trial.[6]

The nature of the IJs' decisions and their position in the hierarchy of binding the EOIR was also set forth:

> During a trial, the parties are represented by counsel and the rules of evidence are observed. Thereafter, in arriving at their decisions, Immigration Judges are required to apply immigration statutes, applicable regulations, published decisions of the Board of Immigration Appeals and federal appellate courts, and other foreign and state laws. After the trial, the Judge issues his or her decision, almost always orally, and advises the parties of their appeal rights. Oral decisions are not transcribed unless they are appealed; are not published; and are final and binding only with respect to the parties to the case. With limited exception, decisions of the Immigration Judges may be appealed to the Board of Immigration Appeals and review of their decisions is de novo. Certain cases may also be appealed to the appropriate U.S. circuit court.[7]

Citing its precedential case on the managerial status of BIA members (hereinafter "the BIA Management Case"),[8] the FLRA specifically stated that the BIA appellate judges were management officials within the meaning of section 7103(a)(11) of the statute and, therefore, could not be included in the existing bargaining unit. In particular, it concluded that "the incumbent Board Member directly influences activity policy through his participation in the interpretation of immigration laws and the issuance of decisions and, thereby, meets the definition of a management official set forth in section 7103(a)(11) of the Statute."[9]

In the 2000 decertification attempt, the RD applied the BIA Management Case and concluded that "unlike decisions of the Board of Immigration Appeals, the decisions of Immigration Judges are not published, do not constitute precedent, are binding only on the parties to the proceedings, and are subject to de novo review."[10] The RD accordingly concluded that the decisions of the judges do not influence and determine the Agency's immigration policy, in contrast to the decisions of the BIA.

The FLRA concurred that the RD's definition of a management official is defined as "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency."[11]

Critically, the full FLRA also found that management officials are individuals who: "(1) create, establish or prescribe general principles, plans or courses of action for an agency; (2) decide upon or settle upon general principles, plans or courses of action for an agency; or (3) bring about or obtain a result as to the adoption of general principles, plans or courses of action for an agency."[12]

The FLRA distinguished the trial court IJs from the BIA appellate judges by specifically holding that IJs do not "make policy through the issuance of their decisions ... that in arriving at their decisions, Immigration Judges are required to apply immigration laws and regulations, that their decisions are not published and do not constitute precedent." Finally, the RD observed that the decisions are binding only on the parties to the case, are "routinely" appealed, and are subject to de novo review.[13] There is no difference in this now.

The FLRA specifically agreed with the RD's rejection of the EOIR's claims that "the sheer volume of decisions issued by the [immigration] Judges and the finality of their decisions, unless they are appealed," affect the EOIR's policy. This is because "no matter the volume of decisions issued, or number of appeals filed, the fact remains that when an Immigration Judge issues a decision [,] he or she is applying and following established Agency law and policy."[14] Again, there is no difference in this now.

While IJs have some authority to control practice in their own courtrooms, they have no authority to set overall policy as to how the courts as a whole will operate. Nor, critically, do they have the authority to direct or commit the EOIR to any policy or course of action. The IJs are highly trained professionals with the extremely important job of adjudicating cases.[15] This organizational structure and supervisory delegation was established specifically so that the IJs are unencumbered by any supervisory and management obligations and are free to concentrate on hearings.[16] Aspirationally, this is still the position of the IJs.

What's Different Now?

The DOJ now posits that: subsequent factual and legal developments in the ensuing 19 years indicate that IJs should be considered management officials according to 5 U.S.C. § 7103(a)(11) and, thus, excluded from forming or joining a labor organization.[17]

As stated in the 2019 Petition for Decertification, those changes include, *inter alia*: (1) changes to federal regulations that limit the scope of review of certain aspects of IJ decisions by the Board of Immigration Appeals (the Board); (2) the Board's usage of "affirmance without opinion" decisions in adjudicating appeals, making the IJ decision essentially the final agency decision; (3) the Board's usage of "adopt and affirm" procedures regarding IJ decisions and the concomitant development of federal circuit court case law that effectively reviews the IJ decision as the final agency decision; (4) an exponential increase in the number of credible fear review and reasonable fear review adjudications by immigration judges, where the IJ decision is not reviewable by the Board; and, (5) a recent decision by the Supreme Court regarding inferior officers, who "exercise significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 585 U.S. _, 138 S. Ct. 2044 (2019).

These alleged five changes actually have no impact at all on the daily reality of the role of the IJ. Attorney General Ashcroft attempted to streamline the BIA in 2002 with less than successful results.[18] As part of these 2002 streamlining reforms, Attorney General Ashcroft reduced the size of the BIA from 23 to 11 members.[19] The American Bar Association conducted an in-depth study of this and memorialized its results in a report issued in 2010. This 2010 report concluded that the "streamlining reforms significantly reduced the backlog of unresolved appeals before the Board, but that there was a corresponding increase in the rate of appeals to the federal courts after the 2002 reforms were implemented. For example, the rate of appeals from BIA decisions increased from a low of 5.5% in 2001 to a high of 26.7% in 2006."[20] Although the EOIR director unilaterally decided to repeat the obvious mistakes[21] by directing the BIA's mass utilization of "affirmance without opinion"[22] of IJ decisions, the fact remains that the BIA does have appellate review over those IJs' decisions.

