

72 FLRA No. 146

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
(72 FLRA 622 (2022))
(71 FLRA 1046 (2020))

ORDER DISMISSING IN PART
AND DENYING IN PART
MOTION FOR RECONSIDERATION AND
DENYING MOTION FOR STAY

April 12, 2022

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

Decision by Member Abbott for the Authority

I. Statement of the Case

The Union requests that we reconsider our decision in *U.S. DOJ, Executive Office for Immigration Review (EOIR 2020)*,¹ motion for reconsideration denied (*EOIR 2022*).² In its second motion for reconsideration (motion), the Union again argues that the Authority erred by allowing the Agency to collaterally attack the previous union certification, and by disregarding Authority precedent and the factual record in determining Immigration Judges (IJs) are management officials. The Union further argues that the Authority erred in *EOIR 2022* by rejecting the Union's January 6, 2022 motion to remand, issuing an advisory opinion, and violating its due process. As discussed below, we dismiss in part, and deny in part, the Union's motion.

¹ 71 FLRA 1046 (2020) (then-Member DuBester dissenting).

² *U.S. DOJ, Exec. Off. for Immigr. Rev.*, 72 FLRA 622 (2022) (Chairman DuBester dissenting).

II. Background

The details of this dispute are thoroughly set forth in two previous Authority decisions and orders;³ therefore, we only briefly summarize the pertinent details here.

In *EOIR 2020*, the Authority found that existing case law regarding the determination of management officials warranted reconsideration.⁴ Based on this review, the Authority found that IJs are management officials, and, therefore, directed the Regional Director (RD) to exclude IJs from the bargaining unit.⁵ In *EOIR 2022*, the Authority denied the Union's first motion for reconsideration because the Union failed to demonstrate extraordinary circumstances warranting reconsideration.⁶ The Authority also denied the Union's motion for stay of the decision in *EOIR 2020* as moot.⁷

³ *EOIR 2020*, 71 FLRA at 1046-47; *EOIR 2022*, 72 FLRA at 622-23.

⁴ *EOIR 2020*, 71 FLRA at 1048-49.

⁵ *Id.* at 1049.

⁶ *EOIR 2022*, 72 FLRA at 623-26. The Union correctly notes that the Authority's original decision in *EOIR 2022* misidentified a party in one sentence. Second Motion for Reconsideration (Mot.) at 9 n.5. The Authority corrected this error by issuing an errata and corrected version of *EOIR 2022*, which was served on the Union via USPS on January 25, 2022, and received by the Union on January 28, 2022. See USPS Tracking, https://tools.usps.com/go/TrackConfirmAction?qt_c_tLabels1=70210350000037070629 (last visited Apr. 8, 2022). Therefore, contrary to the Union's assertion, the Authority did not "mislead[] . . . the public [or] violate[] [Authority] [R]egulations on service of Authority decisions." Mot. at 9 n.5.

⁷ *EOIR 2022*, 72 FLRA at 626.

Subsequently, the Union filed this motion on February 7, 2022. The Agency did not file an opposition to the Union's motion.⁸

III. Preliminary Matters: We dismiss the Union's challenges to *EOIR 2020* as untimely.

The Union asserts that the Authority erred in its conclusions of law by disregarding the "collateral attack doctrine,"⁹ and by "ignor[ing] its own precedent and the extensive factual record before the

⁸ On March 4, 2022, the Agency filed a motion for leave to file, and did file, a "Response to the Union's Second Motion for Reconsideration and Stay and a Request for the Authority to Effectuate [*EOIR 2020*]." See Resp. at 1. Although labeled as a response, the Agency's filing does not oppose or support the Union's motion, but instead, asks the Authority to instruct it on "which specific actions are appropriate and available under [Authority] [R]egulations and the [Federal Service Labor-Management Relations] Statute to resolve this [controversy]." *Id.* at 5-6. This is effectively a request for an advisory opinion, which is prohibited by § 2429.10 of the Authority's Regulations. 5 C.F.R. § 2429.10. As such, we deny the request. We note the Agency's filing further highlights the troubling actions of the Washington Regional Office (WRO) that we emphasized in *EOIR 2022*. See Resp. at 3-4 ("Despite [*EOIR 2020*] and [*EOIR 2022*], the . . . WRO . . . has not issued, and apparently does not intend to issue, a modification of the Union's Certification of Representative excluding IJs from the bargaining unit as ordered by the Authority."); *id.* at 4 ("On or about February 9, 2022, [a representative of the WRO] informed the Agency of the following: (1) the WRO will not issue a revocation of certification pending the Union's [second] Motion for Reconsideration . . . or a ruling from the [Court of Appeals for the District of Columbia Circuit (the Court)] from any petition of review the Union may file; (2) until the Authority issues a decision on the Union's [second] Motion for Reconsideration or the [Court] issues a ruling if the [U]nion files a petition for review, the parties should maintain the status quo; and (3) if the Union files an unfair[-]labor[-]practice charge against the Agency, the WRO will investigate and follow the [Authority's] procedures regarding the results of the investigation."); *id.* (stating that the Agency entered into the settlement agreement resolving the three unfair-labor-practice charges mentioned in *EOIR 2022* as a result of "positions of the [WRO] Regional Director and the Administrative Law Judge that the Agency was obligated to bargain with the Union despite [*EOIR 2020*]"). Although there was no ambiguity in our previous order "direct[ing] the RD to exclude IJs from the bargaining unit," *EOIR 2020*, 71 FLRA at 1049, we now order the RD to exclude IJs from the bargaining unit as soon as possible but not later than seven calendar days from the date of this order. See *infra* section V; see, e.g., *Dep't of the Air Force, 6th Missile Warning Squadron, Otis Air Force Base, Mass.*, 3 FLRA 111, 115 (1980) (*Otis Air Force*) (directing the RD to conduct an election within a specified time period).

