# U.S. Department of Justice, Executive Office of Immigration Review, Office of the Chief Immigration Judge (Petitioner/Agency) and National Association of Immigration Judges (Labor Organization/Union)

[ v56 p616 ]

**56 FLRA No. 97**

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
OFFICE OF THE CHIEF IMMIGRATION JUDGE
(Petitioner/Agency)

and

NATIONAL ASSOCIATION OF
IMMIGRATION JUDGES
(Labor Organization/Union)

WA-RP-90056

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ORDER DENYING APPLICATION FOR REVIEW

September 1, 2000

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Before the Authority: Donald S. Wasserman, Chairman and Dale Cabaniss, Member.

## I. Statement of the Case

This case is before the Authority on an application for review filed by the U.S. Department of Justice, Executive Office of Immigration Review, Office of the Chief Immigration Judge (Agency) under section 2422.31(c) of the Authority's Regulations. The Agency seeks review of the Regional Director's (RD's) Decision and Order dismissing the petition in this case. The National Association of Immigration Judges (Union) filed an opposition to the application for review. In addition, the Agency filed a motion to strike certain portions of the Union's opposition and the Union filed a response to the motion.

For the reasons that follow, we deny the application for review.

# II. Background

The Agency filed a petition seeking a determination as to whether employees who encumber the position of Immigration Judge are management officials within the meaning of section 7103(a)(11) of the Federal Service Labor-Management Relations Statute (Statute). **[n1]** The Agency maintained that changes in the duties and responsibilities of its Immigration Judges have occurred since the bargaining unit was initially certified and, as a result, that these employees are now management officials. Consistent with this claim, the Agency further maintained that the unit is no longer appropriate.

The RD observed that the Union was certified in 1979 as the exclusive representative of a unit of Immigration Judges employed by the Immigration and Naturalization Service (*INS*). **[n2]** Four years later, in 1983, the Executive Office for Immigration Review (EOIR) was created through an internal reorganization in which the Immigration Judge function, previously performed by employees of the INS, was combined with the Board of Immigration Review. The primary function of the Board is to hear appeals of the Judges' decisions. **[n3]**

Immigration Judges are appointed by the U.S. Attorney General for the purpose of conducting formal, quasi-judicial proceedings involving the rights of aliens to enter or remain in the United States. It is undisputed that these duties have remained essentially unchanged since the early 1970s when the position was titled "Special Inquiry Officer" and located in the INS. Pursuant to a regulatory change in 1973, incumbents of this position were formally authorized to use the title "Immigration Judge." By 1979, when the unit was certified, all of the Judges were, and have continued to be, attorneys. **[n4]**

Organizationally, Immigration Judges serve in 52 courts located throughout the country. 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. Two Deputy Chief Immigration Judges assist the Chief Judge in providing **[ v56 p617 ]** program direction and establishing priorities for the Immigration Judges. Supervisory responsibility for the Judges, however, is directly delegated to eight Assistant Chief Immigration Judges, who serve as the principal liaison between the Office of the Chief Judge and the Immigration Courts. Although the Assistant Chief Immigration

Judges serve as first-line supervisors for the Immigration Judges, they do not evaluate the Immigration Judges or review their decisions. Rather, in their adjudicatory role, the Judges are independent.

The daily activities of the Immigration Courts are managed by the court administrators who, like the Judges, are supervised by an Assistant Chief Immigration Judge. It is the responsibility of the court administrators to hire, supervise, and evaluate the court's support staff, including language clerks, language specialists, legal technicians, and clerk/typists. Court administrators, however, "[do] not share the supervisory responsibility with [the] Immigration Judges, who have no supervisory responsibility or authority." RD's Decision at 4.

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). *Id.* at 5. OPPMs were first implemented after the Immigration Courts were transferred to the EOIR as a means of establishing improved management and uniform policies and procedures throughout the courts. OPPMs are directed to court administrators, Immigration Judges, and other court personnel. Forty-one OPPMs are currently in effect and cover a variety of subjects such as case processing, burden of proof, leave administration, wearing of the robe, and recording immigration hearings. It is the intent of the current Chief Immigration Judge to circulate draft OPPMs to field personnel for comment before issuance.

