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)

71 FLRA No. 207

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

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DECISION AND ORDER

ON REVIEW

November 2, 2020

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members

(Member DuBester dissenting)

1. **Statement of the Case**

In the attached decision and order (decision), Federal Labor Relations Authority Regional Director Jessica S. Bartlett (the RD) denied the Agency's 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).[1] The RD found that changed circumstances existed to support a re-examination of the Authority's finding that the unit could include IJs. Despite the changed circumstances, the RD found that the unit was still appropriate because IJs are not management officials. The Agency filed an application for review of the RD's decision.[2] After a thorough review of the record, including the Union's opposition and the amicus curiae from the Association of Administrative Law Judges, the Authority finds that existing case law warrants reconsideration. As such, we grant the application for review, find that IJs are management officials, and, therefore, exclude them from the bargaining unit.

2. **Background and RD's Decision**

In 2000, in *U.S. DOJ, Executive Office for Immigration Review, Office of the Chief Immigration Judge* (*EOIR*

2000),[3] 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.[4]

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.[5] 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 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.[6] 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."[7] The RD further found that IJs' 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.

3. **Analysis and Conclusions**

Under § 2422.31(c) of the Authority's regulations, the Authority may grant review when the application demonstrates that: (1) the RD's 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 which the RD has: failed to apply established law, committed a prejudicial procedural error, or committed a clear and prejudicial error concerning a substantial factual matter.[8] Further, the Authority has recognized that a party may not collaterally attack a previous unit certification.[9] Therefore, a party must demonstrate that substantial changes have altered the scope and character of the unit since the last certification to show that a previously certified unit is no longer appropriate.[10]

A. The RD's unchallenged finding of a substantial change calls for a re examination of the appropriateness of the unit.

Initially, we note that the RD found that a substantial change existed in this case, and that the existence of a substantial change required a "thorough[] reassess[ment]" of the IJs' status as management officials.[11] Further, the Union did not file an application for review to challenge either of those findings. 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.[12]

B. The RD's decision raises an issue for which there is an absence of precedent; however, we find that it does not affect the appropriateness of the unit.

The Agency argues that there is a lack of precedent on whether "[o]fficers" under the Constitution are management officials under § 7103(a)(11).[13] They assert that because IJs are "[o]fficers" under the Constitution, they are automatically management officials under the Statute.[14] The Agency is correct that the Authority has not considered whether "officers" under the Constitution are management officials. However, we disagree with the Agency's assertion, and agree with the Union that *Lucia* is irrelevant in the management official determination.[15]

Section 7103(a)(11) defines management officials 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 an agency."[16] Further, the Authority has long held that the statutory definition of management official includes 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.[17]

The plain language of the Statute and the expanded definition adopted by the Authority do not consider how an individual's employment starts—whether appointed, competitive selection, or other method—but instead look at the duties and responsibilities of the individual to determine if he or she is a management official under the Statute. Therefore, whether IJs are "officers" under the Constitution is not relevant in determining if they are or are not management officials. Consequently, this issue does not provide a basis for overturning the RD's decision.[18]

C. Established Authority precedent warrants reconsideration.

The Agency argues that *EOIR 2000* needs to be reconsidered because it is in conflict with *U.S. DOJ, Board of Immigration Appeals* (*BIA*).[19] We agree.

In *BIA*, the Authority found that Board Members of the BIA were management officials because each "Board Member directly influences [Agency] policy through his [or her] participation in the interpretation of immigration laws and the issuance of decisions."[20] The Authority also emphasized that Board Members "ha[ve] broad discretionary power to administer the immigration laws through the issuance of precedential and non-precedential final decisions."[21]

In *EOIR 2000*, the Authority held that IJs were not management officials because they did not influence the agency's policy, but merely implemented the policy.[22] Further, the Authority distinguished IJs from Board Members of the BIA.[23] This distinction was based on the fact that IJ decisions were reviewable by the BIA and, according to the Authority, merely implemented the policy and precedent set by the BIA.[24]

The Authority in *EOIR 2000* failed to recognize the significance of IJ decisions and how those decisions influence Agency policy. IJ decisions influence the policy of the Agency for similar reasons that Board Member decisions influence the policy of the Agency. Just like *BIA* where the Authority found that Board Members influence the policy of the Agency by interpreting immigration laws and making decisions,[25] IJs also 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.[26]

Contrary to the Authority's holding in *EOIR 2000*, we conclude that IJs influence the policy of the Agency in the decisions they render, just as Board Members influence the Agency's policy in the decisions they render. Arguing 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. Such a distinction, based on what appears to be solely the reviewability of decisions, is nonsensical.[27], [28] As such, we find that IJs are management officials under § 7103(a)(11), and, therefore, are excluded from the bargaining unit pursuant to § 7112(b)(1).[29]

4. **Order**

We grant the Agency's application for review, vacate the RD's decision, find that IJs are management officials, and direct the RD to exclude IJs from the bargaining unit.

Member DuBester, dissenting:

In a recent decision, the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) reminded the Authority that "[a] fundamental norm of administrative procedure requires an agency to treat like cases alike."1 On this point, the court explained that "'[r]easoned decision making . . . necessarily requires the 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.'"2 And, applying this standard to a previous Authority decision, the D.C. Circuit soundly rejected the Authority's analysis because it was based upon nothing more than "sophistry."3

That term aptly describes the majority's decision rendered today. Acting in haste to deprive immigration judges (IJs) of their right to belong to a union, the majority has cobbled together a decision that ignores Authority precedent governing both the review of unit certifications and the scope of the "management official" exclusion, as defined in § 7103(a)(11) of the Federal Service Labor Management Relations Statute (the Statute).4

At the outset, I strongly disagree with the majority that "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."5 In making this assertion, the majority acknowledges that "a party may not collaterally attack a previous unit certification."6 It also recognizes that, 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

In the case before us, the Regional Director (RD) agreed with the Agency that a regulatory change to the level of review of the IJ's factual determinations constituted a substantial change warranting a reassessment of the IJ's status.8 But upon conducting that reassessment, the RD found that this change did not establish that the IJs are management officials.9

The majority's decision does not disturb these findings. Indeed, it concludes that the substantial change finding does not even "raise a separate ground for review under 5 C.F.R. § 2422.31(c), but merely demonstrates that re-examination of the certified unit was required."10 Nevertheless, in an act of legal gymnastics, the majority decides it may reconsider our decision in *U.S. DOJ, Executive Office for Immigration Review, Office of the Chief Immigration Judge* (*EOIR*)11 – the *very* decision in which the Authority determined that the IJs were not management officials – because the Union did not file an application for review to challenge the RD's findings regarding the substantial change.12

Leaving aside the question of why the Union would seek review of a decision *denying* the Agency's petition, it is entirely unclear how its failure in this regard opens the door to what is essentially a collateral attack on our decision in *EOIR*. The majority does not base its reconsideration of *EOIR* upon any change found by the RD. Nor does it find that the RD erred by applying *EOIR* to dismiss the Agency's petition, or – for that matter – that the RD erred in any other respect.13

Moreover, the majority specifically rejects the Agency's argument that there is a "lack of precedent on whether employees who adjudicate decisions that bind the agency are management officials because they 'influence the policies of the agency.'"14 Indeed, the majority concludes that, "[a]s evidenced in the RD's decision . . . the Authority has considered this issue before," and it references the litany of cases upon which the RD relied to conclude that the IJs are not management officials.15

But even assuming that *EOIR*'s viability is properly before us, the majority fails to set forth a plausible reason for reconsidering this decision, much less vacating the RD's decision for relying upon it. The majority's purported justification is that *EOIR* "is in conflict"16 with our decision in *U.S. DOJ, Board of Immigration Appeals* (*BIA*).17 But this is simply not true.

In *BIA* – a decision issued seven years before our *EOIR* decision – the Authority concluded that a Board Member of the Board of Immigration Appeals (Board) was a management official. As the majority notes, the Authority based this conclusion on the RD's finding that the Board Member "directly influences [Agency] policy through his [or her] participation in the interpretation of immigration laws and the issuance of decisions."18

But more specifically, the Authority also relied upon the RD's finding that the decisions rendered by the Board are "essentially the final administrative ruling on the case," and that its decisions "have the effect of law unless overruled by the courts."19 And the Authority emphasized that there was "no question that individual Board Members *substantially* influence and determine the [Agency's] immigration policy" because their votes on individual cases "are not '*supervised nor subject to change*' within the [Agency],"20 and because the Board has "broad discretionary power to administer the immigration laws through the issuance of precedential and non-precedential *final* decisions."21

The Authority was well-aware of *BIA* when it decided *EOIR*. In denying the agency's application for review of the RD's decision that the IJs were *not* management officials, the Authority concluded there was "an abundance of Authority case law" governing how the IJ's duties should be evaluated.22 And it found that the RD correctly applied Authority precedent in concluding that the IJs "do not formulate the Agency's national or local immigration policy."23

Most importantly, *EOIR* rejected the Agency's argument that our decision in *BIA* required the RD to find that the IJs were management officials. On this point, the Authority noted that, in *BIA*, it found that the Board Members were management officials because they have "the power to issue the *final administrative ruling* in a case, and to bind the [IJs], District Directors of the INS, as well as the State Department" through their issuance of rulings in cases.24 And it concluded that the RD correctly relied upon these facts in distinguishing the duties of the IJs to find that they are not management officials.25

In the case before us, the RD made extensive factual findings regarding the differences between the duties and responsibilities of the IJs and the Board Members. And applying Authority precedent explicitly governing application of the management exclusion, she concluded that the IJs are not excluded from the Statute as management officials because the IJs "do not make policy, but instead, only assist in the implementation of agency policy."26

The RD based this conclusion, in turn, upon her findings that while the Board Members may "clarify, modify, or create new precedent" on an issue, "the IJs continue to be bound by the BIA policy,"27 and

that the IJs "do not issue precedential decisions."28 And she distinguished our decision in *BIA* by correctly noting that, in *BIA*, we concluded that the "'Board's implementation of precedent in future Board cases effectively creates and establishes general agency principles which guide the outcome of future immigration decisions and establish [Agency] policy.'"29

As noted, the majority takes no issue with the RD's factual findings. Nor does it find fault with her characterization of *EOIR* or *BIA*. But it concludes that the Authority erred in *EOIR* because that decision "failed to recognize the significance of IJ decisions and how those decisions influence Agency policy."[30] More specifically, it concludes that IJ decisions "influence the policy of the Agency for similar reasons that Board Member decisions influence the policy of the Agency," because the IJs "also 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."[31]

The majority is simply incorrect that we failed to recognize the significance of the IJs decisions in *EOIR*. But more fundamentally, the majority does not even attempt to reconcile its conclusion with long-standing Authority precedent applying the management-official exclusion, including the decisions upon which the RD relied and the decisions upon which we relied in *EOIR* and *BIA*. And the majority's analysis entirely ignores the critical distinctions the Authority carefully drew between the authority possessed by the IJs and the Board Members to bind the Agency with respect to its policies. Instead, the majority simply dismisses the relevance of such distinctions because to do otherwise would be "nonsensical."[32]

This is the antithesis of reasoned decision making. Based upon the conclusory nature of the majority's analysis, along with the facetious manner in which it reconciles its decision with Authority precedent precluding collateral attacks on unit certifications, it is abundantly clear that the majority's sole objective is to divest the IJs of their statutory rights. Once again, I refuse to join a decision "so fundamentally adverse to the principles and purposes of our Statute."[33]

Accordingly, I dissent.