⁹ Mot. at 11-14; see also *id.* at 17-18 (arguing that the Authority erred in concluding that petition was not a collateral attack).

[RD]" in determining IJs are management officials.¹⁰ However, a motion for reconsideration "shall be filed within ten . . . days after service of the Authority's decision or order."¹¹ In disputes giving rise to multiple Authority decisions, a motion for reconsideration must be filed within ten days of the decision that first set forth the determination the party is challenging.¹² Although the Union asserts that these are challenges to *EOIR 2022*, it raises arguments regarding determinations made in *EOIR 2020*,¹³ which was issued over a year before it filed this motion.¹⁴ As such, we dismiss these challenges as untimely.

IV. Analysis and Conclusion: We deny the remainder of the motion for reconsideration of *EOIR 2022* and the motion for a stay.

The Union asks the Authority to reconsider its decision in *EOIR 2022*. Specifically, the Union argues that the Authority in *EOIR 2022*, by rejecting the Union's motion to remand,¹⁵ issued an "advisory opinion" because the case is moot.¹⁶ The Union also asserts that the Authority violated its due process by "forc[ing] Chairman DuBester's participation in the issuance of . . . *EOIR 2022*."¹⁷

Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority

¹⁰ *Id.* at 14.

¹¹ 5 C.F.R. § 2429.17.

¹² *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 69 FLRA 512, 515 (2016) (refusing, in decision after remand, to reconsider determination set forth in original decision); *Def. Sec. Assistance Dev. Ctr.*, 60 FLRA 292, 295 n.4 (2004) (same); *U.S. Dep't of HHS, Navajo Area Indian Health Serv., Window Rock, Ariz.*, 56 FLRA 1035, 1039 (2000) (same).

¹³ See *EOIR 2020*, 71 FLRA at 1047 (finding that the Authority "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"); *id.* at 1048-49 (concluding that IJs are management officials after reevaluating previous Authority precedent and applying it to the factual record). Even if the Union's challenges were timely, they are the same arguments that we already denied in *EOIR 2022*. See *EOIR 2022*, 72 FLRA at 624-25 (finding the Union's "collateral attack" argument failed to demonstrate extraordinary circumstances); *id.* at 625-26 (finding the Union's argument that the Authority erred in evaluating the factual record in determining IJs are management officials failed to demonstrate extraordinary circumstances); *id.* at 625 n.31 (finding the Union's argument that the Authority erred in overturning precedent failed to demonstrate extraordinary circumstances).

¹⁴ *EOIR 2020*, 71 FLRA at 1046 (noting the decision was issued on November 2, 2020).

¹⁵ Mot. at 18-20.

¹⁶ *Id.* at 20.

¹⁷ *Id.* at 20-21.

decision.¹⁸ Consistent with this standard, mere disagreement with the Authority’s conclusions or attempts to relitigate the Authority’s conclusions do not demonstrate extraordinary circumstances.¹⁹

The Union argues that the Authority erred in *EOIR 2022* by rejecting the Union’s motion to remand.²⁰ However, the Union’s argument is mere disagreement with the Authority’s decision that the Union’s motion to remand for further factual findings was untimely or otherwise not appropriate.²¹ As such, the Union has failed to demonstrate extraordinary circumstances.

The Union also asserts that the Authority violated its due process by “forc[ing]” Chairman DuBester to supply his revised dissent in a timely manner.²² The U.S. Supreme Court has held that “‘the root requirement’ of the Due Process Clause [is] . . . ‘that . . . individual[s] be given an opportunity for a hearing before [they are] deprived of any significant

property interest.’”²³ The Union fails to explain – and we fail to see – how the Authority’s *internal* processing guidelines and timelines deprived the Union of any due-process interest. Furthermore, the Authority clearly provided the Union with the opportunity to be heard regarding its interest in the representation proceeding at issue, as evident by *EOIR 2020* and *EOIR 2022*.²⁴ Because the Union’s assertion is not based in the law, we find that it does not demonstrate extraordinary circumstances.

¹⁸ 5 C.F.R. § 2429.17 (“After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order.”).

