Exhibit A

72 FLRA No. 121

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. 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)

WA-RP-19-0067
(71 FLRA 1046 (2020))

ORDER DENYING
MOTION FOR RECONSIDERATION AND
MOTION FOR STAY

January 21, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and James T. Abbott, Members
(Member Kiko concurring; Chairman DuBester dissenting)

I. Statement of the Case

The Agency requests that we reconsider our decision in *U.S. Department of Justice, Executive Office for Immigration Review* (*EOIR 2020*).[1] In that case, the Agency filed a petition to clarify the bargaining unit (the unit) to exclude all immigration judges (IJs) on the grounds that they are management officials and therefore not appropriate unit members under § 7112(b)(1) of the Federal Service Labor-Management Relations Statute (Statute).[2] In the decision and order (decision), Federal Labor Relations Authority (FLRA) Regional Director Jessica S. Bartlett (the RD) denied the Agency's petition, finding that despite changed circumstances, the unit was still appropriate because IJs are not management officials. On

[1] 71 FLRA 1046 (2020) (then-Member DuBester dissenting).
[2] 5 U.S.C. § 7112(b)(1).

review, the Authority found that existing case law regarding the determination of management officials warranted reconsideration. Pursuant to the reevaluated case law, the Authority found that IJs are management officials, and, therefore, excluded from the bargaining unit.

In a motion for reconsideration (motion), the Union argues that the Authority erred by "refus[ing] to analyze the factual record."[3] The Union also argues that the Authority erred in its conclusions of law by "concluding that the bar on collateral attacks did not apply and . . . upending its precedent without adequate justification."[4] Because the Union's arguments fail to establish that the Authority erred, those arguments do not provide a basis for reconsideration. Accordingly, we deny the Union's motion.[5]

II. Background

In 2000, in *U.S. DOJ, Executive Office of Immigration Review, Office of the Chief Immigration Judge* (*EOIR 2000*),[6] the Authority denied a petition by the Agency to clarify the unit by excluding IJs on the grounds that IJs are management officials. Since then, the number of cases pending before IJs and decided each year has significantly increased. Furthermore, the Agency codified "adopt-and-affirm" and "affirmance with opinion" procedures, and changed the level of review of IJ factual determinations from de novo to a clear error standard. Moreover, the Supreme Court of the United States decided *Lucia v. Securities & Exchange Commission* (*Lucia*), finding that Administrative Law Judges (ALJs) at the Securities Exchange Commission were officers of the United States under the Appointments Clause of the U.S. Constitution.[7]

Subsequently, the Agency filed the clarification petition at issue in this case, seeking to overturn the decision in *EOIR 2000* based on the changed circumstances.[8] After considering the petition and the Union's response, the RD found that the IJs' day-to-day duties remain largely unchanged since the Authority's decision in *EOIR 2000*. The RD also found that the processes for "adopt-and-affirm" and "affirmance without opinion" existed in practice prior to the Authority's decision in *EOIR 2000*. The RD further found that *Lucia* did

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[3] Mot. for Recons. (Mot.) at 10.
[4] *Id.*
[5] We note that the Union filed a motion for leave to file a motion for remand and stay on June 21, 2021. In support of this motion, the Union argues that changes to regulations and policies warrant a remand to the RD for further factual findings on the appropriateness of the unit. Mot. for Remand at 3-4. If the Union has evidence that substantial changes have affected the unit since the RD's decision, then the Union can comply with our regulations for filing a new representation case and assert its substantial-changes arguments at that time. *See* 5 C.F.R. § 2422. We also note that two of the three alleged changes occurred prior to the November 2020 issuance of *EOIR 2020*. *See* Mot. for Remand at 9 (arguing that a September 24, 2020 decision by the U.S. Attorney General was a substantial change); *id.* at 12 (arguing that the "newly created 'Unit Chief Immigration Judge' position [announced] on September 2, 2020," was a substantial change). Thus, even if a motion for remand to submit new evidence were an appropriate course of action in this case, the time to submit that motion would have been before we issued our original decision.
[6] 56 FLRA 616, 623 (2000).
[7] *Lucia v. SEC*, 138 S. Ct. 2044, 2054 (2020).
[8] Decision at 1.

not have any bearing on whether IJs were management officials under the Statute. However, the RD found that the regulatory change to the level of review of IJs' factual determinations was a substantial change that warranted a "thorough[] reassess[ment]" of the IJs' status.[9] Therefore, the RD reevaluated whether IJs are management officials under the Statute.

The RD found that, although the Agency deferred to the IJs' factual findings under a clear error standard, IJs "continue[d] to make decisions based on the facts presented and in accordance with law, regulation, and precedential [Board of Immigration Appeals (BIA)] decisions."[10] The RD further found that most IJ decisions are still reviewed by the BIA, and IJs are bound by BIA precedent and policy. As such, the RD found that IJs merely apply the laws, policies, regulations, and BIA decisions, and, therefore, do not create and influence policy. Based on these findings, the RD concluded that IJs are not management officials under the Statute. The Agency filed an application for review of the RD's decision on September 4, 2020.

In *EOIR 2020*, the Authority found that the RD's unchallenged finding of a substantial change allowed for a re-evaluation of the merits of the Agency's arguments regarding the appropriateness of the unit.[11] The Authority also found that whether an employee is an "officer[]" under the Constitution is not relevant in determining if they are a management official under the Statute.[12] Finally, the Authority found that *EOIR 2000* needed to be reconsidered because it was in conflict with *U.S. DOJ, Board of Immigration Appeals (BIA)*.[13] The Authority found that the rationale in *BIA* for excluding BIA Members (Board Members) as management officials also applied to IJs because both influence the Agency policy by interpreting immigration laws and decisions. The Authority also found that a distinction between IJs and Board Members based solely on the basis of reviewability was nonsensical. Accordingly, the Authority vacated the RD's decision, found that IJs are management officials, and directed the RD to exclude IJs from the bargaining unit.[14]

Subsequently, the Union filed this motion on November 17, 2020.[15] The Association of Administrative Law Judges (AALJ) filed an amicus curiae brief on November 16, 2020,