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[1] 5 U.S.C. § 7112(b)(1).

[2] In addition, the Authority granted the Association of Administrative Law Judges permission to file a brief as amicus curiae in this proceeding under § 2429.9 of the Authority's Regulations.

[3] 56 FLRA 616, 623 (2000).

[4] *Lucia v. SEC*, 138 S.Ct. 2044, 2054 (2020).

[5] Decision at 1.

[6] *Id.* at 16.

[7] *Id.* at 20.

[8] 5 C.F.R. § 2422.31(c).

[9] *U.S. Dep't of the Air Force, Air Force Material Command, Wright-Patterson Air Force Base, Ohio*, 70 FLRA 327, 328 (2017) (*Wright-Patterson AFB*) (citing *U.S. Dep't of the Air Force, Air Force Material Command, Eglin Air Force Base, Hurlburt Field, Fla.*, 66 FLRA 375, 377 (2011)).

[10] *Id.* (citations omitted).

[11] Decision at 16.

[12] *Wright-Patterson AFB*, 70 FLRA at 328.

[13] Application for Review (Application) at 16-21. The Agency also argues that IJs are exempt from the bargaining unit as "employee[s] engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security." *Id.* at 26 n.7 (quoting 5 U.S.C. § 7112(b)(6)). However, the Agency failed to make this argument before the RD. 5 C.F.R. § 2422.31(b) ("An application may not raise any issue or rely on any facts not timely presented to the Hearing Officer or Regional Director."). Therefore, we do not consider it.

[14] Application at 16-21.

[15] Opp'n Br. at 19.

[16] 5 U.S.C. § 7103(a)(11) (emphasis added).

[17] *Dep't of the Navy, Automatic Data Processing Selection Office*, 7 FLRA 172, 177 (1981).

[18] The Agency also argues there is a lack of precedent on whether employees who adjudicate decisions that bind the agency are management officials because they "influence the policies of the agency." Application at 21-26. However, the Agency's assertion is incorrect. As evidenced in the RD's decision and the Agency's application, the Authority has considered this issue before. Decision at 2 (citing *EOIR 2000,* 56 FLRA at 622, for the proposition that IJs were not management officials even though they conducted formal, quasi-judicial proceedings); *id.* at 17 (citing *USDA, Fed. Crop Ins. Corp., Wash. Reg'l Office*, 46 FLRA 1457, 1466 (1993), for the proposition that an employee was a management official if they had the authority to bind the agency); *id.* (citing *Nat'l Credit Union Admin.*, 59 FLRA 858, 861-62 (2004), for the proposition that employees who assigned ratings to credit union based on established criteria as well as their professional judgement were not found to be management officials); *id.* (citing *U.S. DOD, Def. Logistics Agency, Def. Contract Mgmt. Command, Def. Contract Mgmt. Dist. N. Cent.*, 48 FLRA 285, 290 (1993), for the proposition that employees who interpreted regulatory and policy guidance and had some decision-making authority within that framework were not management officials); Application at 3 (arguing that "the Authority should apply and re-affirm its decision in [*U.S. DOJ, Bd. of Immigration Appeals*]," 47 FLRA 505 (1993) (*BIA*)). Therefore, this assertion does not justify disturbing the RD's decision.

[19] 47 FLRA at 509; Application at 34-42. The Agency also argues that "substantial intervening changes in the character of IJ[s'] duties have occurred since *EOIR 2000.*" *Id*. at 27-33. This argument is the same argument required to justify a re-examination of a previously certified unit. *Wright-Patterson AFB*, 70 FLRA at 328. As such, the argument does not raise a separate ground for review under 5 C.F.R. § 2422.31(c), but merely demonstrates that re-examination of the certified unit was required.

[20] *BIA*, 47 FLRA at 509.

[21] *Id.*

[22] *EOIR 2000*, 56 FLRA at 621-22.

[23] *Id.* at 622.

[24] *Id.*

[25] *BIA*, 47 FLRA at 509.

[26] Opp'n Br. at 16 (IJs "take testimony, receive evidence, and decide the individual cases before them."); *id.* (IJs are "required to apply binding law and precedent to the facts of the *individual case* and to *render a decision*." (emphasis added)).

[27] Moreover, we note that IJs do review the decisions of Department of Homeland Security officials in two classes of cases called "reasonable fear" and "credible fear" reviews. Decision at 9. In this way, IJs are similar to Board Members. And although the BIA may review IJs' decisions in many cases, the BIA's decisions are also subject to review – by both the Attorney General and the federal judiciary. Therefore, both IJs and Board Members review others' decisions, and issue decisions that higher-level authorities may subject to additional review. These similarities further undermine *EOIR 2000*'s conclusion that IJs are not management officials, but Board

Members are.

[28] Member Abbott believes that *EOIR 2000* exemplifies the "technical hair-splitting" that the Authority should not engage in. *See U.S. DOD, Def. Educ. Activity*, 71 FLRA 900, 902 n.20 (2020) (Member Abbott concurring; Member DuBester dissenting); *U.S. Dep't of the Navy, Navy Region Mid-Atlantic, Norfolk, Va.*, 70 FLRA 512, 514-15 (2018) (Member DuBester dissenting) (finding that the interpretation and application of 5 U.S.C. § 7116(d) "has become an exercise in technical hair-splitting and artful pleading . . . and [this Authority] must return to the straight-forward interpretation of the Statute as given to us by Congress").

[29] Because we vacate the RD's decision, we do not reach the Agency's remaining arguments. *U.S. Dep't of VA, Kansas City VA Med. Ctr., Kansas City, Mo.*, 70 FLRA 465, 469 n.62 (2018) (Member DuBester dissenting). Application at 42-49 (arguing that the RD failed to apply established Authority case law, or committed a clear and prejudicial error concerning a substantial factual matter); *id.* at 49-51 (arguing that the RD committed prejudicial procedural errors by failing to address legal authorities cited by the Agency).

1 *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 883 (D.C. Cir. 2020) (quoting *Westar Energy Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007)).

2 *Id.* (quoting *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010)).

3 *U.S. DOJ, Fed. BOP, Fed. Corr. Complex Coleman, Fla.*, 737 F.3d 779, 787 (2013).

4 5 U.S.C. § 7103(a)(11).

5 Majority at 3.

6 *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) (*Wright-Patterson AFB*)). The Authority has similarly rejected parties' claims that precedent applied by a Regional Director in resolving a unit clarification petition warrant reconsideration merely because the party disagrees with the precedent. *U.S. Dep't of the Treasury, IRS*, 62 FLRA 298, 304-05 (2007) (citing *USDA, Forest Serv., Los Padres Nat'l Forest, Goleta, Cal.*, 60 FLRA 644, 651 (2005) (Chairman Cabaniss dissenting) (no basis for reconsideration of Authority precedent where respondent raised substantively identical arguments to those that had been previously raised and rejected)).

7 Majority at 3 (citing *Wright-Patterson AFB*, 70 FLRA at 328); *see also Dep't of the Interior, Nat'l Park Serv. W. Reg'l Office, S.F., Cal.*, 15 FLRA 338, 341 (1984) (rejecting agency's petition and holding that existing certified units remained appropriate where their "scope and character" had not been "substantially changed" following several reorganizations); *Dep't of the Interior, Nat'l Park Serv., Mid-Atl. Reg'l Office, Phila., Pa.*, 11 FLRA 615, 616 (1983) (rejecting agency's petition where no "substantial change [shown] in the scope and character" of the certified unit, inasmuch as a reorganization had not "significantly altered" the unit).

8 Decision at 16.

9 *Id.* at 20.

10 Majority at 5 n.19.

11 56 FLRA 616 (2000).

12 Majority at 3.

13 *Id.* at 6 n.29 (noting that "we do not reach the Agency's remaining arguments," including "that the RD failed to apply established Authority case law, or committed a clear and prejudicial error concerning a substantial factual matter," or "that the RD committed prejudicial procedural errors by failing to address legal authorities cited by the Agency").

14 *Id.* at 4 n.18 (quoting Application at 21 26).

15 *Id.* (citing *EOIR*, 56 FLRA at 622; *see also Nat'l Credit Union Admin.*, 59 FLRA 858 (2004); *U.S. DOD, Def. Logistics Agency, Def. Contract Mgmt. Command, Def. Contract Mgmt. Dist. N. Cent.*, 48 FLRA 285, 290 (1993); *USDA, Fed. Crop Ins. Corp., Wash. Reg'l Office*, 46 FLRA 1457, 1466 (1993) (*USDA*); *U.S. DOJ, Board of Immigration Appeals*, 47 FLRA 505 (1993) (*BIA*)).

16 *Id.* at 4.

17 47 FLRA 505.

18 Majority at 5 (quoting *BIA*, 47 FLRA at 509).

19 *BIA*, 47 FLRA at 509.

20 *Id.* (emphasis added).

21 *Id.* (emphasis added).

22 *EOIR*, 56 FLRA at 621-22 (citing *USDA*, 46 FLRA at 1458-59; *U.S. Dep't of HUD, Boston Reg'l Office, Region I Boston, Mass.*, 16 FLRA 38 (1984); *Headquarters, Space Div., Air Force Sys. Command, Dep't of the Air Force*, 9 FLRA 885, 887-88 (1992)).

23 *Id.* at 622.

24 *Id.* (emphasis added).

25 *Id.* (upholding RD's finding that "unlike [the] decisions of the Board," the decisions of the IJs are not published, do not constitute precedent and are binding on the parties).

26 Decision at 20.

27 *Id.*; *see also id.* at 21 (finding that the Board Members' decisions "can create and modify precedential EOIR policy that the IJs are both bound to follow and unable to modify").

28 *Id.* at 21.

29 *Id.* at 22 (quoting *BIA*, 47 FLRA at 509).

[30] Majority at 5.

[31] *Id.* at 5-6.

[32] *Id.* at 6.

[33] *OPM*, 71 FLRA 571, 579 (Dissenting Opinion of Member DuBester).

UNITED STATES OF AMERICA

BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON REGIONAL OFFICE

U.S. DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

(Agency/Petitioner)

and

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

INTERNATIONAL FEDERATION OF PROFESSIONAL

AND TECHNICIAL ENGINEERS

JUDICIAL COUNCIL 2

(Union)

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WA-RP-19-0067

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DECISION AND ORDER

1. **Statement of the Case**

The U.S. Department of Justice, Executive Office for Immigration Review (Agency, EOIR, or Petitioner) filed a petition with the Federal Labor Relations Authority (Authority) on August 13, 2019, under

the Federal Service Labor-Management Relations Statute (Statute). The Agency argues that the Immigration Judges (IJs) should be excluded from the nationwide bargaining unit of employees represented by the National Association of Immigration Judges, International Federation of Professional and Technical Engineers, Judicial Council 2 (Union) because the employees are management officials within the meaning of section 7103(a)(11) of the Statute.

The issue of whether the IJs are management officials under 7103(a)(11) of the Statute and whether the IJs are properly excluded from the bargaining unit under 7112(b)(1) of the Statute was presented to the Authority in *U.S. Dep't of Justice, Executive Office of Immigration Review and National Association of Immigration Judges,* 56 FLRA 616 (2000)(*EOIR)*. The Authority determined that the Immigration Judges were not management officials and were properly included in an appropriate unit under the Statute. EOIR now contends that prior controlling precedent should be re-examined, based on changed circumstances and that the IJs should be excluded under 7112(b)(1) of the Statute because they are management officials under section 7103(a)(11) of the Statute.