Further, the IJ review of the Department of Homeland Security's (DHS's) Asylum Officers' Credible or Reasonable Fear Determina-

continued on page 21

cussed how the issue is being addressed in their districts, including Yellowstone National Park, a federal enclave. The panel presentation spawned a lively discussion about whether law enforcement agencies have the resources to determine whether certain forms of hemp and cannabis are illegal or not.

Juliette Palmer White of Parsons Behle & Latimer (Utah) moderated the "Civility and Decorum Panel," which consisted of U.S. District Judges Nancy Freudenthal (Wyoming), B. Lynn Winmill (Idaho), and Bruce Jenkins (Utah), who were joined by Ninth Circuit Judges N. Randy Smith and Ryan Nelson. The panel discussed the increasingly contentious public discourse and growing concerns about the loss of civility in American public life. In contrast, the panelists applauded practitioners throughout the Tri-State area for the civility and courteousness that is the norm in Idaho, Wyoming, and Utah. In response to a series of lively questions from the audience, the panelists encouraged practitioners to remain courteous, even when their opponents are impertinent. In the long run, the panelists agreed that judges are in the best position to cure practitioner misbehavior.

Elijah Watkins (Partner, Stoel Rives) and Sam Johnson and Spencer Felton (University of Idaho College of Law FBA Student Chapter Members).

Top: Dana Herberholz; Dean Erwin Chemerinsky (Dean, Berkeley Law, University of California); and Bob Sykes (Utah). Lower left: Kyle Cole (Law Clerk for Judge Ryan Nelson); Ninth Circuit Judge Ryan Nelson; and Mark Klaassen (U.S. Attorney, District of Wyoming). Lower right: Dean Erwin Chemerinsky and U.S. Bankruptcy Judge William Thurman (District of Utah).

Top: John Zarian (Past-President, Idaho Chapter, FBA) and Alyson Foster (President-elect and Partner, Andersen Schwartzman Woodard & Dempsey). Bottom: Ninth Circuit Judges Richard C. Tallman, Ryan Nelson, and N. Randy Smith.

Please mark your calendar for this year's Tri-State conference, which is being hosted by the Wyoming Chapter in Jackson Hole, Wyo., from Oct. 8-10, 2020. For more information, contact Susie Headlee at Parsons Behle & Latimer at sheadlee@parsonsbehle.com. ⊙

Immigration Law *continued from page 10*

tions regarding the admissibility of a noncitizen seeking entry to the United States at airports or borders is hardly a management function. At the border, noncitizens without permission to enter the United States are subjected to summary removal by DHS without a hearing. However, those persons who express a fear of harm if returned to their country are detained and given a "credible fear interview" by a DHS-U.S. Citizenship and Immigration Service (USCIS) asylum officer. This is a screening, not a full application for asylum. The law sets what is intended to be a very low standard for a credible fear hearing: the asylum officer need only find that there is a significant possibility that the noncitizen could establish in a full hearing eligibility for asylum. If the asylum officer (who is often not a lawyer) finds there is no such significant possibility, the applicant can ask that an IJ review the asylum officer's determination. This review by an IJ is not a full asylum hearing. The IJ is not in any way bound by the asylum officer's factual determination and hears testimony from the noncitizen on whether there is any potential at all under the law for this individual to succeed at a full merits hearing. This does not make the IJ the appellate review court for a determination of an officer from a different agency. An appellate body does not hear testimony. This process is merely a legal determination by the court as to whether the first threshold for asylum can potentially be satisfied, akin to a summary judgment motion. Also, as noted by the FLRA in the 2000 Decertification Action and discussed above, the volume of adjudications has no impact on the designation of the IJ as a manager. ⊙

Why It Matters to Due Process

IJs have absolutely no management authority. They have no more authority to supervise any employees or bind the agency in which they are housed than they did in 2000. DOJ's petition is a disingenuous

attempt to silence the voice of the IJs, to impede transparency and accountability, and to thereby put into question the very integrity of the immigration court system. ⊙

The views expressed here do not represent the official position of the Department of Justice, the attorney general, or the Executive Office for Immigration Review. The authors' views represent their personal opinions, which were formed after extensive consultation with the membership of the NAIJ.