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[9] *Id.* at 16.
[10] *Id.* at 20.
[11] *EOIR 2020*, 71 FLRA at 1047.
[12] *Id.* at 1047-48.
[13] *Id.* at 1048; *BIA*, 47 FLRA 505, 509 (1993).
[14] *EOIR 2020*, 71 FLRA at 1049.
[15] It appears that the Agency attempted to file an opposition to the Union's motion via commercial delivery on November 24, 2020. The Authority did not receive the Agency's mailed opposition. However, as the Agency has filed a motion to withdraw its opposition, which we grant, we find it unnecessary to determine whether the opposition was properly filed and do not consider it. The Agency also filed a motion to withdraw its clarification petition in *EOIR 2020* on July 19, 2021. Mot. to Withdraw Pet. at 2. The Agency's motion to withdraw its petition is, in effect, a motion for reconsideration. Section 2429.17 of the Authority's Regulations allows a party to file a motion for reconsideration "within ten (10) days after service of the Authority's decision." 5 C.F.R. § 2429.17. The Authority issued its decision in *EOIR 2020* in November 2020. As such, the Agency's motion is untimely. Accordingly, we dismiss it.

and the American Federation of Government Employees, AFL-CIO (AFGE) filed an amicus curiae brief on December 15, 2020.[16]

III. Analysis and Conclusion: We deny the motion for reconsideration and request for a stay.

The Union asks the Authority to reconsider its decision in *EOIR 2020*. Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision.[17] The Authority has repeatedly held that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[18] As relevant here, the Authority has held that errors in its legal conclusions or factual findings may justify granting reconsideration.[19] However, mere disagreement with or attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.[20]

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[16] Section 2429.9 of the Authority's Regulations provides that "[u]pon petition of an interested person . . . the Authority may grant permission for the presentation of written and/or oral argument . . . by an amicus curiae . . . ." 5 C.F.R. § 2429.9. The AALJ and AFGE filed motions for leave to file amicus curiae briefs. *See* AALJ Mot. for Leave; AFGE Pet. to File Amicus Curiae Br. Pursuant to § 2429.9, the Authority grants the AALJ and AFGE permission to file amicus curiae briefs. *See EOIR 2020*, 71 FLRA at 1046 n.2 (granting the AALJ permission to file a brief as amicus curiae under § 2429.9 of the Authority's Regulations). Accordingly, we will consider the AALJ's amicus curiae brief and AFGE's amicus curiae brief. *See* Amicus Curiae Br. in Support of Nat'l Ass'n of Immigr. Law Judges' Mot. for Recons. (AALJ Amicus Br.); Amicus Curiae Br. of the AFGE (AFGE Amicus Br.). The Authority considers amicus briefs "only to the extent they address issues raised by the parties." *Broad. Bd. of Governors*, 66 FLRA 380, 386 n.18 (2011) (Member Beck dissenting on other grounds); *see also U.S. Dep't of the Treasury, IRS*, 65 FLRA 687, 689 n.5 (2011) (Member Beck dissenting on other grounds) (citing *UPS, Inc. v. Mitchell*, 451 U.S. 56, 61 n.2 (1981)) (declining to resolve issue raised solely by amicus).

[17] 5 C.F.R. § 2429.17 ("After 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 so doing, may move for reconsideration of such final decision or order.").

[18] *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 71 FLRA 188, 189 (2019) (then-Member DuBester dissenting) (citing *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 860, 861 (2018) (then-Member DuBester dissenting); *AFGE, Loc. 2238*, 70 FLRA 184, 184 (2017)); *SPORT Air Traffic Controllers Org.*, 71 FLRA 25, 26 (2019) (then-Member DuBester concurring) (citations omitted); *U.S. DHS, U.S. CBP, Swanton, Vt.*, 66 FLRA 47, 48 (2011); *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 63 FLRA 600, 601 (2009); *U.S. Dep't of the Interior, Wash., D.C. & U.S. Geological Surv., Reston, Va.*, 56 FLRA 279, 279 (2000).

[19] *AFGE, Loc. 2338*, 71 FLRA 723, 723 (2020) (*Local 2338*) (Member Abbott concurring) (citing *SPORT Air Traffic Controllers Org.*, 70 FLRA 345, 345 (2017) (*SPORT 2017*)); *Indep. Union of Pension Emps. for Democracy & Just.*, 71 FLRA 60, 61 (2019) (*IUPEDJ*) (then-Member DuBester concurring) (citing *NTEU*, 66 FLRA 1030, 1031 (2012)).

[20] *Int'l Brotherhood of Elec. Workers, Loc. 1002*, 71 FLRA 930, 931 (2020) (*IBEW*) (finding attempts to relitigate conclusions reached by the Authority are insufficient to demonstrate extraordinary circumstances); *Local 2338*, 71 FLRA at 723 (citing *SPORT 2017*, 70 FLRA at 345)) (same); *IUPEDJ*, 71 FLRA at 61 (same); *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.*, 58 FLRA 169, 169 (2002) (citing *U.S. DOD, Def. Logistics Agency, Def. Dist. Reg. W., Stockton, Cal.*, 48 FLRA 543, 545 (1993)) (finding that mere disagreement with the conclusion reached by the Authority is insufficient to establish extraordinary circumstances).

First, the Union argues that the Authority erred in its legal conclusions because the Agency's petition was an "impermissible collateral attack on the Union."[21] Specifically, the Union claims that, in its clarification petition, the Agency never argued that Authority precedent warranted reconsideration,[22] and that the substantial change found by the RD "is not the same basis on which the Authority made its decision."[23]

Not only are the Union's arguments simply attempts to relitigate conclusions reached by the Authority in *EOIR 2020*,[24] the Union's arguments are contrary to the record and Authority regulations.[25] The Agency asserted, in its petition, that the Authority should

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[21] Mot. at 11. The Union, quoting the dissent in *EOIR 2020*, claims that "the decision was 'cobbled together' and posted to the Authority's website on Election Day . . . [as] a last-gasp manifestation of hostility of the current (now outgoing) administration to both immigration and to the concept of unions." *Id.* at 2. However, the timing of the Authority's decision had nothing to do with Election Day, and everything to do with the regulatory requirement to undertake to grant review of the RD's decision within sixty days of the filing of the application. *See* 5 C.F.R. § 2422.31(e)(2) ("A Decision and Order of a Regional Director becomes the action of the Authority when . . . [a] party files a timely application for review with the Authority and the Authority does not [take action] within *sixty (60) days* of the filing of the application." (emphasis added)).