The Union disagrees, contending that the IJs' day-to-day duties remain unchanged since the Authority's 2000 decision held that the IJs are not management officials. The Union argues that a re-examination of the IJs' status is not supported, and even if changed circumstances exist to support a re-examination, the IJs are not management officials under the Statute.

A hearing was held in this matter before a Hearing Officer of the Authority. I have reviewed the rulings made by the Hearing Officer and find that they are free from prejudicial error. Accordingly, the Hearing Officer's rulings are affirmed. Further, Motions filed to Correct the Record are granted. The Agency and the Union both filed timely briefs. A request to file a reply brief was filed and approved, and a reply brief was also filed by the Union. Lastly, the International Federation of Professional and Technical Engineers, Association of Administrative Law Judges, Judicial Council No. 1, AFL-CIO (AALJ), the exclusive representative of Social Security Administrative Law Judges, sought and was granted permission to file an *amicus curie* brief. All briefs were timely filed and were considered. I have considered the entire record, pursuant to section 2422 of the Authority's Rules and Regulations. For the reasons discussed below, I find that IJs are not management officials within the meaning of section 7103(a)(11) of the Statute, and EOIR's petition is dismissed.

II. Findings

A. The Authority's 2000 Decision

On September 1, 2000, the Authority denied an application for review from a Regional Director's Decision and Order, which dismissed a petition seeking a determination that the IJs were management officials. *EOIR*, 56 FLRA at 622. The Authority noted the unit in question was first certified in 1979, with the Union becoming the exclusive representative of a unit of Immigration Judges at the Immigration and Naturalization Service. *Id.* at 616. (A Ex 1[1]). In 1983, EOIR was created by a merger of the IJs and the Board of Immigration Appeals, which then and now, hears appeals from the IJs' decisions. *EOIR*, 56 FLRA at 616. IJs are appointed by the Attorney General to conduct formal, quasi-judicial proceedings about the rights of aliens to enter or remain in the United States. *EOIR*, 56 FLRA at 616. (Tr 173). The Authority upheld the Regional Director's Decision and Order, concluding that "there is an abundance of Authority case law" to aid in the evaluation of the IJs' duties and that the Regional Director correctly "applied such precedent in resolving the Agency's petition." *EOIR*, 56 FLRA at 621-22. This analysis included distinguishing IJs' status from that of the Board of Immigration Appeals, whose members are management officials. *Id.* at 621.

B. Executive Office for Immigration Review's Structure

EOIR manages the immigration court system of the United States. (Tr 28). EOIR includes three adjudicatory components: the Immigration Courts, where IJs sit; the Board of Immigration Appeals (BIA), which reviews many IJ decisions; and the Office of the Chief Administrative Hearing Officer or Chief Judge. (Tr 28, 311). The day-to-day duties of the IJs, or as they were previously named "Special Inquiry Officers," have remained essentially unchanged since the early 1970s and have not changed since the Authority's 2000 decision. (Tr 171-72). *See also EOIR*, 56 FLRA at 616. The IJs are all attorneys. (Tr 155). *See also EOIR,* 56 FLRA 616.

Organizationally, IJs serve in 69 courts located throughout the country. (Tr 30). The Office of the Chief Immigration Judge, which is also located within the EOIR, is responsible for providing overall policy direction, as well as operational and administrative support, to the Immigration Courts. (Tr 236-27). *See also EOIR*, 56 FLRA at 616-17. Deputy Chief IJs assist the Chief IJ in providing program direction and establishing priorities for the IJs. (Tr 236-37). *See also EOIR*, 56 FLRA at 616-17. Supervisory responsibility for the IJs, however, is directly delegated to the Assistant Chief Immigration Judges (ACIJs), who serve as the principal liaison between the Office of the Chief IJ and the Immigration Courts. (Tr 236-37). *See also EOIR*, 56 FLRA at 616-17. The ACIJs serve as first-line supervisors for the IJs. (Tr 236-37). *See also EOIR*, 56 FLRA at 616-17. When the Authority decided this matter in 2000, the ACIJs did not evaluate the IJs or review their decisions. *Id.* at 617. As noted below, IJs now have their performance reviewed by the ACIJs every other year. (Tr 160, 239).

The daily activities of the Immigration Courts are managed by the Office of the Chief Immigration Judge, three

Deputy Chief IJs, and about 30 ACIJs (Tr 123, 168). It is the responsibility of the ACIJs to supervise and evaluate the court's support staff. (Tr 122, 124). The ACIJs also check the quality of IJ decisions as part of their evaluation of the IJs' performance, as well as review the decisions for departure from precedent and review allegations of misconduct. (Tr 127, 132, 160, 239). The ACIJs do not have the right to direct the outcome of cases on the IJs' dockets, nor do they review the merits of IJ decisions for the purpose of performance evaluations. (Tr 133-34, 192-93, 409-10). The ACIJs review decisions after they issue, and will discuss departure from precedent with IJs as necessary. (Tr 160-61, 191). IJs play no role in the case assignment process, which is regarded as a management prerogative. (Tr 337-38). In making case assignments, ACIJs are guided by the Agency's Uniform Docketing System Manual (Manual). (Tr 339). IJs had no role in the development or implementation of the Manual. (Tr 339).

The position description for ACIJs includes the duty to develop policy and procedures for IJs and, with the Chief Immigration Judge, to formulate policies and programs for the agency. (Tr 237-237; I Ex 3). The ACIJ position description also includes the duty to analyze programs and projects and to recommend the adoption or rejection of policy changes. (Tr 237; I Ex 3). The ACIJs will solicit feedback from IJs when they have been asked to comment on policy. (Tr 247).

The IJs have no supervisory responsibility or authority. (Tr 99, 121-22, 371-72). IJs are not authorized to enter into contracts on behalf of the employer. (Tr 121-122). IJs do not set the time the court opens or closes each day, but IJs do set the time they commence their hearings on a daily basis. (Tr 99-100). IJs are not invited to and do not attend meetings EOIR calls "management summits." (Tr 373-74).

The Federal Rules of Evidence do not strictly apply to IJ hearings. (Tr 100). IJs have the authority to question witnesses and to issue subpoenas. (Tr 101). As with most judges, IJs hold hearings; administer oaths and take testimony; they make rulings; set deadlines; receive evidence; issue subpoenas; reopen matters *sue sponte*; and after the record is closed, they issue a decision. (Tr 101, 172, 183, 184, 407). While the IJs are created by Statute, the appellate reviewer, the Board of Immigration Appeals (BIA), is established by regulation. (Tr 101). The primary role of the IJ is to adjudicate cases which decide whether aliens are removable or have status that supports their remaining in the United States. (Tr 170, 333). IJs have the authority to withhold removal of an alien; determine custody; allow an alien to withdraw an application; issue contempt orders; adjudicate relief; and order removal. (Tr 183-84). These significant and potentially life-altering day-to-day duties have not changed since 1996. (Tr 171, 172). The Agency asserts the importance of IJ decisions has increased since the Authority's 2000 decision. (Tr 171). 8 C.F.R § 1003.10(b) notes that the IJs, when deciding individual cases before them, are subject to the applicable governing standards, that they exercise independent judgement and discretion and that they may take any action consistent with their authorities under the Act to decide their cases. (Tr 173). At the end of the process, the IJ decides whether an individual has legal status to stay in the United States, or whether they are denied status and have to leave the United States. (Tr 197-198). IJ decisions that are not appealed become final agency decisions. (Tr 411).

IJs have the ability to exercise discretion in their decision making, bound by the facts of their cases and the laws, regulations, and BIA decisions they are required to follow. (Tr 409). An example of IJ discretion relates to bonds for detained aliens – there are several categories of aliens who are ineligible for bonds, including aliens with certain criminal convictions, aliens with final removal orders and arriving aliens who present themselves at the border. In these cases, the IJs have no discretion to exercise. (Tr 85, 231). For aliens who may be released on bond, IJs retain the ability to deny bond on a determination that the alien is a flight risk or presents other danger. (Tr 185-86). The IJs have discretion as to what weight is given to the facts in each case. (Tr 188). Because of this discretion, one IJ may place greater weight on certain types of convictions than other IJs and arrive at differing bond amounts. (Tr 188-189). Statute and BIA precedent set forth the criteria IJs consider in determining flight risk and dangers. *Id.* IJs may also consider work history and ties to the community when exercising discretion. (Tr 186). IJs do not have the ability to create new solutions to address existing problems, and instead, must follow the laws, the regulations and BIA precedent. (Tr 188). IJs also do not have the right to disregard statutory rights and refuse to grant bond as a per se rule; such a practice would be subject to appeal to the BIA and would also be addressed by their supervisor. (Tr 190-191).

One example of an area where Judges do not have discretion and cannot influence policy relates to the ability to administratively close cases, which is similar to holding a case in abeyance. (Tr 342). In 2018, in the *Matter of A-B,* IJs were given the authority to move a case out of the active docket, to sit until facts or circumstances supported reopening the matter. Attorney General Jeff Sessions eliminated the ability of IJs to administratively close cases, a decision that is under judicial review. (Tr 343, 345). The IJs did not play a role in assessing, reviewing, establishing or eliminating this policy. (Tr 217-18). Indeed, it was noted that the ability of IJs to administratively close cases was given by the BIA in a BIA decision, and that thus, it is the BIA that had the ability to influence policy through its decision. (Tr 291).

C. Agency Policies

The operating policies and procedures of the Immigration Courts are set forth in numbered memoranda that are collectively known as Operating Policies and Procedures Memoranda (OPPMs). (Tr 155-56) Since about 2018, instead of issuing OPPMs, the Agency issues Policy Memos (PMs). (Tr 156). Most OPPMs were issued by the Office of the Chief Immigration Judge. (Tr 155). Currently, PMs are typically developed by the newly created Office of Policy. (Tr 156). IJs played no role in the issuance of OPPMs. (Tr 156). Like the OPPMs, IJs have no formal role in the creation or modification of the PMs. (Tr 157). Some OPPMs continue to exist, and others were replaced by PMs. (Tr 155). In 2000, the Authority noted OPPMs are directed to court administrators, Immigration Judges, and other court personnel. *EOIR*, 56 FLRA at 617. Forty-one OPPMs were in effect in 2000 and covered a variety of subjects such as case processing, burden of proof, leave administration, wearing of the robe, and recording immigration hearings. *Id.*

In addition to OPPMs, the Authority, in 2000, noted the Office of the Chief Immigration Judge had also established a system of advisory committees for the purpose of obtaining input from Immigration Judges and court administrators on subjects relevant to the operation of the Immigration Courts. *Id.* This system was implemented in order to address the poor relationship that existed between the Immigration Judges and court administrators. *Id.* Committee members were appointed by the Chief Judge and served "at his pleasure." *Id*. Although the stated purpose of the committees is to "work on various initiatives and projects for the benefit of the [courts,]" the RD found that "[t]hey appear to be used primarily to obtain input from [J]udges and court administrators" with regard to pertinent issues. *Id.* Since the 2000 Authority decision, these committees have been largely been disbanded. (Tr 157).

