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FLRA Decision Busts Immigration Judges Union, Effectuating Former Trump Administration's Anti-Union Attacks on Federal Employees and the Immigration Court

The decertification of National Association of Immigration Judges is "unprecedented attack on federal employees' bargaining rights and extends the Trump Administration's politicization of the Immigration Court."

WASHINGTON, DC – The executive officers of the International Federation of Professional and Technical Engineers (IFPTE) responded to the Federal Labor Relations Authority's (FLRA) revocation of the National Association of Immigration Judges '(NAIJ) union certification, denying over 530 immigration judges employed by the Department of Justice (DOJ) their statutory union rights. NAIJ was recognized and certified as the exclusive union representative for immigration judges over forty years ago, in 1979.

IFPTE President Matthew Biggs:

> "The FLRA's revocation of our members' union continues both an ongoing and unprecedented attack on federal employees 'bargaining rights and the Trump Administration's politicization of the Immigration Court. The former Trump Administration effectively weaponized the FLRA's processes for the purpose of retaliating against the NAIJ because it felt that the union was an overly effective voice for immigration judges. This is especially true regarding concerns about that administration's extreme political pressure on the Immigration Court for the sake of achieving Trump's anti-immigrant agenda as well as implementation of policies that continue to threaten due process and fairness in the Immigration Court, such as a lack of resources and mismanagement. This unionbusting and purely political attack on NAIJ only affirms the value of federal sector unions for federal employees and for the public good. IFPTE will work with the NAIJ leaders and members to make sure immigration judges have their union rights restored and overturn the dangerous precedent set in this FLRA decision.
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> "It's a bitter irony that the Trump Administration's anti-federal worker and anti-federal union agenda is still alive in the FLRA despite the Biden-Harris Administration's clear commitment to protecting the federal workforce, engaging with federal unions to address and improve federal employees 'workplaces and help the public, and removing

barriers to union organizing and bargaining in the federal government. This FLRA order shows exactly why IFPTE, the unions of the Federal Workers Alliance, and other federal employee unions have repeatedly urged the Senate to confirm President Biden's FLRA nominees as soon as possible. IFPTE members and federal employees are still waiting for the Senate confirmation vote for Susan Grundmann."

IFPTE Secretary-Treasurer Gay Henson:

"IFPTE is outraged by the FLRA order to revoke the certification of the NAIJ-IFPTE Judicial Council 2. Over the last year, Attorney General Merrick Garland has scrapped his predecessor's attacks on the NAIJ, has withdrawn the petition to decertify the union that misclassified immigration judges as management, and has taken steps to rebuild a productive labor-management relationship. It is, therefore, the height of absurdity that – fifteen months into the Biden-Harris Administration – the Trump-appointed majority on the FLRA has blatantly ignored DOJ's withdrawal of its opposition to NAIJ and has proceeded to carry out the Trump anti-union and anti-federal worker agenda.

"Unions throughout the AFL-CIO and the Federal Workers Alliance have repeatedly warned that President Biden's effort to make the federal government a model employer will be undermined by an ideologically anti-union FLRA majority that was appointed by the last administration. IFPTE members who work for the federal government know that their union plays a key role in improving their workplace so their agencies can succeed and serve the public interest. This FLRA decision doesn't only unfairly deny union rights to IFPTE members working at the Immigration Court; it leaves the public and the agency worse off and creates precedent that a future anti-federal union administration can use to again harm federal workers and the federal government. We're firm in our commitment to make sure NAIJ remains the exclusive collective bargaining representative for immigration judges."

Across the United States and Canada, IFPTE represents 90,000 highly skilled workers in the federal, public, and private sectors. IFPTE is an affiliate of the AFL-CIO and the CLC. More information can be found at www.IFPTE.org.

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Background on FLRA Decision
Last week's FLRA decision and order to decertify the NAIJ is the latest development with the Trump-era DOJ and former Attorney General Barr filing an FLRA unit clarification petition in August 2019 to erroneously classify all non-supervisory immigration judges represented by NAIJ as "management officials." In July 2020, the FLRA D.C. Regional Director denied the petition after NAIJ proved conclusively that immigration judges are not management and are entitled to union rights under the federal services labor-management relations statute. After DOJ filed an application for review to the three-member FLRA board, the two-member Trump-appointed majority issued a poorly reasoned decision on November 2, 2020, that declared immigration judges are management officials. The two-member FLRA majority ordered the FLRA D.C. Regional Director to deem as management" all non-supervisory immigration judges represented by NAIJ and removed the immigration judges from the NAIJ bargaining unit, therefore decertifying the union. FLRA Member Ernest DuBester (who is now FLRA Chair and has been renominated by President Biden) dissented with the majority's decision and concluded, "it is abundantly clear that the majority's sole objective is to divest the IJs of their statutory rights."