[22] Mot. at 11-12. To the extent the Union asserts that the Authority incorrectly concluded that the RD's finding of a substantial change was unchallenged, the Authority emphasizes that parties are responsible for presenting arguments to the Authority. *See* 5 C.F.R. § 2422.31(b) ("An application for review must be sufficient for the Authority to rule on the application without looking at the record . . . [and the] application must specify the matters and rulings to which exception(s) is taken."). While the Union is correct that it contested whether a substantial change had occurred in its post-hearing brief before the RD, the Union glosses over the fact that it implicitly agreed with the RD's finding of a substantial change in proceedings before the Authority. *See* Opp'n Br. at 29 ("The [RD] [d]id [n]ot . . . [c]ommit a [c]lear and [p]rejudicial [e]rror [c]oncerning a [s]ubstantial [f]actual [m]atter."). Thus, the Authority properly relied on the RD's unchallenged finding that there was "a substantial change . . . sufficient to support reconsideration of the IJs' status" and that this change warranted "thoroughly reassess[ing] the IJs' status *considering the totality of the facts and circumstances* presented at the hearing." Decision at 16 (emphasis added).

[23] Mot. at 12-14. The dissent contends that *EOIR 2020* "did not premise its reexamination of the IJ's unit upon any finding that a substantial change had actually *altered* the scope and character of the IJ's unit." Dissent at 14-15. But this contention is nonsensical because, in this representational context, the term of art "substantial change" *means* changes that alter the scope and character of a bargaining unit. *EOIR 2020*, 71 FLRA at 1047 (citing Decision at 16); *id.* (citing *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 70 FLRA 327, 328 (2017) (recognizing that only changes that "alter[] the scope and character of the unit since the last certification" warrant a reconsideration of unit appropriateness and finding that "the standard for reconsideration is met")). In other words, the Authority does not use the phrase "substantial change" in this context except to refer to changes that alter the scope and character of a bargaining unit. *E.g.*, *id.* (adopting the RD's unchallenged findings).

[24] 71 FLRA at 1047-48 (finding that the RD's unchallenged finding of substantial change calls for a re-examination of the appropriateness of the unit); *id.* at 1048-49 (finding that Authority precedent warrants reconsideration).

[25] The dissent argues that we "cite[] no legal support" for the proposition that the Union was required to file an application for review to challenge the RD's finding that substantial changes altered the scope and character of the bargaining unit. Dissent at 15 (quoting Mot. at 13). But the Authority's Regulations provide all of the legal support that is necessary. 5 C.F.R. § 2422.31(b) ("An application must specify the *matters and rulings to which exception(s) is taken* . . . ." (emphasis added)). Further, this criticism is irreconcilable with our dissenting colleague's previous decision to resolve a dispute on the basis that the party that "otherwise won" its case failed to appeal an adverse determination. Dissent at 9 (quoting Mot. at 13). *Compare id.*, *with NTEU, Chapter 231*, 66 FLRA 1024, 1026 (2012) (reversing arbitrator's denial of backpay to a grievant because the "[a]rbitrator found that the [a]gency violated [an agency regulation], and *there are no exceptions to that finding*" (emphasis added) (citation omitted)).

reconsider *EOIR 2000*.[26] Furthermore, the Union's assertion that the Authority's review of the application is limited to the substantial change found by the RD is contrary to the Authority's regulations.[27] Of the three grounds for granting an application for review of an RD's decision, only one ground involves the findings and conclusions of the RD.[28] Therefore, these assertions are insufficient to establish extraordinary circumstances.

Next, the Union argues that the Authority erred in reconsidering and overturning its "established precedent."[29] In supporting its argument, the Union relies on the dissent in *EOIR 2020*, claiming that the Authority "gave 'no plausible reason for reconsidering [*EOIR 2000*]'" and "[a]s the dissent here explained, the Authority got it wrong in holding that members of the Board and [IJs] are for all intents and purposes the same."[30] As stated above, mere disagreement with or attempts to relitigate the Authority's conclusions are insufficient to establish extraordinary circumstances.[31] Similarly, we find that merely reiterating the dissenting opinion to the underlying decision, which is reviewed by the majority prior to finalizing a decision for issuance, does not demonstrate extraordinary circumstances warranting reconsideration.

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[26] Pet., Attach. 1, Addendum at 1 (arguing that "factual and legal developments" in the nineteen years since the issuance of *EOIR 2000* "indicate that IJs should be considered management officials"); *see also* Decision at 16 (noting, but declining to address, the Agency's argument that *EOIR 2000* was incorrectly decided); *EOIR 2020*, 71 FLRA at 1048 (citing Application at 34-42) (summarizing the Agency's argument, in its application for review, that *EOIR 2000* warranted reconsideration).

[27] 5 C.F.R. § 2422.31(c) ("The Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds: (1) The decision raises an issue for which there is an absence of precedent; (2) *Established law or policy warrants reconsideration*; or (3) There is a genuine issue over whether the Regional Director has: (i) Failed to apply established law; (ii) Committed a prejudicial procedural error; or (iii) Committed a clear and prejudicial error concerning a substantial factual matter." (emphasis added)).

[28] *Id.* The AALJ also argues that the Authority erred by reversing *EOIR 2000* because there was no "substantial change that altered the scope or character of the bargaining unit." AALJ Amicus Br. at 3-4. AFGE similarly argues that the Authority erred in *EOIR 2020* because it granted review beyond the permissible grounds stated in 5 C.F.R. § 2422.31(c). *See* AFGE Amicus Br. at 17-19. We find the AALJ's and AFGE's arguments unpersuasive for the same reasons we find the Union's argument unpersuasive.

[29] Mot. at 15. The AALJ argues that the Authority erred as a matter of law by finding that IJs influence policy. *See* AALJ Amicus Br. at 4-5. This is merely an attempt to relitigate a conclusion reached by the Authority in *EOIR 2020*. *See EOIR 2020*, 71 FLRA at 1048 (finding that "IJ decisions influence the policy of the Agency . . . by interpreting immigration laws when they apply the law and existing precedent to the *unique facts of each case*." (emphasis added)). The AALJ also acknowledges that it advanced this same argument in *EOIR 2020*. *See* AALJ Amicus Br. at 4 ("The Authority ignored *Amicus's* arguments in its previous brief and has chosen to disregard *Free Enterprise*."). As such, this argument does not demonstrate extraordinary circumstances warranting reconsideration. *See IBEW*, 71 FLRA at 931.

[30] Mot. at 15 (quoting *EOIR 2020*, 71 FLRA at 1050 (Dissenting Opinion of then-Member DuBester)).