In addition to OPPMs, the Office of the Chief Immigration Judge has 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. This system was implemented in order to address the poor relationship that existed between the Immigration Judges and court administrators. Committee members are appointed by the Chief Judge and "serve at his pleasure." *Id.* at 5. 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.* Other initiatives implemented by the Office of the Chief Immigration Judge include a formal training program wherein newly appointed Immigration Judges are trained at the National Judicial College; a court evaluation program wherein each court is evaluated through a system of peer review; and a liaison Judge program wherein each Immigration Court selects a Judge to serve a six month term as the point of contact between the Assistant Chief Immigration Judge, the court administrator, the local INS and private bar and other personnel. The RD found that "[t]he record includes no evidence of any policy or directive issued by an [a]dvisory [c]ommittee or as a result of its deliberations." *Id.* The RD similarly found no evidence that Judges who participate in the court evaluation program "serve any greater or different role than that of court administrators and support staff." *Id.* at 6.

The daily routine of an Immigration Judge involves hearing and deciding cases that arise from the operation of the INS. A court's jurisdiction to decide these cases is determined at the time a case is filed.

After filing, the cases are randomly assigned by the court administrator to an individual Judge and placed on a Judge's calendar on his or her master calendar day. At that time, the Judge hears presentations from the parties and their attorneys, identifies the issues, and advises individuals as to their right to representation. The Judge also sets time frames and briefing schedules, as well as the date for trial.

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

Each Immigration Judge is responsible for the manner in which proceedings in his or her courtroom are conducted. Some Immigration Courts have issued local rules which consist of operating procedures governing practice in their courtrooms. These rules are developed collegially by the Judges of the issuing courts, with an opportunity for input by the INS and the **[ v56 p618 ]** local private bar. The rules must, however, be consistent with applicable Federal rules and Agency regulations and approved by the Office of the Chief Immigration Judge.

Immigration Judges typically spend 36 hours of a 40 hour workweek hearing cases and issuing decisions. Judges are permitted to spend four hours per week on administrative matters, at a scheduled time. On average, Immigration Judges complete 35 cases a week.

# III. RD's Decision

The RD found that under section 7103(a)(11) of the Statute, a management official is defined as "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." *Id.* at 8. The RD additionally found that in *Department of the Navy, Automatic Data Processing Selection Office*, 7 FLRA 172, 177 (1981) (*Navy/ADP*), the Authority held that management officials are individuals who: (1) create, establish or prescribe general principles, plans or courses of action for an agency; (2) decide upon or settle upon general principles, plans or courses of action for an agency; or (3) bring about or obtain a result as to the adoption of general principles, plans or courses of action for an agency.

Applying the definition set forth in *Navy/ADP* to the facts of this case, the RD concluded that Immigration Judges are not management officials within the meaning of the Statute. In reaching this result, the RD first rejected the Agency's claim, based upon *U.S. Department of Justice, Board of*

*Immigration Appeals*, 47 FLRA 505 (1993) (*BIA*), that Immigration Judges make policy through the issuance of their decisions. In this connection, the RD observed that the nature and effect of the Judges' decisions has not changed since the unit was certified in 1979. The RD further observed that the definition of a management official has also remained unchanged during this period of time. Next, the RD observed that in arriving at their decisions, Immigration Judges are required to apply immigration laws and regulations, that their decisions are not published and do not constitute precedent. Finally, the RD observed that the decisions are binding only on the parties to the case, are "routinely" appealed, and are subject to *de novo* review. RD's Decision at 9. Based on these factors, the RD found that the role of an Immigration Judge can be readily distinguished from that of a member of the Board of Immigration Appeals. According to the RD, unlike decisions of an Immigration Judge, decisions of the Board of Immigration Appeals constitute a final administrative ruling, are binding on the Judges below and, consequently, influence and determine immigration policy.