In 2019, EOIR, with DOJ and Congressional approval, created and codified in the Code of Federal Regulations, an Office of Policy to ensure better coordination of policy making through rulemaking. (Tr 138-39, 141). No IJs are assigned to the Office of Policy. (Tr 366-67). No evidence that the Office of Policy solicits input from the IJs when EOIR, through Department of Justice, creates policy through rulemaking. (Tr 34, 169). IJs do not have a formal role in rulemaking – the EOIR Office of Policy instead drafts proposed rules, which then go through levels of review that do not, by design, include planned review or comment by the IJs. (Tr 35, 140, 169-70). EOIR creates policy through the issuance of policy memos. (Tr 34). EOIR asserts IJ decisions represent the IJs' primary mechanism for creating policy. (Tr 35).

D. Day-to-day Work of Immigration Judges

Unchanged since the Authority's 2000 decision, the daily routine of an IJ involves hearing and deciding cases that arise from the operation of the Agency. (Tr 333-334). Indeed, the current IJs' position description is dated August 27, 1996, which predates the Authority's 2000 decision and accurately captures the duties of the IJs. (Tr 44, 154, 170-71). IJs generally decide two issues: first, whether individuals are removeable from the United States, and, if they are, whether they are entitled to relief or protection that would allow them to remain. (Tr 32). After filing, the cases are assigned by the Court Administrator to an individual IJ and placed on that IJ's calendar. (Tr 333). At that time, the IJ hears presentations from the parties and their attorneys, identifies the issues, and advises individuals as to their right to representation. *Id.* The Judge also sets time frames and briefing schedules, as well as the date for trial. The IJs estimate that they spend about 7 hours and 30 minutes each day, 36 to 40 hours a week hearing matters on their docket. *Id.* IJs occasionally have administrative time when they are not hearing cases on the bench, and use that time to read filings and submitted documents; respond to motions; update themselves on recent case decisions; respond to emails; and complete deliberations on any undecided cases. (Tr 340-41). Neither the ACIJs nor any other Department of Justice employee, however, has the authority to direct IJs as to how to decide their cases. (Tr 56-67, 191). Starting in 2008-2009, IJs began receiving performance evaluations, and recently had numeric performance

measures added. (Tr 57). In part, these measures were added to address criticism from Congress, the U.S. Government Accountability Office, and the Office of the Inspector General related to case processing times. (Tr 58).

In 2000, each IJ was responsible for the manner in which proceedings in his or her courtroom were conducted. *EOIR*, 56 FLRA at 617. Some Immigration Courts issued local rules which consisted of operating procedures that govern practice in their courtrooms. *Id.* These rules were developed collegially by the IJs of the issuing courts, with an opportunity for input by the INS and the local private bar. *Id.* at 617-18. Since 2000, the IJs have had their ability to control their courtroom practices and procedures diminished. IJs report to an ACIJ who now manages the day-to-day operations of the courts. (Tr 56).

Under their current performance standards, IJs are expected to complete 700 cases each performance year, with credible and reasonable fear determinations and bond hearings not counting toward that total. (Tr 232, 385). If IJs fail to resolve 95% of their cases on the initial hearing date, they fail to meet a performance benchmark. (Tr 233). Supervisors have the ability to consider the nature of the cases when reviewing a failure to meet performance benchmarks. (Tr 233). IJs' performance standards also require them to not have more than a 15% remand rate. (Tr 385). Additionally, as dockets differ in different parts of the country, IJs are required to keep a variety of other actions (including bond determinations and credible and reasonable fear decisions) within pre-determined time ranges, and to avoid dropping below other specified performance levels. (Tr 385-386: I Ex 17).

During a hearing, the parties may be represented by counsel. The IJs conduct hearings according to statutory and regulatory authority. (Tr 32). IJs rule on objections, enter evidence into a record, they administer oaths, they examine witnesses and they make decisions. (Tr 32). Thereafter, in arriving at their decisions, IJs are required to apply immigration statutes, applicable regulations, published decisions of the BIA and Federal Appellate Courts, and other laws. (Tr 48). After the trial, the IJ issues her decision, which is issued orally in about 75% to 90% of the cases, and advises the parties of their appeal rights by dictating into the record. (Tr 59, 60, 200, 246, 351). Oral decisions are not transcribed unless they are appealed; they are not published; and they are final and binding generally only with respect to the parties to the case, their family members, or on close associates as explained below. The extemporaneous oral decisions can take 45 minutes to deliver. (Tr 60, 350, 352: P Ex 5) Occasionally, an IJ decision is circulated publicly after a FOIA request or the decision is otherwise released. (Tr 72). As admitted by EOIR's Director, the IJ decisions are non-precedential. (Tr 61, 211). Many IJ decisions are appealed to the BIA, the decisions of which are also mostly non-precedential. (Tr 62-63). IJ decisions are binding on the parties who appear before the IJ, including the Department of Homeland Security (DHS), and conceivably could bind an issue in an unrelated case with a third party. (Tr 72, 211). When IJs render a decision from the bench, they speak for the Agency, and that binds the Agency. (Tr 211). Further, when not appealed, the IJ decision becomes the final agency determination and thus represents the final word on the case. (Tr 212).

IJs do not have the authority to invalidate a law, a regulation, a BIA decision or an IJ's decision in another matter. (Tr 352). While there used to be a Precedent Committee of IJs to solicit clarification of issues from the BIA, that Committee has not met for over a year. (Tr 353-354). The Committee, when it did meet, did not recommend changes in Agency policy or practice, and instead only noted areas where future BIA guidance would be appropriate. (Tr 355) Additionally, when the IJs asked for permission to provide training in 2019, they were told by the Agency that they are not management officials. (Tr 392-395; I Ex 19, 20, 21.

E. Appeals of Immigration Judge Decisions and the Board of Immigration Appeals

The process of appealing an IJ decision to the BIA begins with the filing of a Notice of Appeal. (Tr 63). Then a transcript is prepared, a briefing may be scheduled and the parties may submit briefs. *Id.* In rare cases, oral arguments occur. *Id.* Then, the BIA issues its decision. *Id.* Some appeals are assigned to one BIA judge, while others are assigned to three judge panels. *Id.* Occasionally, the three-judge BIA panels are unable to reach agreement, and a dissent may issue in those circumstances. *Id.* Some IJ decisions, such as a denied change of venue motion, are subject to interlocutory appeal to the BIA. *Id.*

In 2000, with limited exception, decisions of the Immigration Judges could be appealed to the BIA and at that time, the review of the IJs decisions was *de novo*. *EOIR*, 56 FLRA at 617. The BIA not only has jurisdiction over some IJ decisions but also has jurisdiction over some decisions from DHS that are appealable to the BIA. (Tr 33). It is authorized 21 members, and at the time of the hearing, it had 17 members. (Tr 78). In 2019, the BIA reviewed 19,449 IJ decisions. (Tr 33, 77; P Ex 8). As with all appellate bodies, the BIA reviews cases to assure the Agency is making the correct decision in the cases before it. (Tr 303).

Perhaps the most significant change since the Authority's 2000 decision relates to the standard of review by the BIA of IJ decisions. (Tr 325). Beginning in 2002, the BIA accorded IJ factual findings a higher level of deference. Now, IJs' factual findings are overturned only with a showing of clear error while issues of law continue to be reviewed *de novo*. (Tr 78, 222). This 2002 regulatory change was implemented as part of an effort to streamline the adjudication process, and the changed standard of review recognized the primacy of the IJs as factfinders. (Tr 296, 299). The BIA, however, retains the right to overturn IJ findings of fact, and

significantly, can also remand cases to IJs for additional fact finding. (Tr 102, 107, 297, 300). On remand, the IJs are required to follow the BIA's direction. (Tr 102). The BIA continues to review appeals of IJ decisions legal basis *de novo*, which includes review of questions of law, questions of discretion, and questions of judgment. (Tr 78, 107). Only questions of fact receive deference on review. (Tr 107). As a result of the 2015 BIA case, *Matter of Z-Z-O*, judicial predictions about future events are considered findings of fact, and are not reviewed *de novo* but instead are reviewed under the "clearly erroneous" standard of review. (Tr 279, 282).

Per 8 C.F.R. § 1003.1(g), BIA decisions become precedential after a majority vote of the permanent board members under an *en banc* process. (Tr 78, 80-81, 210, 223, 310). Other than obtaining a majority vote of the entire BIA, there are no other requirements or limits on the number of precedential decisions the BIA may issue each year. (Tr 79, 223). The BIA three-member panels are tasked by regulation with resolving complex, novel, unusual or recurring issues of law and fact. (Tr 319). *See also* Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 Fed. Reg. 31463 (July 2, 2019) (to be codified at 8 C.F.R. pts. 1003 and 1292). Individual BIA members' decisions and even decisions by three-member panels are not precedential. (Tr 101, 223). But, these non-precedential decisions are binding on the parties and on the IJs for that case. (Tr 166). IJs are required to follow BIA precedential decisions. (Tr 81, 410). The BIA typically issues 20 to 30 precedential decisions each year. (Tr 208, 224). These decisions are issued when the BIA wants to make a point or to provide guidance to the IJs. (Tr 282). Additionally, the Attorney General may decide a case and the IJs are required to follow that precedent. (Tr 193, 240, 410).

After the BIA issues its decision, it may be appealed to the Federal Circuit courts. In 2018, there were 5,158 such appeals from BIA decisions. (Tr 225). When the Circuit Court reviews a BIA affirmance without opinion (AWO) or an adopt-and-affirm, it reviews the IJ's decision. (Tr 89, 225-226, 417-18). In those circumstances, which vary slightly Circuit to Circuit, the IJ's factual findings may be conclusive, and the Circuit Court generally grants them deference. (Tr 83). However, AWOs and adopt-and-affirms are subject to prior BIA review. (Tr 418). IJ decisions, AWOs, and adopt-and-affirm decisions have become precedential after review by the Circuit Courts. (Tr 226-227). Similarly, predictive findings by IJs, about what may occur if a respondent is returned to their home country, for example, have been held to represent findings of fact to which the IJ determination is accorded deference. (Tr 84). Further, when adopted by the Circuit Court, the IJ determinations bind the Agency. (Tr 84, 85) Some courts have granted the level of deference outlined in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) to IJ decisions where the BIA did not issue a separate opinion. (Tr 86, 224, 306). Indeed, the 9th Circuit, in *Lanza v. Ashcroft,* 389 F.3d 917 (2004) noted with the deference granted to IJ factual findings, the IJ decision becomes the final agency decision, and the regulatory scheme allowed the Court the ability to scrutinize the IJ's decision as it would a decision by the BIA itself. (Tr 301-302).

The Regulations governing the IJs make clear that their decisions are subject to review by the BIA in any case in

which the Board has jurisdiction provided in 8 C.F.R. § 1003.31. (Tr 174). The Agency retains the right to change its regulations and thus modify the options granted to the IJs. (Tr 180). These changes also could be mandated by the BIA or Federal Courts. (Tr 180). IJs do not have the ability to create new options or types of relief for aliens. (Tr 180-81).