[31] *Supra* note 18. The Union also argues that the Authority's decision violates the doctrine of stare decisis. Mot. at 16. However, as the Union acknowledges, *id.* at 17, the Authority can overturn precedent. *See AFGE, AFL-CIO, Loc. 1929 v. FLRA*, 961 F.3d 452, 457 (D.C. Cir. 2020) (*Loc. 1929*) (finding that the Authority could depart from precedent); *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 405-06 (2018) (then-Member DuBester dissenting) (overturning the "abrogation" standard and adopting the "excessively interferes" standard); *NTEU, Chapter 302*, 65 FLRA 746 (2011) (Member Beck dissenting). Therefore, the Union's argument – which is merely disagreement with the Authority's decision to overturn precedent – fails to demonstrate extraordinary circumstances.

Finally, the Union argues that the Authority failed to consider Agency regulations spelling out the roles of IJs.[32] According to the Union, the regulations provide that IJs have different roles than members of the Board of Immigration Appeals, because IJs "are limited to deciding 'individual cases.'"[33] We agree with the Union that IJs decide individual cases.[34] However, the Union's argument misses the Authority's point in *EOIR 2020*, that IJs influence policy through individual cases.[35]

Additionally, the Authority noted that there are two categories of cases – "reasonable fear" and "credible fear" reviews – where, if an IJ concurs with the assessment of a Department of Homeland Security official, there is no BIA review of the IJ's determination.[36] The number of "reasonable fear" and "credible fear" cases has risen astronomically since *EOIR 2000*.[37] Therefore, the number of cases where an IJ's determination is not subject to review has dramatically increased.[38]

Thus, "both IJs and [BIA] Board Members review others' decisions, and issue decisions that higher-level authorities may subject to additional review,"[39] and render decisions that are not subject to review. "These similarities further undermine *EOIR 2000*'s conclusion that IJs are not management officials, but Board Members are."[40] Therefore, we

[32] Mot. at 20 (citing 8 C.F.R. § 1003.0(e)(1); *id.* § 1003.1(g)(1); *id.* § 1003.10(b)).
[33] *Id.* (quoting 8 C.F.R. § 1003.10(b)); *see also* 8 C.F.R. § 1003.0(e)(1) (describing the role of the Office of Policy); *id.* § 1003.1(g)(1) (decisions of the Board and of the Attorney General are binding on IJs).
[34] *EOIR 2020*, 71 FLRA at 1048.
[35] *Id.* (finding that "IJ decisions influence the policy of the Agency . . . by interpreting immigration laws when they apply the law and existing precedent to the *unique facts of each case*." (emphasis added)). The AALJ directly challenges this finding, arguing that the Authority erred in its "factual finding" that IJs influence policy by interpreting immigration laws when they apply the law and existing precedent to individual cases. AALJ Amicus Br. at 6-7. However, this is the same argument raised by the dissent in *EOIR 2020*. *See EOIR 2020*, 71 FLRA at 1051 (Dissenting Opinion of then-Member DuBester). As discussed above, merely reiterating a dissenting opinion to the underlying decision does not demonstrate extraordinary circumstances. As such, we find the AALJ's argument does not demonstrate extraordinary circumstances.
[36] *EOIR 2020*, 71 FLRA at 1049 n.27 (citing Decision at 9). Additionally, we disagree with the Union's accusation that we "ignored the [RD]'s detailed factual findings." Mot. at 19. That we found it unnecessary to redundantly recite every finding in the RD's twenty-four-page decision does not mean that we did not consider those findings.
[37] Decision at 9 ("In 2000, there were about 197 credible and reasonable fear reviews. In 2019, there were 15,433 such reviews.").
[38] Our conclusion is further supported by the fact that IJs factual findings are now subject to a clear-error review instead of de novo review; thereby, limiting the scope of review. Decision at 15-16.
[39] *EOIR 2020*, 71 FLRA at 1049 n.27.
[40] *Id.*

fail to see how these regulations, including the statement that IJs decide "individual cases,"[41] demonstrate extraordinary circumstances. As such, we deny the Union's motion.[42]

The Union also requests that the Authority stay its decision in *EOIR 2020* during the pendency of its motion for reconsideration.[43] Because we deny the Union's motion for reconsideration, we also deny its request for a stay as moot.[44]

IV. Willful Noncompliance with *EOIR 2020*

Although we have already resolved all of the legal questions from the Union's filings, this case has revealed a disconcerting reality that we must also address: The RD and the Acting General Counsel (AGC) have refused to give effect to the Authority's decision in *EOIR 2020* for more than a year.

The Statute charges the Authority with the duty to "determine the appropriateness of units for labor organization representation."[45] Among the central principles that guide such determinations is Congress's direction that a unit shall not "be determined to be appropriate if it includes . . . any management official."[46] Thus, in *EOIR 2020*, after finding that the IJs

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[41] 8 C.F.R. § 1003.10(b) ("In deciding the individual cases before them, and subject to the applicable governing standards . . . , [IJs] shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.").

[42] AFGE argues that the Authority erred in *EOIR 2020* because the decision amounted to an untimely review of *EOIR 2000*. *See* AFGE Amicus Br. at 13-14. Despite AFGE's apparent position that the Authority can never revisit or overturn precedent, the Authority's decision to reconsider its holding in *EOIR 2000* is within the Authority's capacity as an administrative agency. *See Loc. 1929*, 961 F.3d at 457 (noting that the Authority can change its "interpretation and implementation of the law if doing so is reasonable, within the scope of the statutory delegation, and the departure from past precedent is sensibly explained" (quoting *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017))). In *EOIR 2020*, the Authority decided that its interpretation of "management official" in *EOIR 2000* was incorrect, and therefore, *EOIR 2000* should be overturned. *EOIR 2020*, 71 FLRA at 1049. AFGE also argues that the Agency's claim that established law – *EOIR 2000* – warrants reconsideration is untimely under 5 C.F.R. § 2429.17. *See* AFGE Amicus Br. at 14-16 (although AFGE cites 5 C.F.R. § 2929.17, it appears that this argument is based on § 2429.17, which governs motions for reconsideration). Contrary to AFGE's assertion, the Agency did not file a motion for reconsideration of *EOIR 2000*, but instead argued that established law – specifically *EOIR 2000* – needed to be reconsidered because it applied an incorrect definition of what constitutes a management official. *See* Application at 26 ("the RD erred by relying on the Authority's decision in *EOIR 2000*."); *id.* at 34-42. As such, the faulty arguments do not demonstrate extraordinary circumstances.

[43] Mot. at 3.

[44] *U.S. Dep't of HUD*, 71 FLRA 794, 796 (2020) (then-Member DuBester concurring) (citations omitted) (denying a motion for reconsideration and finding the request for a stay moot); *see also U.S. Dep't of VA, St. Petersburg Reg'l Benefit Off.*, 71 FLRA 1, 3 (2019) (then-Member DuBester dissenting); 5 C.F.R. § 2429.17 ("The filing and pendency of a motion [for reconsideration] under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority.").