NAIJ appealed the decision by filing a motion to reconsider at the FLRA decision. Due to the appeal, the FLRA D.C. Regional Director held off on implanting the decision. Just before and soon after the Biden-Harris Administration took office, numerous Members of Congress – including Senate Judiciary Democrats and the House Labor Caucus –requested the new Administration and the DOJ reverse the Trump Administration's effort to bust the NAIJ union. In late June and mid-July 2021, the DOJ filed with the FLRA a motion to withdraw their opposition to the NAIJ motion for reconsideration and a motion to withdraw the August 2019 unit clarification petition seeking to decertify the NAIJ. By early December, DOJ had fully recognized NAIJ and acknowledged that the November 2020 decision had not been implemented and therefore NAIJ's union certification had not been revoted.

On January 21, 2022, the Trump-appointed two-member FLRA majority rejected the NAIJ's motion to reconsider, disregarding the DOJ's motions to withdraw their opposition to NAIJ's motion to reconsider and the DOJ motion to withdraw the petition. On April 12, the FLRA issued an order requiring the Regional Director to decertify the National Association of Immigration Judges (NAIJ) within seven days, and today the Regional Director entered a revocation thereby decertifying NAIJ. The FLRA issued its order as part of a decision denying NAIJ's motion to reconsider and for stay.

Failure to Confirm Biden FLRA Nominees
On Aug 5, 2021, President Biden renominated sitting FLRA Member Ernest DuBester, nominated Susan Grundmann for FLRA Member to replace current Member James Abbott, and nominated Kurt Rumsfeld for FLRA General Counsel.

All three were reported favorably out of the Senate Homeland Security and Gov't Affairs Committee (HSGAC) on November 3rd. Yet none of the three nominees were considered for confirmation on the Senate floor before the end of the 2021 Congressional session. IFPTE, federal employee unions, and the AFL-CIO had requested that Senate Dem Leadership, at the very least, prioritize Grundmann's confirmation before the end of the year.

On Jan 3, 2022, at the end of the first session of the 117th Congress, the three FLRA nominees were returned to the President. They were renominated on January 4, 2022. Grundmann was reported favorably out of HSGAC on February 2 and the vote to close debate on her nomination succeeded with a bipartisan majority on March 28, 2022. However, the Senate recessed on April 7 without scheduling a confirmation hearing for Grundmann. Senate confirmation would have restored order, functionality, and fairness to the FLRA.

Over the last four years, Kiko and Abbott's decision-making has severely restricted federal employees' statutory right to bargain, scaled back management's duty to bargain, and limited negotiability over telework and unions' ability to initiate bargaining over work conditions. During the time that Kiko and Abbott have formed a majority on the FLRA, the dissenting voice on the FLRA board has been Member and now Chair DuBester, whose minority opinions have applied sound reasoning and relied on well-established precedent.

House Government Operations Subcommittee Chair Gerald Connolly's letter from November 2020 objects to "three radical policy decisions" from Member Abbott and Chair/Member Duffy: "The Republican two-member majority discarded decades of labor-management relations precedent and violated their own rules to achieve the goal of limiting collective bargaining for the almost 1.2 million federal employees represented by federal employee unions... For those reasons, these recent decisions issued by a two-to-one Republican majority at the close of the Trump administration should be reconsidered in the future and overturned to reinstate precedents and customary practices that have governed these issues for decades."

The U.S. Circuit Court for the District of Columbia has vacated five significant decisions in which Kiko and Abbott formed a majority on. Strikingly, in each of these D.C. Circuit Court rulings, the court has admonished Kiko and Abbott for misunderstanding legal concepts and arriving at arbitrary decisions that inappropriately set aside precedent. In a 2020, D.C. Circuit Court decision noted that Abbott and Kiko "engage[d] in a type of circular reasoning that has been criticized by the U.S. Supreme Court" when they misapplied basic precedent in their FLRA decision regarding the difference between the phrases "terms and conditions of employment" and "working conditions" (AFGE Local 1929 v FLRA, 961 F.3d 452, D.C. Cir. 6/9/2020). More recently, the D.C. Circuit described a 2020 policy statement advanced by Kiko and Abbott that removed union's right to seek mid-term bargaining based on reasoning that is "a non sequitur" (AFGE v FLRA, No. 20-1398, D.C. Cir. 1/28/2022). A further example of Kiko and Abbott's poorly reasoned decisions is the D.C. Circuit vacated another policy statement and explained, "The cursory policy statement that the FLRA issued to justify its choice to abandon thirty-five years of precedent promoting and applying the de minimis standard and to adopt the previously rejected substantial-impact test is arbitrary and capricious" (AFGE v FLRA, No. 20-1396, D.C. Cir. 2/1/2022).