The BIA has the ability to review several types of IJ decisions including deportation, exclusion and removal decisions. (Tr 201; P Ex 4). The BIA also reviews asylum only, rescission, Nicaraguan Adjustment and Central American Relief Act decisions (NACARA) and continued detention reviews. *Id.* The Agency notes several types of decisions that are not subject to BIA review and asserts those unreviewed decisions evidence the IJs impacting Agency policy. Regarding the IJ decisions that the BIA does not have jurisdiction over, and thus does not review, they fall into 4 categories: removals in absentia, credible fear, reasonable fear, and claim status reviews. *Id.*

Removal in absentia orders are not reviewable by the BIA. These orders issue, under statutory authority, when an individual whose immigration status is under review fails to attend a scheduled hearing. (Tr 42, 163). When the government can prove that it provided proper notice of the hearing date and time, as well as present evidence that the party is removeable, the IJ can order removal for an alien who failed to attend. (Tr 163, 265, 360). If the IJ denies the request, that denial can be appealed to the BIA. (Tr 360-61). When an in-absentia removal order is granted, that ruling is not reviewable by the BIA, per regulation, but the impacted party has the right to file with the IJ a Motion to Reopen and request reconsideration. (Tr 43, 163, 165, 234, 266, 361). If an IJ denies a Motion to Reopen, that denial can be appealed to the BIA. (Tr 234, 266). In 2008, the IJs issued 25,354 such orders. (Tr 271). About 90,000 such orders issued in 2019. (Tr 43, 271). When the Motions are accompanied with evidence of a legitimate basis for the no-show, the IJ may return the matter to the IJs docket, and subsequent decisions on the merits are then appealable to the BIA. (Tr 164). Removal in absentia cases existed prior to 2000. (Tr 159, 361). While the Judges' removal order is subject to Motion to Reopen, and appeal to the BIA thereafter, the Agency asserts by ordering the removal, the IJ is setting the Agency policy as their decision is often final and it therefore sets the course of action of the agency. (Tr 165).

The second type of IJ decision that is partially unreviewable by the BIA are credible fear reviews which occur when an individual slated for deportation claims they have a credible fear of persecution in their home country. Initially, these claims are considered by DHS. If DHS finds against the alien, the claimants have a right to have that determination reviewed by an IJ. (Tr 39, 254). If the IJ affirms the DHS determination that the alien has no credible fear, the decision is final, there is no appeal to the BIA and the alien is subject to deportation. (Tr 39, 255). If the IJ disagrees with the DHS determination, then the alien is free to pursue relief before an IJ in a later hearing. (Tr 255, 258). While the initial IJ decisions on credible fear reviews are not subject to appeal to the BIA, if the IJ overrules DHS's determination and a later hearing is held, that later decision is appealable to the BIA. (Tr 255-56, 258). One IJ's findings with respect to a credible fear review may not be cited by another IJ when handling another credible fear review. (Tr 359). The Supreme Court currently has under review whether the alien has an appeal right to the federal courts.[2] (Tr 39). All IJs can handle

credible fear reviews. (Tr 39). It was estimated that a credible fear review takes about 15 minutes to hold. (Tr 357).

The third type of unreviewable decision by IJs are reasonable fear reviews which are similar to credible fear reviews, but they apply when the ordered removal is based on a conviction or on a prior removal order. (Tr 40). While the legal standard applied is slightly higher than in credible fear reviews, the process of the IJ reviewing and deciding it after the DHS decision creates a similar final decision that is not subject to further appeal so long as the DHS decision is upheld. (Tr 40). Similar to credible fear reviews, in reasonable fear reviews, if the IJ disagrees with the DHS decision, and a later hearing is held, and that decision is appealable to the BIA. (Tr 262).

Both credible fear and reasonable fear cases existed before 2000. (Tr 159). In 2000, there were about 197 credible and reasonable fear reviews. In 2019, there were 15,433 such reviews. (Tr 263: P Ex 6). This increase is attributable to an increased number of aliens asserting that they have a fear of returning to their home country. (Tr 264).

The fourth type of case that the BIA does not review are claims status reviews which occur when someone arrives in the United States and claims status as an asylee, a refugee, a lawful permanent resident/green card holder or as a citizen. DHS again makes an initial determination, and when DHS concludes no status, that determination is subject to review by an IJ. (Tr 41, 66-67). When the IJ affirms the DHS finding of no status, there is no further appeal. (Tr 41, 67, 272, 274). It is noteworthy that an IJ decision on these points may have a collateral or *res judicata* effect. (Tr 216). In this regard, if an IJ determines that an individual is a citizen, that may preclude DHS from being able to remove them later. (Tr 41, 67). There are not a large number of claims status reviews. (Tr 42). One IJ noted he only had one during his tenure. (Tr 272). Another, who has been in IJ since 2005, noted that she never handled one, and is unaware of any IJ who has handled one. (Tr 362). Claims status review proceedings existed before 2000. (Tr 159.) Further, the possibility for *res judicata* or collateral estoppel applied prior to the Authority's 2000 decision. (Tr 216). Under the *res judicata* and collateral estoppel theories, if one IJ determines that one sibling is granted asylum, and a second sibling had a similar claim, the first non-precedential decision can be cited to inform, to influence and to obtain a similar result in the second related case. (Tr 219-20). Similarly, if an IJ in one office is reviewing the criminal history of an alien in another office, the IJ may reach out to IJs if the States' criminal codes are significantly different to determine how certain crimes impact IJ decisions. (Tr 220-21). The IJ determination also could impact the alien's family member's petitions, or members of a specific social group; however, it was also stressed that that IJs ultimately make independent decisions on the cases they have before them, and other IJs' decisions are not precedential. (Tr 276-79, 283).

In terms of numbers, in fiscal year 2019 there were 285,298 initial IJ decisions, and 11,525 subsequent

decisions, which includes post appeal decisions and decisions on Motions to Reopen. (Tr 48, 201: P Ex 4). This figure included about 181,000 removal decisions, which account for the majority of IJ cases. (Tr 337: P Ex 4). Additionally, there were 30,479 relief granted decisions and 26,592 voluntary departures. (P Ex 3; Tr 46). In 2019, the IJs conducted 265,414 initial removal proceedings, which includes removals in absentia decisions; 12,144 credible fear; 3,281 reasonable fear; and 15 claim status reviews. (Tr 49, Tr 214: P Ex 4).

While there is no review by the BIA of some aspects of credible and reasonable fear cases, some Circuit Courts assert they have the right to review these IJ decisions. (Tr 214). Additionally, in 2019, there were 89,919 IJ issued in absentia removal orders. (Tr 214: P Ex 6). Regarding the BIA appeals and decisions, in 2019 there were 54,039 appeals from IJ decisions to the BIA. (Tr 202: P Ex 8). These appeals included appeals of decided cases, appeals of IJs decisions on motions to reopen, bond appeals, interlocutory appeals, continued detention reviews and zero bond appeals. (Tr 202-03).

As a comparator, in 2000, there were 197 credible fear and reasonable fear decisions, while in 2019, there were 15,433. (Tr 64; P Ex 6). These 15,433 cases are appealable to the BIA only if the IJ does not affirm the DHS determination. (Tr 39, 64, 255) As noted above, if the IJ rejects the DHS determination, the matter is set for hearing, and the subsequent decision is reviewable by the BIA. (Tr 255-56, 258). In 2008, there were 25,343 in absentia removals, while in 2019, that number had grown to 89,919. These in absentia removals also are not subject to direct appeal to the BIA, but as noted above, motions to reopen may be filed and IJ decisions on them are subject to appeal to the BIA. Further, when cases are reopened, the future substantive decisions are subject to review by the BIA. (Tr 65; P Ex 6).

Certain cases may also be appealed to the appropriate U.S. Circuit Court. The majority of the time, these cases have first been subject to the opportunity for review by the BIA. After the 2000 Authority, decision, however based on changes in regulations, the BIA began increasing the number of adopt-and-affirms and AWOs. (Tr 37). In AWOs, the BIA issues a one-line decision affirming the IJs opinion. (Tr 222). In adopt-and-affirms, the BIA adopts part of an IJ's decision, and comments on another part. (Tr 223). In both of these categories, the BIA designates one reviewing official who, after review, either adopts without comment the IJ's decision, or issues minimal comments that do not alter the IJ's ruling. Both of these options existed before the Authority's 2000 decision, but the BIA's use of these options has increased in the recent years. (Tr 90). The practice of issuing AWOs was codified in regulations which date back to 2002. (Tr 293, 295). The adopt and affirm procedure and practice is referenced in a case called *Matter of Burbano,* which it dates back to 1994. (Tr 89, 286, 288).

The BIA reviewing officials always retain the option of raising a case for substantive review by the BIA. (Tr 287). The BIA also retains the discretion to decide whether to issue an AWO or an adopt and affirm. (Tr 294). Per 8 C.F.R. § 1003.1(g), BIA decisions become precedential after a majority vote of the permanent board members

under an *en banc* process. (Tr 78, 80-81, 210, 223, 310). It is these higher-level review decisions that create the precedent that the IJs follow. The typically unpublished IJ decisions do not change the laws, rules, regulations or the BIAs precedent the IJs are required to follow. Indeed, with AWO and adopt and affirm cases, the BIA, as a threshold matter has to first review the IJ decision, conclude it is correct, and decide it need not supplement or clarify the decision. (Tr 242, 320). If the BIA were to find any problem with the IJ decision, it would not issue an AWO or an adopt and affirm. (Tr 242, 303). Therefore, AWOs issue only when the BIA concludes after review that the IJ decision is correct. (Tr 303-05). Per the regulation, any errors in the IJ decision must be harmless or non-material, must not address novel issues, and must not warrant a written opinion by the BIA. (Tr 242). When AWOs or adopt and affirms are issued, the U.S. Circuit Court judges review the IJ's decision, and thus, the Agency asserts the IJ's decision becomes that of the Agency. (Tr 37, 291). If, however, the BIA added additional analysis, the Circuit Court would also review the BIA decision. (Tr 292). As noted, however, the IJ decision that is reviewed by the Circuit Court due to an AWO or adopt and affirm was first reviewed by the BIA. (Tr 243). In its July 2, 2019 Federal Register statement, the Agency noted that AWOs do not reflect an abbreviated review of a case, but rather reflects the use of an abbreviated order to describe the review when the regulatory requirements of 8 CFR § 1003.1e(4) are met. 84 Fed. Reg. 31463. (Tr 244).

Federal court remands are to the BIA, which can render a new decision or may remand cases to the IJ, as occurs if additional fact finding is necessary. (Tr 90-91, 204). During its initial review, the BIA cannot conduct additional fact finding, and must remand cases that need further fact finding back to the IJ, but the BIA may issue a new decision with a differing legal rationale. (Tr 204). Remands from the BIA to the IJs for further factfinding occur infrequently, often with inexperienced IJs who are new to the bench, and testimony about one specific office reported that there can be spans of months between remands. (Tr 206). Indeed, only about 10% of cases are appealed from IJs to the BIA. (Tr 207).

Equal Access to Justice cases also present a scenario where the courts may review the IJ's decision, but in these cases, the BIA has the opportunity to review and issue its own decision. (Tr 37-38).