[45] 5 U.S.C. § 7105(a)(2)(A).

[46] *Id.* § 7112(b)(1).

were management officials, the Authority unequivocally directed the exclusion of IJs from the bargaining unit.[47]

Although the "Authority may delegate to any regional director its authority . . . to determine whether a group of employees is an appropriate unit,"[48] that delegation is subject to review.[49] Accordingly, when a party appeals an RD's decision, the Statute empowers the Authority to "affirm, modify, or reverse any action reviewed."[50] And the Authority exercised that review power in *EOIR 2020* by "vacat[ing] the RD's decision . . . and direct[ing] the RD to exclude IJs from the bargaining unit."[51]

A few days after the decision, the Agency contacted the regional office about implementing the decision, but a regional-office representative indicated that the RD had no plan to revoke the Union's certification until any and all potential motions and appeals were resolved.[52] Shortly thereafter, the Union filed its motion for reconsideration, which is the subject of this decision. The Authority's Regulations, however, clearly establish that "[t]he filing and pendency of a motion [for reconsideration] . . . *shall not operate to stay the effectiveness of the action of the Authority*, unless so ordered by the Authority."[53] Therefore, it was the RD's responsibility to promptly comply with the Authority's decision, but the RD failed to do so.

Instead of implementing *EOIR 2020*, the regional office took specific actions that not only stymied implementation but also appeared to penalize the Agency for its attempt to comply. Specifically, when the Agency refused to negotiate with the Union because the bargaining unit consisted of management officials, the regional office, with the approval of the AGC, filed a consolidated unfair-labor-practice (ULP) complaint against the Agency.[54] In the complaint, the regional office, contrary to *EOIR 2020*, asserted that the "Union . . . is the certified exclusive representative of [a] nationwide unit of employees."[55] Thus, the regional office used its own defiance of an Authority decision as leverage to prosecute the Agency for complying with that decision. The astonishing intransigence of the regional office was rivaled only by the AGC, who approved the prosecution of the Agency for

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[47] *EOIR 2020*, 71 FLRA at 1049 ("We grant the Agency's application for review . . . and *direct the RD to exclude IJs from the bargaining unit*." (emphasis added)).
[48] 5 U.S.C. § 7105(e)(1)(A).
[49] *Id.* § 7105(f).
[50] *Id.*
[51] 71 FLRA at 1049.
[52] *Id.* The Agency recounted these communications in a motion filed with the Authority. Mot. for the Authority to Revoke the Union's Certification of Representative at 4. This motion was not a sworn statement, but later events strongly corroborated the Agency's recounting.
[53] 5 C.F.R. § 2429.17 (emphasis added).
[54] *See generally DOJ, Exec. Off. of Immigr. Rev.*, Case Nos. WA-CA-21-0146, WA-CA-21-0147, WA-CA-21-0148, Consolidated Compl. & Notice of Hr'g. "As the Authority has consistently found it appropriate to take official notice of other FLRA proceedings," we may take official notice of this consolidated ULP complaint. *NTEU*, 70 FLRA 57, 58 (2016) (citing *AFGE, Loc. 3690*, 70 FLRA 10, 11 (2016) (citing *U.S. Dep't of the Air Force, Air Force Materiel Command, Eglin Air Force Base, Hurlburt Field, Fla.*, 66 FLRA 375, 377 n.4 (2011))).
[55] *DOJ, Exec. Off. of Immigr. Rev.*, Case Nos. WA-CA-21-0146, WA-CA-21-0147, WA-CA-21-0148, Consolidated Compl. & Notice of Hr'g at 1.

obeying an Authority decision. Rather than remedying ULPs, the Office of General Counsel may have actually *facilitated the commission* of ULPs by compelling the Agency to negotiate with an exclusively management-controlled Union.[56]

Unfortunately, this troubling series of events has allowed the Union to continue to act as an exclusive representative for more than a year in contravention of the Statute – all the while ironically assisted by the Statute's machinery for ensuring compliance with the law. Indeed, if regional directors cannot be trusted to comply with the Authority's decisions on applications for review under § 7105(f), then that disappointing realization calls into question the continued appropriateness of the Authority's delegation of the responsibility to determine unit appropriateness in cases like this one.[57]

V. Order

The Union's motion for reconsideration and request for a stay are denied.[58]

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[56] *EOIR 2020*, 71 FLRA at 1049 (finding that IJs are management officials under § 7103(a)(11)); *see* 5 U.S.C. § 7116(a)(3) (making it a ULP "for an agency . . . to sponsor, control, or otherwise assist any labor organization"); 5 U.S.C. § 7120(e) ("This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official . . . ."); *see also Agreement Reached on Immigration Judges Union Dispute*, FEDweek (Dec. 13, 2021), https://www.fedweek.com/federal-managers-daily-report/agreement-reached-on-immigration-judges-union-dispute; *cf. Veterans Admin. Hosp., Brecksville, Ohio*, 1 FLRC 302, 304 (1973) (expressing strong commitment to preventing management officials from participating in the affairs of a labor organization).

[57] Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the FLRA, 5 C.F.R. Ch. XIV, App. B ("In accordance with [§]7105(e)(1) and (f) of the Statute, [r]egional [d]irectors . . . are hereby delegated the authority to determine whether a group of employees is an appropriate unit . . . . Regional [d]irectors are authorized and have responsibility to receive and process, *in accordance with decisions of the Authority and the rules and regulations of the Authority* and the General Counsel, all petitions filed pursuant to [§§] 7111, 7112(d), 7113, 7115 and 7117(d) of the Statute." (emphasis added)).

[58] Member Abbott unequivocally agrees with the points made in Member Kiko's concurrence. Member Abbott also notes that this decision was first circulated for votes January 8, 2021. On February 1, 2021, a revised majority was sent to Chairman DuBester for his dissent. On June 14, 2021, Chairman DuBester finally provided his dissent. The majority provided the revised decision in response to the dissent to Chairman DuBester on June 28, 2021. In response to additional submissions by the parties, the majority provided a further revised decision to Chairman DuBester on August 4, 2021. On January 7, 2022, Chairman DuBester provided his finalized dissent.

Member Kiko, concurring:

I write separately to emphasize certain plain and compelling circumstances that supported our original decision to re-examine the appropriateness of the unit of immigration judges (IJs).