The RD also rejected the Agency's claims that the sheer volume of decisions issued by the Judges and the finality of their decisions, unless they are appealed, affect the Agency's policy. The RD found that "no matter the volume of decisions issued or number of appeals filed, the fact remains that when an Immigration Judge issues a decision[,] he or she is applying and following established Agency law and policy." *Id.*

As concerns the Agency's assertion that Immigration Judges make policy on both the local and national levels through their involvement in other Agency activities, the RD observed that the Agency principally relied on the development of local rules governing the practice in some courts. According to the RD, these rules govern such matters as filing procedures, motion practice, attorney withdrawal or substitution procedures, and other details of practice in a particular court. As such, the RD found that "they constitute rules for the conduct of parties in the courts, [and] not [A]gency policy." *Id.* at 10. In this connection, the RD observed that these rules are "necessarily established within the framework of the Code of Federal Regulations and . . . must be approved by the [Office of the Chief Immigration Judge]." *Id.* The RD further observed that not all courts have developed them, and in some courts such rules are merely discretionary. The RD accordingly determined, based on precedent such as *U.S. Department of Energy, Headquarters, Washington, D.C.*, 40 FLRA 264 (1991) (*DOE, Headquarters*), that the Agency had failed to establish that such activities involved the formulation, determination, or influencing of agency policy.

The RD also found that other activities cited by the Agency failed to establish that Immigration Judges are now management officials. These activities included, *inter alia*, participation of some Judges on advisory committees to the Office of the Chief Immigration Judge; the opportunity for Judges to review and comment on OPPMs; and participation in the court evaluation system. In the RD's view, while these activities "appear to be commendable efforts to utilize the professional expertise of the [Agency's]

employees and to seek input from those on the front-lines, . . . [e]mployees who perform such ad hoc tasks and lend their expertise and assistance are not establishing agency policy[.]" RD's Decision at 11.

Finally, the RD found no merit in the Agency's contention that Immigration Judges are management officials by virtue of their judicial independence, professional stature and qualifications, the formal amenities of **[ v56 p619 ]** the courtroom and other similar factors. According to the RD, the record establishes that over the years, the professional status of the Immigration Judge has been recognized and increasingly supported by OPM, Congress, the Department of Justice, and by the Office of the Chief Immigration Judge itself. In particular, the RD noted that in a 1996 memoranda entitled "Clarification of Organizational Structure and Supervisory Responsibilities," the current Chief Judge stated:

> This organizational structure and supervisory delegation was established so that the Immigration Judges are unencumbered by any supervisory and management obligations and are free to concentrate on hearings. The Immigration Judges [function] in an independent decision-making capacity determining the facts in each case, applying the law, and rendering a decision.

*Id.* at 11-12. Moreover, the RD further noted that when asked at the hearing whether these statements were true at the time they were written, and whether they continued to be true, the Chief Judge replied "yes" to both questions. Based on these circumstances the RD determined:

> While the [J]udges have some authority to control practice in their own courtrooms, they have no authority to set overall policy as to how the courts as a whole will operate. Nor do they have the authority to direct or commit the [A]gency to any policy or course of action. They are highly trained professionals with the extremely important job of adjudicating cases.

*Id.* at 12. The RD, accordingly, concluded that Immigration Judges are not management officials and that the bargaining unit continues to be appropriate.

# IV. Positions of the Parties

## A. Application for Review

The Agency alleges that review of the RD's decision is warranted on several grounds. First, the Agency alleges that review is warranted under section 2422.31(c)(1) of the Authority's Regulations because the RD's decision raises an issue for which there is an absence of precedent. According to the Agency, that issue is whether Immigration Judges function as management officials under applicable law.

The Agency next contends that review is warranted under section 2422.31(c)(3)(iii) of the Authority's Regulations because the RD "committed clear and prejudicial error concerning substantial factual matters." Application for Review at 2. The Agency argues in this regard that the RD committed a number of errors. First, the Agency claims that the RD erred in finding that the decisions of Immigration Judges

are "routinely" appealed. *Id.* at 3. According to the Agency, the evidence shows that although appeal rates among the Immigration Judges may vary, "statistically, Immigration Judge decisions are only appealed approximately 10% of the time." *Id.* In the Agency's view, "[t]hat means that [their] decisions are final and binding 90% of the time." *Id.*

The Agency also contends that the RD committed a clear and prejudicial error in stating that the Board of Immigration Appeals reviews the decisions of the Immigration Judges and issues final administrative rulings, which constitute binding precedent on the Judges below. The Agency maintains that the Judges' decisions are not reviewed by the Board of Immigration Appeals "or anyone else" prior to issuance. *Id.* The Agency further maintains that like the decisions of the Immigration Judges, decisions of the Board of Immigration Appeals are subject to review at a higher administrative level and that "relatively few" of these decisions constitute precedent binding on the Judges. *Id.* at 4.