F. Asserted Changed Circumstances Since the Authority's 2000 Decision

The EOIR Director acknowledged that the Agency's change arguments "are based on legal changes more so than factual changes." (Tr 108). And, when asked to cite to relevant factual changes in the IJs work, Petitioners witnesses were unable to point to day-to-day changes in IJ work. (Tr 108-109). They were, however, able to testify about several legal changes by noting that Immigration Court proceedings are governed by regulations found in 8 C.F.R. §§ 1003 and 1240. (Tr 51). The witnesses noted two principal changes to the regulations since 2000. First, starting in October of 1999, the Agency initiated a streamlining process, which codified an AWO process under which single BIA members could affirm IJs' decisions without issuing a separate opinion.[3] (Tr 51, 53). *See also* Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56135 (Oct. 18, 1999) (to be codified at

8 C.F.R. Part 3). The AWO process allows the BIA to adopt all or part of an IJ's decision and also to add its own gloss if it so chooses. (Tr 54). Previously, however, an adopt and affirm option existed for the BIA. (Tr 53). Additionally new regulations issued in August of 2002 expanded the BIA ability noted above, by, for example, making single board member decisions the primary means of adjudication and by making it clear that single members could issue brief, adopt and affirm decisions without having to use the AWO process. (Tr 51, 53).

As discussed above, the 2002 regulation changes also changed the standard of review for IJ factual findings from a *de novo* standard to a clear error standard. (Tr 52, 54). *See also* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878 (Aug. 26, 2002) (to be codified at 8 C.F.R. Part 3). These streamlining changes were designed, in part, to address a backlog and in part in recognition that the IJs ability to make factual findings are significant. (Tr 55). When the BIA concludes the facts are clearly erroneous, the matter is remanded to the IJ per the BIA's review and direction. (Tr 418-19). Remands can occur from one BIA member, while reversals require the action of a three-member BIA panel. (Tr 419).

Another changed circumstance cited by the Agency is the Supreme Court's decision in *Lucia v. Securities Exchange Commission*, 138 S.Ct. 2044 (2018), where the Supreme Court invalided an SEC decision made by an Administrative Law Judge (ALJ) due to the manner in which the ALJ was nominated and confirmed, which the Supreme Court held violated the Constitutional appointment requirements. (Tr 98).

III. Parties' Positions

A. Agency Position

The Agency asserts there have been substantial and meaningful changes in the scope and character of the bargaining unit since the Authority decision in *EOIR.* The Agency argues that the Immigration Judges are now management officials, and may not be included in an appropriate unit under the Statute. The changes in IJ duties are regulatory (affirmances without opinion and adopt and affirm decisions by the BIA), relate to a change in the level of review of IJ factual determinations from *de novo* to a clearly erroneous standard and also relate to recent court decisions. The Agency also asserts the Authority's prior decision in *EOIR* was made in error and should be reversed per the standard articulated in *Small Business Admin.,* 70 FLRA 525 (2018).

The Agency further asserts IJ duties are analogous to ALJ duties, that the IJs are Constitutional Officers under the Supreme Court's *Lucia* decision*,* and this change also supports the IJs exclusion from the unit as management officials because some IJ decisions represent the position of the United States in appeals to the

Federal courts. The Agency notes IJs and ALJs have similar duties and functions as both take testimony, receive evidence, examine witnesses, conduct trials, administer oaths, and then issue decisions containing factual findings and legal conclusions. The Agency asserts the IJs thus are creating/influencing the policy of the Agency.

Further, Petitioner notes the change in the level of review of IJ decisions by the BIA from *de novo* review for factual determinations to the current clear error standard for factual determinations. Petitioner asserts that added deference further supports the conclusion that IJs are managers. Indeed, the Agency asserts the IJs decision are similar to the BIA decisions, and since the BIA members are management officials, as held in *Dep't of Justice, Board of Immigration Appeals,* 47 FLRA 404 (1993) (*BIA*) that that case, which existed and was distinguished in the Authority's 2000 decision in *EOIR* nonetheless should be controlling and supports the conclusion that the IJs are management officials under the Statute, and, therefore, not permitted to be included in an appropriate bargaining unit.

In addition to the above representing sufficient changed circumstances to support a review of the IJs' status, Petitioner also asserts IJ decisions influence agency policy so as to make the IJs management officials under the Statute. In this regard, the Agency asserts IJs' decisions establish, prescribe, bring about or obtain a result which binds the Agency to a course of action. As noted at the hearing, Petitioner's theory is that the IJs speak on behalf of the Agency and if what they say is adopted in whole or in part by the BIA, it is reviewed by the Circuit Court. Thus, the Agency contends that IJs formulate policies through the issuance of decisions. The Agency cites and relies on an article by Charles Koch, Jr., entitled *Policymaking by the Administrative Judiciary*, 56 Ala. L. Rev. 639 (Spring 2005) to support these arguments.[4] In further support, Petitioner notes several categories of IJ decisions that are not fully and, in some types of cases, even partially reviewable by the BIA. Petitioner asserts IJs have similar or greater authority than the BIA, and thus should be excluded like the BIA per the Authority's decision in *DOJ, BIA*.

Petitioner does not assert that IJs are supervisors or otherwise excluded under any other Statutory provision.

B. Union Position

The National Association of Immigration Judges asserts that there have been no substantial changes to the scope or character of the bargaining unit since the Authority's 2000 decision, and that reconsideration of the 2000 decision is unsupported. The Union notes it is undisputed that the IJs' duties and day-to-day functions remain unchanged. The Union asserts the Authority's 2000 decision correctly found that IJs are not management

officials as they do not issue precedential decisions and do not make policy. Instead, other parts of EOIR, including BIA and Office of Policy, have those functions. The Union notes that the Agency refuses to characterize IJs as management officials in other contexts. The Union asserts that any changes since 2000 have actually reduced the IJs' ability to influence agency policy. Lastly, the Union asserts the Agency's novel theories regarding the Supreme Court's decision in *Lucia* are misplaced, as that case is not about IJs, it does not make a finding about the status of management officials under the Statute, and that neither *Lucia* nor any other Supreme Court decision addresses the status or appointment of IJs.

Regarding the argument that because some IJ decisions become the final agency decision, those decisions represent policymaking, warranting exclusion of the IJs as management officials, the Union asserts the decisions effectuate and implement existing policy and do not "formulate, determine, or influence" policy. The Union argues that since Judges merely apply – rather than create – precedent, they do not make policy, and thus are not managers. The Union asserts that over 95% of the IJs' decisions are appealable to the BIA, and those that are not appealable were similarly non-appealable in 2000, have no precedential effect, and are binding only with the respect to the parties to the case. Lastly, the Union notes EOIR creates policy in two ways: through precedential decisions issued by the BIA and when the Office of Policy engages in rulemaking or issuance of policy memoranda, and that the IJs have no role in that policy creation.

C. *Amicus Curiae* Brief by the AALJ

The AALJ asserts it is an interested party as it represents about 1,300 Administrative Law Judges (ALJs) at the Social Security Administration. While noting differences between IJs and ALJs, it concedes that both are adjudicators and the AALJ asserts that Petitioner's theory that adjudication is policy making could impact the AALJ as both units are comprised of Federal sector adjudicators. The AALJ asserts neither unit includes supervisors, management officials, or any other recognized Statutory exclusion.

The AALJ notes that the Authority has upheld the appropriateness of bargaining units of adjudicators in multiple bargaining units, including units described in cases such as *Merit Systems Protection Board*, 12 FLRA 137 (1983) (employees conduct administrative hearings, establish record of those proceedings, and issue initial decisions on the merits); *Equal Employment Opportunity Comm.,* 9 FLRA 973 (1982) (EEOC AJs issue unpublished, non-precedential decisions which are reviewable either by the EEOC Office of Federal Operations or by the Federal Courts); and in *USDA, Fed. Crop Insurance Corp.,* 46 FLRA 1457 (1993) (Hearing Officers have no authority to change or overrule existing policies or procedures, and decisions were reviewable first at USDA and then in Federal Courts). According to the AALJ, those cases stand for the proposition that adjudicators are judges, not policy makers, and that they should not be found to represent management officials.

While noting differences between ALJs and IJs, including ALJs' heightened protections under the Administrative Procedure Act, a lack of performance appraisals and heightened removal procedures under 5 U.S.C. § 7521 and 5 C.F.R. § 930.206, the AALJ also noted that the Authority in *Soc. Sec. Admin., Office of Disability Adjudication and Review,* 67 FLRA 896 (2014) held that non-supervisory SSA ALJs continued to represent an appropriate unit.

The AALJ asserts that adjudication is not policy making, and that the Supreme Court's *Lucia* decision does not relate to appropriate bargaining unit status and is not relevant to the issues presented in this petition.

IV. Analyses and Conclusions

A. Changed circumstances exist to support a re-examination of the Authority's 2000 decision that Immigration Judges are not management officials.

The Authority has held that "to show that a previously certified unit is no longer appropriate, a party must demonstrate that substantial changes have altered the scope or character of the unit since the last certification." *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base,* 70 FLRA 327, 238 (2017). The Agency acknowledges, in its brief, that while these substantial changes often relate to the work and duties of the incumbents, that is not the fact pattern presented here. Instead, changes other than the IJs' work and duties support the re-examination of the Authority's prior case. Based on the record, it is clear that the day-to-day duties of the IJs, as established in their still-accurate 1996 position description, remain largely unchanged since the Authority's 2000 decision. However, the regulatory change to the level of deference the BIA grants when reviewing IJ factual findings, represents a significant change. Because the change in BIA deference occurred after the Authority's 2000 decision, I find that a substantial change exists, which requires a review of the matter on the merits.

To support its contention, the Agency points to several other asserted changes to the legal significance of the IJs' work to provide evidence of substantial changes which alter the scope or character of the unit. The Agency also asserts that prior Authority precedent focusing on changed duties should not be solely controlling as this case presents a matter where there is a lack of on-point Authority precedent related to the changes it submits supports its request for reconsideration. Contrary to the Agency's theory, the lack of Authority precedent here supports the conclusion that Petitioner's main asserted change, to the legal significance of the IJs decisions, does not support a finding of substantial change. While it is undisputed that the number of cases pending before the IJs and decided each year has significantly increased, mere increases in numbers of the same type of work do not serve as a basis for establishing the necessary substantial changes. *EOIR*, 56 FLRA at 618. Further, as the

Lucia case expressly covers ALJs, not IJs, and does not expressly connect the Constitutional Officer status to the Statute or any Statutory exclusion, that case also does not establish the substantial change needed to warrant reconsideration.

However, the Agency cites other changes since the Authority's 2000 decision, most notably a regulatory codification of adopt-and-affirm and affirmance without opinion procedures and a change in the level of review of IJ factual determinations from a *de novo* standard to a clear error standard. The record establishes, however, that the two prior methods of the BIA reviewing IJ decisions previously existed in practice if not also in name, and thus they fail to satisfy the "change" element of the substantial change standard. It is clear, however, that the Agency also changed the standard of review of IJ factual determinations from the *de novo* standard, which allowed the BIA to review the totality of the IJs factual findings, to a standard that accords the IJs' factual findings greater deference and elevates the significance of the IJs' factual determinations. This change represents a substantial change and is sufficient to support reconsideration of the IJs' status, because it elevates a significant part of the IJs' work, while simultaneously reducing the BIA's work of reviewing one significant aspect of the IJ decisions. Because the standard for reconsideration is met, the Region will thoroughly reassess the IJs' status considering the totality of the facts and circumstances presented at the hearing. Lastly, given that this decision will result in a decision on the petition on the merits, there is no need to adjudicate the Agency's theory that the Authority's 2000 decision was incorrect at that time it was issued. Instead, the issue for consideration here is, whether, based on the record, the IJs are management officials under the Statute requiring their exclusion from the Statute under 7112(b)(1).