The Regional Director (RD) found that, since the Authority's decision in *U.S. DOJ, Executive Office of Immigration Review, Office of the Chief Immigration Judge* (*EOIR 2000*),[1] the Agency issued a regulation that ended de novo review of IJs' factual findings and, instead, subjected those findings to clear-error review.[2] This substantial change rendered the IJs' factual findings the last word on such matters in the *vast majority* of cases that come before the IJs. Further, there are two sets of cases where, if an IJ concurs with the assessment of a Department of Homeland Security (DHS) official, no further review is available beyond the IJ. Those cases involve "reasonable[-]fear" and "credible[-]fear" reviews.[3] As noted in the order, the number of such cases has "risen astronomically" since *EOIR 2000*.[4] In 2000, "there were about 197 credible[-] and reasonable[-]fear reviews[; i]n 2019, there were *15,433*."[5] Thus, when compared to 2000, today there are thousands more reasonable- and credible-fear reviews where the IJ has the final say on whether an individual is subject to deportation. On the magnitude of these changes alone, the IJs now occupy the status of "management official[s]" who "bring about or obtain a result as to the adoption of general principles, plans, or course[s] of action for" the Agency.[6]

The RD discounted the importance of these two circumstances – the change to clear-error review and the astronomical rise in the fear-review cases – for reasons that I did not find persuasive when originally deciding this dispute, and that I find no more persuasive after reviewing the Union's motion.

First, the RD found that the IJs' findings, both factual and legal, are nevertheless subject to review by the Board of Immigration Appeals (BIA). But the availability of review cannot be a disqualifying factor in categorizing an employee as a management official because the BIA's decisions are likewise subject to review – by both the Attorney General and the federal judiciary. Yet, the Authority found that members of the BIA were management officials.[7] In addition, the RD stressed that the BIA reviews the correctness of IJs' decisions, thus imparting importance to the BIA's review functions in explaining the status of BIA members as management officials.[8] But the IJs likewise

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[1] 56 FLRA 616, 623 (2000).
[2] Decision at 15-16.
[3] *Id.* at 9.
[4] Majority at 7.
[5] Decision at 9 (emphasis added).
[6] *Id.* at 16 (citing *Dep't of the Navy, Automatic Data Processing Selection Off.*, 7 FLRA 172, 177 (1981)).
[7] *U.S. DOJ, Bd. of Immigr. Appeals*, 47 FLRA 505, 510 (1993) (rejecting argument that, because the BIA's "decisions are reviewable by the Attorney General and Federal courts," BIA members are not management officials).
[8] Decision at 21.

review determinations by other initial decision-makers. Specifically, IJs review the correctness of initial assessments by DHS officials in fear-review cases. Further, the RD noted that the BIA may reverse its own previous decisions.[9] But I fail to see a pertinent distinction there because IJs may reverse their own previous decisions as well, through the reopening of cases.[10] Therefore, I wholeheartedly agree that – as part of the "thorough[] reassess[ment]" that the RD determined was required in this case[11] – the IJs' functions are sufficiently similar to BIA members to support our conclusion that IJs are management officials, and the Union has not established that extraordinary circumstances exist to warrant revising that conclusion.[12]

Second, regarding the remarkable increase in the fear-review cases, where IJs who agree with DHS officials have the last word in subjecting individuals to deportation, the RD found that the "mere increase" in these cases was not significant.[13] As a *general* proposition, I have no qualms with the notion that an employee's status should not turn on whether the employee's workload has increased. But, at a certain point, large changes in caseload become so different "in degree as to differ thereby in kind,"[14] and such differences warrant changing our conclusion about the status of the affected employees as management officials. Because this particular category of cases is one where IJs' decisions are frequently beyond review, this degree of change – from 197 fear-review cases in 2000 to 15,433 in 2019 – constitutes a difference in the kind of work that the IJs perform, and further supports our conclusion that IJs are management officials. Moreover, the Union's motion has not convinced me that these changes are mere workload increases.

With these observations in mind, I join the order denying the motion for reconsideration without any reservations.

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[9] *Id.* at 20.
[10] The RD stated that "IJs have no authority to disregard [s]tatute or [r]egulation," *id.*, but that is surely unremarkable because the American legal system does not empower *any* decisionmakers to *disregard* statute and regulation.
[11] *Id.* at 16.
[12] *See* Majority at 8; *see also id.* at 7 & nn.36-38.
[13] Decision at 16, 18.
[14] *Baker v. Carr*, 369 U.S. 186, 283 (1962) (Frankfurter, J., dissenting).

Chairman DuBester, dissenting:

I am conflicted about my participation in this decision's issuance today. However, my colleagues have issued an ultimatum that, if I do not respond to their (fifth round of) revisions to the majority opinion in this case – within three weeks of that opinion's circulation on December 21, 2021 – they will issue their majority opinion without my participation.[1] To support their ultimatum, my colleagues cite a protocol that *they* first devised in 2018, but never invoked.

My colleagues have chosen to dust off and inaugurate that protocol despite their failure to respond to my previous inquiries about why they are so fixated on *this* case's issuance when there are dozens of older cases – nearly a third of the inventory assigned to the Member offices – that are older than this one. That includes many cases awaiting *their* respective actions.

I find their focus particularly troublesome given the procedural background and evolution of this case. Although the Agency initially filed the underlying petition and opposed the Union's motion for reconsideration of that decision, it has since changed its position – withdrawing its opposition to this motion for reconsideration and seeking to withdraw the *very petition* that provided the vehicle for the majority to issue its underlying decision.[2] Of course, my colleagues' approach should come as no surprise. Over the last four years, they have repeatedly taken action without regard for – or, indeed, even contrary to – the parties' positions or arguments.[3]

Despite my concerns, I have decided that allowing my colleagues to invoke their previously unused protocol to push out this specific case, without my participation, would

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[1] I note that I circulated an earlier draft of my dissent in this case before the case went overage, but then the majority circulated a revised opinion two weeks later, after the case had gone overage.

[2] While I note that my colleagues have devoted a significant portion of their decision to discussing actions purportedly taken by the Office of General Counsel involving the parties to this petition, I would further note that none of the purported actions upon which the majority bases its discussion are part of the record of this case. For that reason alone, I do not find it appropriate, in this decision, to address the merits of those actions, much less to accuse the Office of the General Counsel of "facilitat[ing] the commission of [unfair labor practice]s." Majority at 10 (emphasis omitted).
I also note that, on January 6, 2022, the Union filed a motion for leave to file – and did file – a motion to vacate, dismiss, and remand the underlying decision in this case. That motion remains unaddressed by this decision.