In addition, the Agency maintains that the RD committed a clear and prejudicial error because he "understated the degree of involvement that Immigration Judges have in formulating and influencing [its] operational policies[.]" *Id.* In support of this assertion, the Agency claims that the RD erroneously dismissed the Judges' role in serving on advisory committees and participating in the court evaluation program as that of front-line employees being consulted for their professional expertise. The Agency claims that the RD failed to recognize that the Judges' expertise with regard to these activities is "*management* expertise" and cites various portions of the record to support this position. *Id.* (emphasis in original).

As a final ground, the Agency asserts that review is warranted under 2422.31(c)(3)(i) of the Authority's Regulations because the RD failed to apply established law. The Agency advances two arguments with regard to this ground. First, the Agency maintains that the RD incorrectly applied the Authority's decision in *BIA*, 47 FLRA 505, to the facts of this case. Second, the Agency claims that the RD failed to address private sector precedent in assessing the issues in this case.

With respect to the RD's application of *BIA*, the Agency asserts that in assessing whether BIA members are management officials within the meaning of the Statute, the Authority "looked primarily to the effect **[ v56 p620 ]** that the decisions . . . had on immigration law." *Id.* at 8. The Agency further asserts that in doing so, the Authority considered several factors including: the finality of the issued decisions; the number of issued decisions; the discretion of the decision-makers; and the overall influence of the decisions on agency policy. The Agency submits that had the RD "properly" applied each of these factors, he would have concluded that the overall effect of the Immigration Judges' decisions on immigration policy is comparable to that of the decisions of the Board of Immigration Appeals

The Agency also asserts that the RD incorrectly applied the Authority's decisions in *DOE, Headquarters*, 40 FLRA 264 and *Department of the Interior, U.S. Fish and Wildlife Service, Patuxent Wildlife Research Center, Laurel, Maryland*, 7 FLRA 643 (1982) (*U.S. Fish and Wildlife Service*), in

determining that Immigration Judges do not formulate the Agency's national or local operational policy. In this connection, the Agency maintains that Immigration Judges contribute to the development of its national operational policy through their participation on advisory committees and court evaluation teams. According to the Agency, this is akin to the contribution of the senior attorneys in *DOE, Headquarters* which were found to be management officials because they "`substantially influence the formulation of Agency policies by providing valued advice' and, thereby, `effectively influence courses of action for the Agency.'" Application for Review at 14.

In connection with local operational policy, the Agency asserts that in issuing written rules of practice for their courts, Immigration Judges "create, establish and enforce the policies that will be followed in carrying out the Agency's mission at the court level." *Id.* at 16. The Agency argues that although the RD dismisses this function as an adjunct of the judicial role and not a management function, these two functions are not mutually exclusive and the RD cited no authority in support of his conclusion to the contrary.

Finally, the Agency asserts that the RD failed to address relevant private sector precedent, cited by the Agency in its closing argument "establishing the principle that even application of agency policy in the exercise of discretion could make an individual a management official." *Id.* at 12. In particular, the Agency asserts that the RD failed to address cases such as *NLRB v. Bell Aerospace Company*, 416 U.S. 267 (1974) (*Bell Aerospace*), wherein the U.S. Supreme Court, in reviewing a decision of the National Labor Relations Board (Board), found the fact that employees were authorized to legally bind the company without prior approval to be persuasive evidence of managerial authority. The Agency also cites *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (*Yeshiva University*) for the proposition that an individual is a manager if he or she "`represents management interests by taking . . . discretionary actions that effectively . . . implement employer policy,' not only if he `creates' such policy." Application for Review at 13.

In view of the foregoing, the Agency submits that the RD's decision should be set aside because "it is incorrect on the facts and on the law to be applied[.]" *Id.* at 18.