Endnotes

[1]Katz, Eric, *Trump Administration Looks to Decertify Vocal Federal Employee Union,* Government Executive. https://www.govexec.com/management/2019/08/trump-administration-looks-decertify-vocal-federal-employee-union/159112/

[2]EOIR is actually three units within the DOJ. The Office of the Chief Immigration Judge (OCIJ) is one component and it oversees the immigration courts where IJs conduct formal removal hearings, adjudicating whether to deny entry, remove/deport, or grant relief to aliens facing removal. *See generally* http://www.usdoj.gov/eoir/ocijinfo.htm. The Board of Immigration Appeals (BIA) is a separate component and it hears appeals from IJ decisions. Decisions of the BIA can become published and thus precedential and binding upon all EOIR components. *See generally* http://www.usdoj.gov/eoir/biainfo.htm

[3]*U.S. Dept. of Justice, Executive Office for Immigration Review, Office of Chief Immigration Judge (Petitioner/Agency) and National Association of Immigration Judges (Labor Organization/Union*), 56 F.L.R.A. No. 97 (2000) https://www.flra.gov/decisions/v56/56-097.html (hereinafter "the 2000 Decertification Attempt").

[4]*See, e.g. U.S. Department of Agriculture, Federal Crop Insurance Corporation, Washington Regional Office and National Federation of Federal Employees,* 46 F.L.R.A. 1457, 1458-59 (1993) (finding that hearing officers were not management officials because their recommendations were reviewed by a number of higher levels [v56 p622] and because they did not have the authority to direct or commit the agency to a certain course of action) and *Headquarters, Space Division, Air Force Systems Command, Department of the Air Force, Department of Defense and American Federation of Government Employees, AFL-CIO, Local 2429*, 9 F.L.R.A. 885, 887-88 (1982) (finding that employees who wrote and independently interpreted regulations that set forth agency policy were management officials). *see also U.S. Department of Housing and Urban Development, Boston Regional Office, Region I Boston, Massachusetts and American Federation of Government Employees*, Local 3258, AFL-CIO, 16 F.L.R.A. 38 (1984) (finding that attorneys at the GM-14 level who engaged in litigation on behalf of the agency and provided legal expertise and interpretation of the agency's policies were engaged in implementing, as opposed to shaping, the agency's policies and therefore were not management officials).

[5]With the creation of the Department of Homeland Security (DHS), as distinct from DOJ, in the aftermath of Sept. 11, 2001, the immigration bureaucracy was radically restructured and INS functions were split between the two departments. Enforcement is handled by DHS. The adjudicatory function in removal/deportation cases is handled by the Executive Office for Immigration Review (EOIR), within DOJ.

[6]*See supra* note 4.

[7]*Id.*

[8]*U.S. Department of Justice Board of Immigration Appeals and American Federation of Government Employees Local 3525,* 47 F.L.R.A. No. 44 (1993).

[9]47 F.L.R.A. at 509.

[10]*Id.*

[11]Regional Director Decision at 8.

[12]*See Department of the Navy, Automatic Data Processing Selection Office,* 7 F.L.R.A. 172, 177 (1981) (Navy/ADP).

[13]Regional Director's Decision at 9, applying *U.S. Department of Justice, Board of Immigration Appeals*, 47 F.L.R.A. 505 (1993) (BIA Management Case). (holding that the role of an immigration judge can be readily distinguished from that of a member of the Board of Immigration Appeals. Unlike decisions of an immigration judge, decisions of the Board of Immigration Appeals constitute a final administrative ruling, are binding on the judges below, and, consequently, influence and determine immigration policy).

[14]*Id.*

[15]*Id.* at 12.

[16]*Id.* at 11-12 (citing comments of the then chief immigration judge in a 1996 memoranda titled "Clarification of Organizational Structure and Supervisory Responsibilities").

[17]2019 Petition for Decertification at 4

[18]Benesh, Susan, *Due Process and Decision making in U.S. Immigration Adjudication,* Admin. L. Rev., 557 (2007) (citing Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation,* 55 Cath. U. L. Rev. 923, 945 (describing how, in the wake of 1996 legislation, enforcement actions increased immediately, with concomitant jumps in cases brought before immigration judges, and appeals to the BIA).

[19]67 Fed. Reg. at 54,893. In 2008 EOIR proposed certain revisions to the streamlining regulations to encourage the use of one-member written opinions and three-member panels and to encourage the publication of precedent. Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654 (June 18, 2008). These regulations were never finalized.

[20]2019 Update Report Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases Am. Bar Ass'n (March 2019).

[21]*Id.* (citing Board of Immigration Appeals: Procedural Reforms to Improve Case Management), 67 Fed. Reg. 54,878, 54,879 (Aug. 26, 2002) (to be codified at 8 C.F.R. Part 3) [hereinafter Procedural Reforms]; *Id.* at 54,901 ("[T]he Board shall be reduced to eleven members as designated by the Attorney General."); *see also* U.S. Dep't of Justice, Executive Office for Immigration Review, BIA Restructuring and Streamlining Procedures (rev. 2006), available at www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf Specifically at .

[22]8 C.F.R. § 1003.1(e)(4)(ii) (2007)) ("The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination.").