[3] *See, e.g.*, *SSA*, 71 FLRA 763, 764 (2020) (Dissenting Opinion of then-Member DuBester) (noting that the majority reconsidered a decision that "neither party . . . asked [the Authority] to reconsider" and granted "relief that was not specifically requested by the [u]nion in its motion for stay based on reasons that were never argued by the [u]nion in support of its motion"); *U.S. Dep't of VA, Kan. City VA Med. Ctr., Kan. City Mo.*, 70 FLRA 465, 470 (2018) (Dissenting Opinion of then-Member DuBester) (noting that the majority issued a decision on a representation petition notwithstanding union's motion to withdraw the petition and the agency's expressed position that it did not oppose the motion to withdraw), *recons. denied*, 70 FLRA 960 (2018) (then-Member DuBester dissenting); *U.S. DOL*, 70 FLRA 452, 458 (2017) (Dissenting Opinion of then-Member DuBester) (same), *recons. denied*, 70 FLRA 953 (2018) (then-Member DuBester dissenting).

set a bad precedent and would be detrimental to the Federal Labor Relations Authority's institutional interests. Therefore, I dissent as follows.

It is not often that we are provided the opportunity to correct our mistakes. Regrettably, in today's decision the majority declines the Union's offer of redemption by denying its motion to reconsider the flawed decision in *U.S. DOJ, Executive Office for Immigration Review* (*EOIR 2020*).[4]

In its motion, the Union argues that *EOIR 2020* constituted an impermissible collateral attack on a previous unit certification; reversed, without any reasoned analysis, Authority precedent governing the application of the "management official" exclusion as defined in § 7103(a)(11) of the Federal Service Labor-Management Relations Statute; and ignored the factual record establishing material differences between the policy-making authority of the Immigration Judges (IJs) and Members of the Board of Immigration Appeals (Board). In my view, reconsideration of *EOIR 2020* is justified for all of these reasons.

As I explained in my dissenting opinion in *EOIR 2020*, I agree with the Union that the decision violated the Authority's long-standing principle that "a party may not collaterally attack a previous unit certification."[5] The Authority certified the IJs' unit in *U.S. DOJ, Executive Office for Immigration Review, Office of the Chief Immigration Judge* (*EOIR*).[6] And the majority in *EOIR 2020* actually recognized the limits on our authority to reexamine this certification, acknowledging that in order to show that a previously certified unit is no longer appropriate, "a party must demonstrate that substantial changes have altered the scope and character of the unit since the last certification."[7]

Nevertheless, it concluded that the Authority could reconsider its decision in *EOIR* without "running afoul of the bar on collaterally attacking a previous unit certification."[8] And it justified this conclusion on grounds that the Regional Director (RD) found that a regulatory change involving the IJs warranted a reassessment of their inclusion in the bargaining unit, and because the Union did not file an application for review challenging that finding.

It is true that the RD found, as a threshold matter, that a regulatory change to the level of review of the IJs' factual determinations constituted a substantial change that warranted a reassessment of their manager status. But upon conducting that reassessment, the RD found that this change *did not establish* that the IJs are management officials.

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[4] 71 FLRA 1046 (2020) (then-Member DuBester dissenting).
[5] *Id.* at 1049 (Dissenting Opinion of then-Member DuBester).
[6] 56 FLRA 616 (2000).
[7] *EOIR 2020*, 71 FLRA at 1047.
[8] *Id.*

As the Union argues in its motion – and as I noted in my dissent in *EOIR 2020* – the majority did not premise its reexamination of the IJ's unit upon any finding that a substantial change had actually *altered* the scope and character of the IJ's unit. Nor could it have, because the majority took no issue with the RD's findings on this (or any other) issue. Indeed, the majority explicitly concluded that the RD's substantial change finding did not "raise a separate ground for review[ing]" the RD's decision.[9]

As the Union correctly asserts in its motion, *EOIR 2020* "cites no legal support" for the proposition that a prevailing party "must bring a prophylactic cross-appeal to preserve a single legal issue on a case it has otherwise won" in order to protect an existing unit certification from collateral attack.[10] Nor does the majority provide any plausible justification for this proposition in today's decision. Rather, it dismisses the Union's assertion as "simply [an] attempt[] to relitigate conclusions reached by the Authority in *EOIR 2020*."[11]

Moreover, while the majority notes that the Authority's regulations allow it to grant an application for review where established law or policy warrants reconsideration, this rationale entirely ignores that it relied *solely* upon the RD's finding of a substantial change in *EOIR 2020* to circumvent the bar on collateral attacks and to review the Agency's arguments concerning the appropriateness of the unit, *including* its contention that established law warrants reconsideration.[12] In my view, *EOIR 2020*'s disregard of the Authority's collateral-attack doctrine, standing alone, warrants reconsideration of this decision.

But even assuming that *EOIR*'s viability was properly before the Authority in *EOIR 2020*, I also agree with the Union that *EOIR 2020* fails to provide a plausible rationale for concluding that *EOIR* was wrongly decided. As the Union notes, *EOIR 2020* failed to reconcile its conclusions with long-standing Authority precedent applying the management-official exclusion, including the decisions upon which the RD relied to conclude that the IJs were *not* management officials. And as the Union further notes, *EOIR 2020* "provided no other rationale" for discarding *EOIR* other than its

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[9] *Id.* at 1050. Contrary to the majority's assertion, there is nothing "nonsensical" about this contention. Majority at 5 n.23. While the RD found that the change to the standard of review afforded to IJ factual determinations "is sufficient to support reconsideration of the IJ's status," she determined, upon conducting that reconsideration, that the change does not alter the scope and character of the IJ's unit.

[10] Mot. at 13.

[11] Majority at 5. To the extent that the majority suggests that its collateral review of the unit's certification was somehow warranted because the Union "implicitly agreed with the RD's finding of a substantial change in proceedings before the Authority," *id.* at 5 n.22, even this premise is unfounded. To support this contention, the majority quotes from a *topic heading* in the Union's opposition brief. But at no point in its brief does the Union "agree" with the RD's finding regarding this threshold question.