## B. Union's Opposition

In its opposition, the Union contends that the Agency's application simply rehashes the arguments that were previously considered and rejected by the RD. In particular, the Union notes the RD's finding that the salient functions of the Immigration Judges' position have remained essentially unchanged since the bargaining unit was certified in 1979. According to the Union, this finding standing alone is sufficient to reject the Agency's petition and leave the current unit intact.

# V. Analysis and Conclusions

For the reasons that follow, we conclude that the Agency has not established that compelling reasons exist for granting its application for review under section 2422.31(c) of the Authority's Regulations.

## A. The RD Did Not Commit a Clear and Prejudicial Error Concerning Substantial Factual Matters Relating to the Immigration Judges' Decisions and Involvement in Other Agency Activities

The Agency alleges that review of the RD's decision is warranted under section 2422.31(c)(3)(iii) of the Authority's Regulations because the RD committed various factual errors relating to the Immigration Judges' decisions, as well as their involvement in other Agency activities. According to the Agency, as a result of these errors, the RD "substantially understated" the effect of the Judges' decisions on the policy set forth in its immigration cases. Application for Review at 3. The Agency submits that the RD's errors include his findings that the decisions of Immigration Judges are "routinely" appealed and that the Board of Immigration Appeals reviews the Judges' decisions and issues final administrative rulings. *Id.*

The Agency also asserts that the RD erroneously "understated the degree of involvement that Immigration Judges have in formulating and influencing [its] operational policies[.]" *Id.* at 4. In this connection, the **[ v56 p621 ]** Agency asserts that the RD incorrectly dismissed the Judges' role in serving on advisory committees and in participating in the court evaluation program as that of front-line employees being consulted for their professional expertise. We find that these allegations are unavailing.

The Agency argued before the RD that changes have occurred since the bargaining unit was certified in 1979 and, as a result, that these employees now function as management officials. According to the Agency, these new duties and responsibilities include the authority of Immigration Judges to develop local rules governing practice in their courts; the participation of some Judges on advisory committees to the Office of the Chief Immigration Judge; the opportunity to review and comment on OPPMs before they become final; participation in the court evaluation system; and serving as faculty members for the National Judicial College. In the Agency's view, as a consequence of these new activities, Immigration Judges now make policy on both the local and national level.

The Agency also argued that Immigration Judges are management officials by virtue of their judicial independence, their professional stature, qualifications and pay, and other similar factors. Nevertheless, the Agency acknowledged in its post-hearing brief that "the central function of adjudicating immigration cases has . . . remained essentially the same[.]" Agency's Post-hearing Brief at 3.

In his decision, the RD specifically examined the Judges' role with respect to each of the new activities and concluded that the activities did not provide the Judges with the level of influence or authority necessary to find them to be management officials. Rather, the RD specifically found that the Judges participated in these activities in their capacity as "highly trained professionals with the extremely

important job of adjudicating cases." RD's Decision at 12. In so finding, the RD relied on well-settled Authority precedent as set forth in such cases as *U.S. Fish and Wildlife Service*, 7 FLRA 643 (finding that employees who provided input into the development of agency regulations were simply experts or professionals rendering resource information and were not management officials) and *DOE, Headquarters*, 40 FLRA 264 (finding that attorneys who provided legal advice, participated in litigation on behalf of the agency, served on various committees and panels, drafted regulations and other documents but did not establish agency policy functioned as technical experts rather than management officials).

Although the Agency submits that the RD incorrectly assessed a number of factual matters relating to the Judges' new responsibilities, such as their role in serving on advisory committees and participating in court evaluation programs, the Agency has failed to establish that any factual errors were involved in the RD's decision. Rather, the Agency is arguing against the evidentiary weight the RD ascribed to those facts.

In these circumstances, we find that the Agency has not established grounds warranting review of the RD's decision under section 2422.31(c)(3)(iii) of the Authority's Regulations. We therefore deny this portion of the application.

## B. The RD's Decision Does Not Raise an Issue for which there is an Absence of Precedent

The Agency also alleges that review is warranted under section 2422.31(c)(1) of the Authority's Regulations because there is an absence of Authority precedent addressing the primary issue presented in this case. According to the Agency, that issue is whether Immigration Judges are management officials within the meaning of section 7103(a)(11) of the Statute.