B. The legal standard for management officials

Under Section 7112(b)(1) of the Statute, a unit is not appropriate if it includes management officials. As analyzed below, since the IJs were found by the Authority in 2000 to not be management officials, and since the subsequent changes to IJs' work does not undermine the validity of the Authority's prior decision, it is concluded that IJs remain eligible for inclusion in an appropriate bargaining unit as they are not management officials.

A "management official" is defined under Section 7103(a)(11) of the Statute 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." The Authority has long held that the statutory definition of management official includes individuals who: (1) create, establish or prescribe general principles, plans, or courses of action for an agency; (2) decide or settle on 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 course of action for an agency. *Dep't of the Navy, Automatic Data Processing Selection Office*, 7 FLRA 172, 177 (1981).

To be a management official within the meaning of the Statute, the person in the position must be formulating policy or actively participating in the ultimate determination of policy. *Nat'l Credit Union Admin.*, 59 FLRA 858, 861-62 (2004) (*NCUA*). *See also Def. Commc'ns Agency, Def. Commercial Commc'ns Office, Scott AFB, Ill.*, 8 FLRA 273, 274 (1982); *U.S. Army Commc'ns Sys. Agency, Fort Monmouth, N.J.*, 4 FLRA 627, 629 (1980). The independent judgment exercised by the individual formulating, determining, or influencing agency policies is critical in determining whether a person is a management official. *See, e.g.*, *Headquarters, Space Div., Air Force Sys. Command, Dep't of the Air Force, DOD*, 9 FLRA 885, 887 (1982) (*Space Div. HQ*). For example, having recommendations generally accepted by superiors does not, on its own, rise to the level of "influential" within the meaning of the Statute; there must be some exercise of additional authority, such as "the authority to bind the agency or . . . to commit agency funds." *USDA, Fed. Crop Ins. Corp., Wash. Reg'l Office*, 46 FLRA 1457, 1466 (1993).

An employee who serves as a "resource person[] for higher level management and who recommend[s] changes in [agency] policy, but [does] not have the authority to commit the [agency] to a specific course of action" is not a management official within the meaning of the Statute. *Id.* at 1465-66. *Compare U.S. EPA, Research Triangle Park, N.C.*, 12 FLRA 358 (1983) (employees serving on committees acted as resource persons to those who made policy and were not management officials), *and Dep't of the Interior, Fish & Wildlife Serv., Patuxent Wildlife Research Ctr.*, 7 FLRA 643 (1982) (employees who provided input into the development of agency regulations were simply experts or professionals rendering resource information and not management officials), *with Space Div. HQ*, 9 FLRA at 887 (employees who wrote and independently interpreted regulations which set forth agency policy were found to be management officials); *U.S. Coast Guard, Headquarters, Wash., D.C.*, 7 FLRA 743 (1982) (employee who served as chairman of an international work group that developed industry policies, which were usually adopted by the agency on the employee's recommendation, was a management official). Likewise, an employee who assists in the implementation rather than the shaping of agency policy is not a management official. *U.S. Air Force, Eglin AFB, Eglin AFB, Fla.*, 10 FLRA 402, 403-04 (1982). *See also U.S. Dep't of VA, Wash., D.C.*, 60 FLRA 749, 751 (2005) (employee who exercised discretion according to applicable laws, regulations, and policies not found to be a management official); *NCUA*, 59 FLRA at 861-62 (employees who assigned ratings to the credit unions based on established criteria as well as their professional judgment were not found to be management officials); *U.S. Dep't of Defense, Defense Logistics Agency, Defense Contract Mgmt. Command, Defense Contract Mgmt. Dist. North Central*, 48 FLRA 285, 290 (1993) (employees who interpreted regulatory and policy guidance and had some decision-making authority within that framework were implementing rather than shaping agency policy).

Another factor the Authority considers in determining whether an employee is a management official is whether that individual's work is subject to higher level review and/or approval within an agency. *U.S. Dep't of Agriculture, FNS*, 34 FLRA 143, 147 (1990) (*Dep't of Agriculture*).

C. Two prior Authority EOIR decisions

Here, the Authority has twice reviewed the bargaining unit eligibility of the Agency's employees, holding initially that the BIA staff who review the IJs' decisions are not eligible for Statutory coverage based on their status as management officials. Several years later, the Authority reviewed the status of the IJs and found that the Immigration Judges were not managers or otherwise excluded from the Statute. The Authority's analyses and conclusions in the two prior EOIR cases must be considered when examining whether the changed circumstances exists and whether the IJs' current work supports the conclusion that they should now be excluded as management officials.

In 2000, in *EOIR*, the Authority, under Chairman Dale Cabaniss, unanimously upheld the Regional Director's determination that IJs are not management officials. There, as here, the Agency asserted that the IJs' duties and responsibilities are similar to those of the BIA members, and that because of those similarities, the IJs should be excluded on the same bases as BIA members. The Authority rejected the Agency's contention. With regard to the IJ comparison to the BIA members, the Authority noted, that in 1993 in *BIA*, the Authority found that members of the BIA are excluded because, as noted by the RD, members "judgements and decisions in [immigration] cases . . . influence and determine the Board's policies within the meaning of section 7103(a)(11) of the Statute. . . In this connection, the RD found that the Board is a 'quasi-judicial organization . . . [which] issues administrative decisions [by] interpret[ing] the immigration laws and establish[es] precedent in the area of administrative immigration law.' The RD also found that the 'Board [decisions are] essentially the final administrative ruling on the case' and 'have the effect of law unless overruled by the courts." *BIA*, 47 FLRA at 508-09 (internal citations omitted). The Authority also specifically noted that BIA decisions are binding on IJs, and that the BIA has broad discretionary power to administer the immigration laws through the issuance of precedential and non-precedential final decisions. As such, the Authority concluded that the "Board's implementation of precedent in future Board cases effectively creates and establishes general agency principles which guide the outcome of future immigration decisions and establish Activity policy." *Id*. at 509.

In concluding that IJs are not management officials, the Authority distinguished the *BIA* case, noting that, like here, the central duties of the IJs have remained essentially unchanged since the unit was first certified in 1979. The Authority was also cognizant that, unlike the BIA, the IJs' decisions are not published, do not constitute precedent, are binding only on the parties to the proceedings, and, at the time, were subject to *de novo* review. Thus, the Authority concluded that the RD correctly found the IJs' decisions did not influence and determine the Agency's immigration policy, in contrast to the decisions of the BIA, and the Authority held that IJs were not management officials excluded from the Statute's coverage.

Lastly, the Authority noted in *EOIR* that the RD rejected the Agency's claim "that the sheer volume of decisions

issued by the Judges and the finality of their decisions, unless appealed, affect the Agency's policy" because "the fact remains that when an Immigration Judge issues a decision[,] he or she is applying and following established Agency law and policy." *EOIR*, 56 FLRA at 618 (internal citations omitted). The Authority accepted this line of reasoning in its decision.

D. Immigration Judges are not management officials under section 7103(a)(11) of the Statute.

i. Judges are not subject to a blanket Statutory exclusion.

When Congress passed the Federal Service Labor-Management Statute, it specifically listed multiple agencies that were excluded from Statutory coverage and it specifically listed multiple categories of positions that may not be included in an appropriate bargaining unit. Petitioner now, and in its prior organizations, was not excluded from the Statute, and while many employee categories were listed as excluded in section 7112(b) of the Statute, judges and adjudicators were not. Further, neither Superior nor Constitutional Officers are listed as a category of employee which is excluded from the Statute's coverage.

Under the statutory interpretation cannon, *expressio unius est exclusio alterius,* the fact that neither judges nor Constitutional Officers were included in the list of excluded groups of employees supports the conclusion that Congress intended them to eligible for inclusion in bargaining units. *United States v. Barnes*, 222 U.S. 513 (1912). The Authority's upholding the validity of units of judges at the USDA, the EEOC, the NLRB, the MSPB, and previously at the Petitioner further supports the conclusion that the Statute does not establish a *per se* bar of all judges or adjudicators under a blanket theory that they are management officials.

ii. IJs do not create policy and their decisions are not precedential.

Petitioner's organization consists of a Director, a Chief Administrative Hearing Officer, a cadre of Assistant Chief Judges who act as quasi-first line supervisors, an Office of Policy to review and to create policies, and a review board. Petitioner's organizational review board, the BIA, was previously found to consist of management officials given their duty to both review IJ decisions and to establish precedential decisions that, by binding the IJs, represents the issuance of policy. It is undisputed that IJ decisions are not routinely published and that they do not create precedent that binds other IJs or the BIA in deciding future cases. Moreover, the vast majority of IJ decisions continue to be subject to review by the BIA, and this factor, supports the conclusion that the IJs are not managers. *Dep't of Agriculture*, 34 FLRA at 147.

For the sake of efficiency, and facing a significant backlog, the Agency codified AWO and adopt-and-affirm practices. However, as noted, even when issuing these abbreviated decisions, the BIA members still conduct a complete review of the underlying case on appeal, and the BIA retains the right to augment the decision, to reverse it on legal grounds, to remand it for additional fact finding, or to recommend it for a broader BIA panel or a full BIA precedential decision. These options all existed before the 2000 Authority decision, and while the BIA may now be using some of them more often, that does not support the conclusion that IJs' decisions, which continue to issue as before, now make them management officials.

The creation and elimination of IJs' ability to administratively close cases presents another example where the Petitioner's structure excluded the IJs from both the creation and then the later elimination of that policy and practice. Management officials play a role in the creation, modification or elimination of such practices, and the fact that the record is bare of any examples of any IJ role in such decisions being implemented further supports the conclusion that IJs are not management officials.

iii. The change in the standard of review of IJ decisions does not establish the IJs are now management officials.

Existing Authority case law does not support the conclusion that being reviewed on a clear error standard, as opposed to a *de novo* standard renders the IJs management officials. IJs made factual findings both before and after the change in the review standard and the BIA continues to review and to remand cases as necessary. More importantly, judges are inherently finders of fact and the IJs continue to make decisions based on the facts presented and in accordance with law, regulation, and precedential BIA decisions. The IJs have no authority to disregard Statute or Regulation, or to ignore or rewrite BIA precedent. To the contrary, 8 C.F.R. § 1003.10(b) notes that the IJs, when deciding individual cases before them, are subject to the applicable governing standards, that they exercise independent judgement and discretion and that they may take any action consistent with their authorities under the Act to decide their cases. In many respects, it is these constraints that define the IJs as judges and not managers.

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. *See Elgin AFB*, 10 FLRA at 403-04; *Dep't of Def., Def. Log. Agency*, 48 FLRA 285, 290 (1993). At the hearing, much was made of the fact that some IJ factual determinations on some matters of fact could apply to future IJs decisions. They apply, however, only if the underlying facts remain unchanged, and no testimony established that future

IJs, when confronted with different facts or changed circumstances, were unable to use those differing facts to support a different decision. Indeed, given the BIA's acknowledged ability to remand cases for further factual findings, it appears the BIA retains the ability to insist that IJs create a thorough factual record in the case they are deciding, and may remand the case should the BIA ever conclude an IJ, without support, simply followed another IJ's conclusion. Lastly, on this point, it must be noted that it was a BIA case, *Matter of Z-Z-O*, that codified the conclusion that IJ determinations about future events were findings of fact which merited deference. If the BIA wishes to clarify, modify or create new precedent on that issue, the BIA remains free to do so, while the IJs continue to be bound by the BIA policy. This illustrates the significance of the BIAs' ability to establish precedent, which supports the conclusion that the BIA members remain management officials and which distinguishes BIA member's status from IJs.

iv. The duties of IJs do not support the conclusion that they are management officials.