[12] *See EOIR 2020*, 71 FLRA at 1047 ("Further, the Union did not file an application for review to challenge [the RD's substantial change] finding[]. Therefore, we may evaluate the merits of the Agency's arguments regarding the appropriateness of the unit without running afoul of the bar on collaterally attacking a previous unit certification.").

conclusion that it would be "nonsensical" to distinguish the role of IJs from those of Board Members on the basis of the reviewability of their decisions.[13]

Although I raised these same concerns in my dissent in *EOIR 2020*, the majority failed to address them. Regrettably, the majority compounds its mistake in today's decision, concluding that it need not consider the Union's arguments because they "merely reiterat[e] the dissenting opinion to the underlying decision."[14] While the majority apparently believes the Union will take solace from its assurance that it "reviewed" these concerns "prior to finalizing a decision for issuance,"[15] this does not excuse its failure to *address* them by providing a plausible basis for reversing Authority precedent. And it certainly does not excuse the majority's failure to address the Union's additional arguments challenging *EOIR 2020*'s rationale.[16]

I also believe that the Union's motion should be granted because *EOIR 2020* failed to properly consider the factual record developed by the RD. As I noted in my dissenting opinion, the decision took no issue with the RD's detailed findings and conclusions regarding the material differences between the degree to which IJs and Board Members can affect Agency policy.[17] But in its rush to exclude the IJs as management officials, it failed to acknowledge these differences, much less explain why they were irrelevant to its conclusion.

Regrettably, the majority adopts the same approach in today's decision. For instance, the Union correctly notes that *EOIR 2020* failed to consider the Agency's own regulations which articulate the manner in which Agency policy is made. As the Union argues, these regulations provide a clear delineation between the involvement of IJs and Board Members in establishing Agency policy.[18] The majority, however, summarily discards the relevance of these distinctions, instead concluding that the Union's argument

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[13] Mot. at 15 (quoting *EOIR 2020*, 71 FLRA at 1049).
[14] Majority at 7.
[15] *Id.*
[16] For instance, the Union argues that *EOIR 2020*'s analogy to the role of judges in a court system – the premise upon which it relied to demonstrate the flaws of *EOIR* – was itself flawed. Mot. at 15. In drawing the analogy, *EOIR 2020* reasoned that "[a]rguing that IJs' decisions do not influence Agency policy while Board Member decisions do is akin to arguing that district court decisions do not shape the law while appellate court decisions do." *EOIR 2020*, 71 FLRA at 1049 (concluding that "[s]uch a distinction . . . is nonsensical)." But as the Union points out, this is "precisely how our legal system operates," insofar as "[t]rial courts rule on the basis of existing precedent and statutes, which they do not create, but are bound to follow," while "[o]nly appellate courts create controlling precedent." Mot. at 15 (citing *Beezley v. Fenix Parts, Inc.*, 328 F.R.D. 198, 204 n.2 (N.D. Ill. 2018)). Rather than defending its analogy-based reasoning, the majority simply ignores the Union's argument.
[17] *See EOIR 2020*, 71 FLRA at 1051.
[18] Mot. at 20 (explaining that "there are two ways that [Agency] policy is made: by the Board through adjudication, 8 C.F.R. § 1003.1(g)(1), and by the Office of Policy through rulemaking and the issuance of policy memoranda, 8 C.F.R. § 1003.0(e)(1). Immigration Judges, by contrast, are limited to deciding 'individual cases.' 8 C.F.R. § 1003.10(b).").

"misses the Authority's point in *EOIR 2020*" – namely, "that IJs influence policy through individual cases."[19]

But *EOIR 2020*'s failure to acknowledge, much less account for, the material limitations on the IJs' authority to determine Agency policy is *precisely* the point. By ignoring these limitations, and concluding that the IJs establish Agency policy simply because they adjudicate cases, the majority once again fails to provide any plausible basis for ignoring long-standing Authority precedent governing how the IJs' duties should be evaluated.[20]

It is certainly true, as the majority notes, that the Authority "can change its 'interpretation and implementation of the law.'"[21] But as the majority itself acknowledges and the Union reiterates in its motion, the Authority should only depart from past precedent if "doing so is reasonable" and its departure from precedent "is sensibly explained."[22] By repeating the mistakes of *EOIR 2020*, today's decision – once again – betrays these fundamental principles.

Accordingly, I dissent.

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[19] Majority at 7. While ignoring most of the RD's findings, the majority selectively cites a few of these findings in a latent attempt to bolster its decision, including the increase in the number of credible and reasonable fear cases handled by the IJs, and the change in the standard of review afforded to the IJ's factual findings. *Id.* & n.37. As the RD explained, however, the IJs – in both contexts – are still "act[ing] as judges, gathering facts from witnesses and documents, and applying those facts to existing laws, regulations and precedential BIA decisions." Decision at 23. In other words, they are simply "implement[ing] immigration policies," and are not "creat[ing] or influenc[ing] EOIR policies." *Id.*; *see also id.* at 20 ("The BIA has a right to overturn its prior precedent and to make new precedent. The IJs may not overturn BIA precedent or create their own precedent. That unchanged difference is the key difference that supported the Authority finding the BIA members are management officials while the IJs are not. That difference has not changed since the 2000 Authority decision, and that difference supports the continued upholding of the conclusion that IJs do not make policy, but instead, only assist in the implementation of agency policy.") (citing *U.S. DOD, Def. Logistics Agency, Def. Cont. Mgmt. Command, Def. Cont. Mgmt. Dist. N. Cent.*, 48 FLRA 285, 290 (1993); *U.S. Air Force, Elgin Air Force Base, Elgin Air Force Base, Fla.*, 10 FLRA 403, 404 (1982)). The majority has yet to explain how the RD's conclusion that these additional factors did not warrant the IJ's reclassification as management employees is contrary to Authority precedent.

[20] *See EOIR 2020*, 71 FLRA at 1051 n.22 (citing collected cases).

[21] Majority at 8 n.42 (quoting *AFGE, AFL-CIO, Loc. 1929 v. FLRA*, 961 F.3d 452, 457 (D.C. Cir. 2020) (*AFGE, Local 1929*)).

[22] *Id.* (quoting *AFGE, Local 1929*, 961 F.3d at 467); Mot. at 17. As I noted in my dissenting opinion in *EOIR 2020*, the U.S. Court of Appeals for the District of Columbia more recently reminded the Authority that "'[r]easoned decision making . . . necessarily requires [an] agency to acknowledge and provide an adequate explanation for its departure from established precedent,' and an agency that neglects to do so acts arbitrarily and capriciously." 71 FLRA at 1049 (quoting *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 883 (D.C. Cir. 2020)).

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
(Agency/Petitioner)

and

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

WA-RP-19-0067
(71 FLRA 1046 (2020))

STATEMENT OF SERVICE

I hereby certify that copies of the Order of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

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