As discussed in section V.A. above, the Agency does not dispute, and indeed specifically acknowledges, that the central duties of an Immigration Judge have remained essentially unchanged since the unit was certified in 1979. Instead, the Agency's contention that Immigration Judges now function as management officials is predicated on the fact that there have been various changes in their duties and responsibilities since that time. These changes, more fully set forth in section II., include the Judges' authority to develop local rules governing practice in their courts; the participation of some Judges on advisory committees to the Office of the Chief Immigration Judge; the Judges' opportunity to review and comment on OPPMs before they become final; the opportunity to participate in the court evaluation system; and the opportunity of more experienced Judges to serve as faculty members for the National Judicial College.

Notwithstanding the Agency's contention, we find that there is an abundance of Authority case law offering guidance with respect to how the Judges' new duties and responsibilities should be evaluated. Such cases include *U.S. Department of Agriculture, Federal Crop Insurance Corporation, Washington Regional Office and National Federation of Federal Employees*, 46 FLRA 1457, 1458-59 (1993) (finding

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

A review of the RD's decision shows that he applied such precedent in resolving the Agency's petition in this case. Accordingly, we find that the Agency has not established grounds warranting review of the RD's decision under section 2422.31(c)(1) of the Authority's Regulations. We therefore deny this portion of the application.

## C. The RD Did Not Fail to Apply Established Law

As a final ground, the Agency asserts that review of the RD's decision is warranted because the RD failed to apply established law. In support of this assertion, the Agency first maintains that in determining whether Immigration Judges are management officials within the meaning of section 7103(a)(11), the RD incorrectly applied applicable Authority precedent, particularly *BIA*. According to the Agency, the duties and responsibilities of Immigration Judges are substantially similar to those of the members of the Board of Immigration Review as set forth in the Authority's decision. Therefore, consistent with *BIA*, the Agency submits that the RD should have determined that the Judges are management officials.

In *BIA*, the Authority affirmed the RD's determination that a member of the Board of Immigration Appeals was a management official within the meaning of section 7103(a)(11) of the Statute and, therefore, could not be included in the existing bargaining unit. In particular, the Authority concluded that "the incumbent Board Member directly influences Activity policy through his participation in the interpretation of immigration laws and the issuance of decisions and, thereby, meets the definition of a management official set forth in section 7103(a)(11) of the Statute." *BIA*, 47 FLRA at 509. In so concluding, the Authority found significant various powers conferred upon members of the Board. These included the power to "'exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case.'" *Id.* (citing 8 C.F.R. § 3.1(d)(2)). The Authority further included the power to issue the final administrative ruling in a case, and to bind the Immigration Judges, District Directors of the INS, as well as the State Department, through the issuance of such rulings. *See id.*

Applying *BIA* to the facts of this case, the RD concluded that unlike decisions of the Board of Immigration Appeals, the decisions of Immigration Judges are not published, do not constitute precedent, are binding only on the parties to the proceedings, and are subject to *de novo* review. The RD accordingly concluded that the decisions of the Judges do not influence and determine the Agency's immigration policy, in contrast to the decisions of the Board. In our view, the RD's application of *BIA* to the facts of this case, including, particularly, the new duties identified by the Agency, was entirely appropriate and fully supported by the evidence. As such, we find that this contention fails to provide a basis for review.

We also conclude that the RD correctly applied relevant Authority precedent as set forth in such cases as *DOE, Headquarters* and *U.S. Fish and Wildlife Service* in determining that Immigration Judges do not formulate the Agency's national or local immigration policy. Contrary to the Agency, we find that both of these cases directly support the RD's determination that the Judges' participation on the advisory committees and court evaluation teams established well after the initial certification of the unit is not sufficient to influence the determination of Agency policy in the circumstances of this case. We note, in this connection, that in *DOE, Headquarters*, 40 FLRA at 270, the Authority concluded that attorneys who served on the agency's committees and panels were engaged in these activities as resource persons providing technical expertise, rather than as management officials formulating or effectively influencing the agency's policy. Similarly, in *U.S. Fish and Wildlife Service*, 7 FLRA at 648, the Authority determined that employees who analyzed data, discussed their findings and ultimately prepared preliminary recommendations regarding proposed agency regulations were simply experts or professionals who rendered resource information with respect to agency policies.