IJs exercise none of the traditional management indicia. They do not, as a part of their assigned work, write, consult or influence the Agency's published policies or regulations. They do not prescribe courses of action for the agency as a whole that impact other IJs, the BIA or EOIR generally beyond the corners of the case before them.

This conclusion is only supported by other unrefuted testimony from the hearing that IJs play no formal role in agency policy making, that their views are not formally solicited as relates to either process or substantive policy matters under review and that prior IJ committees that attempted to raise matters for clarification to the BIA by design did not offer proposed solutions and have not met in over a year. Bottom line, it does not appear that DOJ, EOIR seeks out or systematically allows IJs to influence policy developed in-house.

While, in unusual circumstances, IJ decisions may influence other IJ determinations for relatives or community members, it is clear also that the later IJs, based on facts presented in later hearings, are also free to reach differing conclusions based on new or differing facts presented to them.

The deference granted to IJs factual findings do not turn judges into management officials. The facts exist, are presented to the Judges in the form of evidence, and can later be superseded by new or previously unknown evidence, or can be subject to re-examination by order of the BIA. In the absence of new or contrary facts or evidence, according deference to IJs factual findings, does not make the IJs managers. Even in the unusual circumstances where the facts may influence a future decision, they remain subject to review, and as such, the added deference now granted to the IJs finding of facts does not create a scenario where the IJs are creating or influencing agency policy.

The ramifications of this point permeate this matter, as the IJs clearly are tasked with applying laws, policies, regulations and BIA decisions interpreting those laws, policies and regulations to the cases before them. This is what judges traditionally do, and, as noted above, Authority precedent does not support the conclusion that judges are excluded from Statutory coverage simply because they non-precedentially apply the facts before them to established law to derive a decision. Only when judges have had the ability, most often in an appellate role, to both review and establish precedent, have judges been found to be management officials excluded from the Statute. *BIA*, 47 FLRA at 509-10. As the IJs are not appellate judges, they are not excluded from the Statute based on Authority precedent because unlike the BIA, they do not issue precedential decisions. Indeed, the fact that the Authority previously reviewed these very Judges and their work, and concluded that they are not management officials carries significant weight in supporting the conclusion here that the changes established by Petitioner do not, under Authority precedent, support the conclusion that the IJs are excluded from Statutory coverage as management officials.

As noted above, and as EOIR's own witnesses testified, the day-to-day duties and work of the IJs has not changed since the Authority previously concluded IJs are not excluded from the Statute's coverage as management officials. In short, the IJs are judges, who spend almost all of their time on the bench rendering decisions in the cases before them. Conversely, the BIA Judges are excluded as management officials because their decisions can create and modify precedential EOIR policy that the IJs are both bound to follow and unable to modify. This appellate reviewing role, coupled with the precedential nature of the BIA's decisions was relied upon by the Authority in concluding that the BIA judges are management officials. In this regard, the Authority noted in *BIA* that the "Board's implementation of precedent in future Board cases effectively creates and establishes general agency principles which guide the outcome of future immigration decisions and establish Activity policy. For these reasons, we reject the Union's claim that the Activity's policies may not be established through the Board's decisions." *Id.* at 509.

While IJ factual findings are no longer reviewed *de novo*, they are still reviewed, they are subject to a standard freely adopted and subject to change by the Agency, and the IJs can be overturned if they fail to meet that established standards or be remanded for further fact gathering when necessary. Moreover, with respect to the IJs' factual determinations, given that they alone observed the witnesses, while reflecting that reality, does not turn the deference given into a significant factor relevant, under current Authority precedent, to requiring a determination that the IJs are management officials.

Given all of the above, it is clear that the Authority's 2000 decision placed importance on the precedential nature of BIA decisions, and that the lack of a precedential nature of IJ decisions, by Agency design, supports the conclusion that the IJs decisions do not set or establish agency policy. Instead, IJ decisions, both in 2000 and now, apply establish Agency policy to the set of facts and to the parties before them. It is also significant that

the Petitioner failed to cite to specific unreviewed IJ decisions that created, influenced or shaped DOJ, EOIR policy in any way other than deciding the specific case before it. Based on the above, the evidence fails to establish that the change in the level of review of IJ decisions turns the IJs into policy makers, requiring their exclusion as management officials.

v. The limited situations where IJ decisions are not reviewed by the BIA does not support the conclusion that IJs are management officials.

When closely examined, the majority of the circumstances of IJs issuing unreviewed decisions cited by the Petitioner reflect a reality that some aspects of those decisions are still subject to BIA review. Thus, for example, while in absentia decisions may not be subject to direct appeal to the BIA, upon motion to reopen by the impacted alien, the IJ must rule on that motion, and that ruling and subsequent decisions on the merits when the motion is granted are subject to appeal to the BIA. Further, in both credible and reasonable fear determinations, while IJ decisions that uphold the DHS determinations are not subject to review, decisions that overturn the DHS determination result in the case being set for hearing, and the subsequent resulting decision from that hearing is subject to BIA review. Lastly, with only 15 reported claims status hearings held out of close to 200,000 hearings held in 2019, the weight of the evidence simply fails to support the conclusion that the cases that are not subject to BIA review, all of which also existed before the Authority's 2000 decision, supports the exclusion of the IJs as management officials.

Given the unchanged underlying relationship of the BIA to the IJs, the Authority's prior decisions and rational continues to apply. The Agency notes, correctly, that since the Authority's 2000 decision, the BIA reviews a smaller percentage of IJ decisions. The Agency also notes that the BIA increased the number of affirmances without opinion and adopt-and-affirms, meaning the BIA increasingly only reviews and adopts the IJ's decision. However, since the BIA retains the ability in each case after review to decide the necessary level of review, its oversight and precedent setting role remains functionally unchanged, with the sole exception of the change in the level of factual review.

At the heart of the Agency's contention is that the IJs, through their decisions, create or modify immigration policy so as to warrant the conclusion that they are management officials. That theory is inapposite to what the record establishes the IJs actually do. IJs act as judges, gathering facts from witnesses and documents, and applying those facts to existing laws, regulations and precedential BIA decisions. By following the law, regulations and precedential IJ decisions, the Judges implement immigration policies, they do not create or influence EOIR policies. The fact that the IJs level of deference to factual findings has been increased does not impact the IJs status as the deference granted continues to be subject to review by the BIA, is subject to remand if it is inadequate, and is subject to being reversed by the BIA when warranted. A clearly erroneous standard still presents the ability for the BIA to overturned even a finding of fact simply by correctly labeling it

as clearly erroneous.

Where, as here, the IJs do not draft or influence the creation of the laws, regulations, or policies, where their decisions are rarely printed much less systematically published, and where their decisions are not precedential, their duties do not make them management officials. Indeed, since 2000, several factors diminished the IJs' roles, including a reduction in their ability to establish court rules. While not dispositive, it is also noteworthy that the Agency even recently started declining to send the IJs out to speak publicly, based on its assertion that the IJs are not management representatives.

Based on the complete record, Petitioner failed to establish that the Authority's prior findings that IJs are not management officials are no longer applicable to the day-to-day work of the IJs.

vi. Petitioner's novel *Lucia* theories

While the Agency asserts *Lucia* supports the conclusion that IJs also are Superior Officers and Constitutional Officers, and that as a result they are management officials who may not be included in an appropriate bargaining unit, the Authority has not held that *Lucia* requires either of those conclusions. While this matter appears to be one of first impression for the FLRA, given the factual dissimilarities between the Administrative Law Judges in *Lucia* and the IJs at issue here, and the fact that *Lucia* includes no finding or dicta about employee status under the Statute, these arguments do not support, under current Authority precedent and a reading of the plain text of the *Lucia* decision, the exclusion of the IJs as management officials.

Lucia addressed Administrative Law Judges at the Securities and Exchange Commission, not Department of Justice Immigration Judges, who are appointed under different statutory schemes, and are subject to differing levels of performance review, supervision and termination. No precedent was presented to support the conclusion that *Lucia* was intended to or does apply to IJs. As such, *Lucia* does not require the conclusion that IJs also are Superior Officers under the Constitution. Indeed, *Lucia* is totally silent on the issue, and thus, fails to stand for the proposition for which the Agency asserts it. Of equal significance, the superior/inferior officer distinction is not a matter that the Authority has ever relied upon to conclude that an employee is excluded from Statutory coverage as a management official. Consequently, even if, as EOIR argues, IJs are Superior and Constitutional Officers, Authority precedent does not support the conclusion that that impacts, much less invalidates, the IJs' inclusion in an appropriate unit under the Statute. As noted above, the Statute, while excluding many categories of employees, does not exclude judges, finders of fact, adjudicators or Superior or Constitutional Officers. The Statute expressly excludes multiple types and groups of employees. It does not, however, expressly excluded any type of judge or Constitutional Officer despite these groups existing prior to the passage of the Statute. Congress could have expressly excluded any of these groups of employees when listing

excluded groups, as all existed and thus were known to Congress when the Statute was drafted. Yet, none were expressly excluded from the Statutes coverage. The Statute's failure to exclude any type of judge or Constitutional Officer in the Executive Branch therefore fails to supports the conclusion that Congress intend to exclude them. Thus, even if IJs are like SEC ALJs, and are Superior Officers under the Constitution, since the Statute and later precedent does not support their exclusion from Statutory coverage, that argument fails, under existing precedent, to establish a basis for excluding them now. While Congress remains free to exclude additional groups of federal employees from the Statute, it has the ability to do so through legislation. In the absence of any precedent to support the conclusion that Superior Officers are management officials or otherwise excluded under Section 7112(b) of the Statute, I conclude IJs are not excluded under the Statute and Authority precedent.

V. Order

Having found that Petitioner failed to establish that Immigration Judges are management officials under the Statute and as under existing Authority precedent, they are not excluded from the Statute's coverage as management officials, the petition is dismissed.

VI. Right to Seek Review

Under section 7105(f) of the Statute and section 2422.31(a) of the Authority's Regulations, a party may file an application for review with the Authority within sixty (60) days of this Decision. The application for review must be filed with the Authority by **September 29, 2020**, and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington, DC 20424–0001. The parties are encouraged to file an application for review electronically through the Authority's website, www.flra.gov.[5]

Jessica S. Bartlett

Regional Director

Washington Region

Federal Labor Relations Authority

Dated: July 31, 2020

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[1] Authority Exhibits will be referenced as A Ex, Petitioner's Exhibits will be referenced as P Ex, the Union's exhibits will be referenced as I Ex and the Transcript will be referenced as Tr.

[2] The Supreme Court Ruled on this matter after the close of the record in the case, but before this Decision issued, and held that aliens do not have a right to court review of these claims after they are decided by the IJ.

[3] The 1999 rulemaking came out after briefing in the case that produced the Authority's 2000 decision, and thus, was not considered by the Regional Director or the Authority in that decision.

[4] No testimony was presented about the law review article, and while I, at Petitioner's request, took judicial notice of the article, the Authority makes decisions based on evidence submitted at hearings as applied to the Statute and to Authority precedent, and not based on theories presented in Law Review Articles.

[5] To file an application for review electronically, go to the Authority's website at **www.flra.gov**, select **eFile** under the **Filing a Case** tab and follow the instructions.

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