

Trump Bust of Immigration Judges' Union Faces D.C. Cir. Scrutiny

By Khorri Atkinson

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- Union seeking to undo decertification order
- Federal labor board says court fight 'incurably premature'

A federal appeals court will consider whether a Republican-controlled federal labor panel erroneously decertified a union created to represent some 500 federal immigration judges who decide disputes over immigrants' legal status.

Counsel for the National Association of Immigration Judges (NAIJ) will urge the US Court of Appeals for the District of Columbia Circuit at oral argument Thursday to overturn a Federal Labor Relations Authority's finding that the judges are managers and therefore aren't eligible for collective bargaining.

The FLRA, which oversees labor relations between the federal government and its employees, was controlled by Republican appointees 2-1 under then-President Donald Trump.

The party-line order issued in November 2020 was a victory for the Trump administration, which pushed the panel to dissolve the union on the basis that immigration judges are management officials who can't form unions under the Federal Service Labor-Management Relations Statute. The law allows federal workers to unionize, but excludes managers who "formulate, determine, or influence the policies of an agency."

The FLRA reaffirmed that order earlier this year before the agency shifted to Democratic control. The move was unusual considering that the Biden-run Justice Department, which oversees the US immigration court system, agreed last year to recognize the union.

That decision also raised questions about the FLRA's authority to nullify a settlement between a federal union and the workers' employer.

Due Process Claim

The NAIJ, an affiliate of the International Federation of Professional and Technical Engineers, has been recognized by all administrations since its formation in 1979. The union argued in its D.C. Circuit brief that the federal labor panel violated its members' due process rights and their protected liberty interest in joining a labor union.

Also at issue is a 2000 FLRA decision preserving the union and upholding its members' organizing rights. It also clarified the role of the US Board of Immigration Appeals' members versus that of immigration judges.

FLRA Washington regional director Jessica Bartlett rejected the Trump administration's bid to gut the NAIJ, ruling in July 2020 that immigration judges aren't management officials like BIA members who influence DOJ policy, because they cannot create their own precedent or overturn rulings by the BIA.

Bartlett rejected the Trump-led DOJ's claim that new regulations limiting review of immigration judges' decisions and the BIA's practice of adopting and affirming immigration judges' rulings in some instances, rather than writing a separate opinion, warrant classifying immigration judges as managers.

There have been no changes to the judges' day-to-day job duties to alter the scope of the bargaining unit, she said.

Appeal 'Premature'

The union's petition is "incurably premature" because the FLRA didn't issue a final decision that's ripe for judicial review, the agency fired back in its response brief. The FLRA is still considering the union's motion for reconsideration, which it filed two weeks before asking the D.C. Circuit to overturn the decertification order, the agency said.

Even if the FLRA had ruled on the pending motion, the appeals court still lacks jurisdiction over the case because federal law and judicial precedent governing appellate resolution of FLRA matters foreclose direct review of orders concerning bargaining unit determinations, according to the agency.

"Instead, the appropriate forum for the union's constitutional claims—just like any of the union's other claims stemming from the authority's unit determination—is an unfair labor practice ('ULP') proceeding before the authority, with judicial review to follow (if necessary) before a federal court of appeals," the brief said.

The country's "broken" and "poorly managed" immigration court system "won't be improved by silencing the judges who hear immigration cases, quite the opposite," NAIJ President Mimi Tsankov said in a statement provided to Bloomberg Law.

"We are hopeful that justice will prevail in this case pending before the D.C. Circuit, and that the FLRA will reverse its anti-union position," Tsankov said.

An FLRA spokesperson didn't reply to a request for comment.

Kesselman, Brantly & Stockinger LLP represents the union. In-house counsel represents the FLRA.

The case is Nat'l Ass'n of Immigration Judges v. FLRA, D.C. Cir., No. 22-01028, oral argument 11/17/22.

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