In this case the RD specifically found that the record includes no evidence of any immigration policy **[ v56 p623 ]** or directive issued by an advisory committee or as a result of its deliberations. The RD also found that the record contains no evidence to establish that Immigration Judges who participate in the court evaluation program serve in a capacity that is any greater than or different from other court personnel who also participate in the program. According to the RD, Agency employees who perform such ad hoc tasks in these and other such activities are not establishing Agency policy but are simply providing expertise as highly trained professionals. In our view, the RD's findings in this regard are fully supported by relevant Authority precedent.

As concerns the Agency's reliance on private sector precedent as set forth in *Bell Aerospace* and *Yeshiva University*, we find that it is misplaced. Under this precedent, an individual who formulates or effectuates agency policy may be found to be a management official. However, at the time that section 7103(a)(11) of the Statute was enacted, Congress specifically chose not to include the word "effectuates" in the definition of a management official. *See* Navy/ADP, 7 FLRA at 174. The deletion of the reference to "effectuates" is a meaningful one because the Board has described "managerial" employees as those who "formulate, determine and effectuate management policies . . . in that they express and make operative the decisions of management." *Bell Aerospace*, 416 U.S. at 276 (quoting *Ford Motor Company*, 66 NLRB

1317, 1322 (1946). The "effectuation" of policy involves making management decisions operative, as distinguished from the actual determination of policy. Accordingly, the deletion of the word "effectuates" raises the bar for purposes of being a manager under the Statute.

In any event, the private sector cases cited by the Agency do not support its claim. *Bell Aerospace* does not assess the status of the buyers who were at issue in that case. Rather, the Supreme Court simply ruled that the Board could not limit the category of managerial employees to those with a conflict of interest. The decision in *Yeshiva University* relies on facts that are quite different from those presented in the instant case. The Supreme Court in *Yeshiva* ruled that the faculty members of the university were "managerial" based upon clear evidence that a collegial system of decision-making yielded "shared authority." *Yeshiva University*, 444 U.S. at 680. The managerial authority of faculty members extended to such matters as the determination of the curriculum, grading system, and academic calendars, as well as decisions on hiring, tenure, sabbaticals, termination and promotion for teachers, and enrollment levels, absence policies and tuition for students. *See id.* at 676-77. As such, we conclude that the RD did not err in failing to address the private sector precedent argued by the Agency.

In these circumstances, we find that the RD's decision does not warrant review under section 2422.31(c)(3)(i) of the Authority's Regulations. We, therefore, deny the Agency's application. **[n5]**

# VI. Order

The Agency's application for review of the RD's Decision and Order is denied.

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**Footnote # 1** for 56 FLRA No. 97

Section 7103(a)(11) provides:

> (11) "management official" means 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[.]

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**Footnote # 2** for 56 FLRA No. 97

The unit is described as:

> INCLUDED: All Immigration Judges employed by the Immigration and Naturalization Service thoughout the United States.
>
> EXCLUDED: All other professional and nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.RD's Decision at 2.

**Footnote # 3** for 56 FLRA No. 97

The EOIR and the INS are separate components of the Department of Justice. The INS is charged with enforcing the nation's immigration laws, while the EOIR is charged with interpreting these laws and conducting administrative hearings and appellate reviews on a wide variety of immigration issues. *See* Union's Post-hearing brief, Exhibit A.

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**Footnote # 4** for 56 FLRA No. 97

In 1982, the position was reclassified as a GS-905-Attorney and, in 1998, the Office of Personnel Management authorized the title of the classified position to be changed from Attorney/Advisor to Immigration Judge.

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**Footnote # 5** for 56 FLRA No. 97

In arriving at our decision, we have not considered the portions of the Union's opposition concerning the Agency's refusal to bargain to which the Agency objected. We, therefore, find it unnecessary to rule on the Agency's motion to strike. *See, e.g.*, *American Federation of Government Employees, Local 1857, AFL-CIO*, 44 FLRA 959, 969 n.5 (1992).