¹⁹ See *Int’l Bhd. of Elec. Workers, Loc. 1002*, 71 FLRA 930, 931 (2020) (finding attempts to relitigate conclusions reached by the Authority are insufficient to demonstrate extraordinary circumstances); *AFGE, Loc. 2338*, 71 FLRA 723, 723 (2020) (Member Abbott concurring) (citing *SPORT Air Traffic Controllers Org.*, 70 FLRA 345, 345 (2017)) (same); *U.S. Dep’t of the Air Force, Seymour Johnson Air Force Base, N.C.*, 58 FLRA 169, 169 (2002) (citing *U.S. DOD, Def. Logistics Agency, Def. Dist. Reg. W., Stockton, Cal.*, 48 FLRA 543, 545 (1993)) (finding that mere disagreement with the conclusion reached by the Authority is insufficient to establish extraordinary circumstances).

²⁰ Mot. at 18-20. We also acknowledge that the Union filed a motion on January 6, 2022 requesting leave to file, and did file, a motion to vacate, dismiss, and remand *EOIR 2020*, alleging that the dispute was moot and that substantial changes since the RD’s decision needed to be evaluated in determining whether IJs are management officials. See *id.* at 18 n.10. For the reasons expressed herein and in *EOIR 2022*, we deny the Union’s motion. See *EOIR 2022*, 72 FLRA at 622 n.5 (addressing the Union’s motion requesting remand for further factual findings based on alleged changes to regulations and policies that occurred after the RD’s decision).

²¹ See *EOIR 2022*, 72 FLRA at 622 n.5. As we instructed the Union then, the appropriate course of action would be for the Union to “comply with our regulations for filing a new representation case and assert its substantial-changes argument s at that time.” *Id.*

²² Mot. at 20.

²³ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis omitted) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)); see also *Alaska Comm’ns Sys. Holdings, Inc. v. NLRB*, 6 F.4th 1291, 1298 (D.C. Cir. 2021) (finding “the contours of due process are flexible and varying depending on the circumstances of the given case” and that the National Labor Relations Board did not violate the due process rights of a company by failing “to provide explicit notice . . . of every possible alternate unit it might consider” particularly considering the “non-adversarial nature” of representation proceedings).

²⁴ To the extent that the Union claims the Authority’s internal policy authorizing the issuance of two-Member decisions in certain circumstances violated the Union’s due process, we note that *EOIR 2022* was a three-Member decision and the Union has not demonstrated that it suffered any harm from the existence of the policy.

Finally, the Union argues that the Authority violated § 2429.10 of the Authority's Regulations by issuing *EOIR 2022* because it constituted an advisory opinion.²⁵ The Union's argument is based on its apparent belief that a December 7, 2021 settlement agreement "whereby the Agency agreed to recognize the Union"²⁶ can absolve the Authority of its statutory obligation to "determine the appropriateness of units for labor organization representation."²⁷ But it is a fundamental principle of the Federal Service Labor-Management Relations Statute that parties cannot "negotiate over the unit status of employees, which is a matter reserved exclusively to the Authority."²⁸ Further, contrary to the Union's implied assertion, the settlement agreement does not resolve the dispute, but merely memorializes the Agency's willingness to recognize the Union *until* the Authority issued *EOIR 2022*.²⁹ The irrationality of the Union's argument is further evidenced by the fact that the Union – after executing the settlement agreement that the Union now claims resolved the dispute – did not seek to withdraw its first motion for reconsideration, but instead filed an additional motion seeking to reverse *EOIR 2020*.³⁰ Accordingly, we find that *EOIR 2022* is consistent with § 2429.10 of the Authority's Regulations.

As such, the Union has not established extraordinary circumstances in this case that would warrant reconsideration of the Authority's decision in

EOIR 2022, and we deny the remainder of the Union's motion.³¹

The Union also requests that the Authority stay its decisions in *EOIR 2020* and *EOIR 2022* during the pendency of its motion for reconsideration.³² Because we dismiss in part, and deny in part the Union's motion for reconsideration, we also deny its request for a stay as moot.³³

V. Order

The Union's motion for reconsideration and motion for a stay are dismissed in part, and denied in part. The RD shall exclude IJs from the bargaining unit as soon as possible but no later than seven calendar days from the date of this order.³⁴

²⁵ Mot. at 20 (citing 5 C.F.R. § 2429.10 ("The Authority and the General Counsel will not issue advisory opinions.")).

²⁶ Mot. at 20.

²⁷ 5 U.S.C. § 7105(a)(2)(A) ("The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority – determine the appropriateness of units for labor organization representation under [§] 7112 of this title.").

²⁸ *NFFE, Loc. 15*, 43 FLRA 1165, 1171 (1992) (citing 5 U.S.C. § 7105(a)(2)).

²⁹ See *Settlement Agreement Between the U.S. DOJ, Exec. Off. for Immigr. Rev. & The Nat'l Ass'n of Immigr. Judges at 2* (Dec. 7, 2021), https://www.naij-usa.org/images/uploads/newsroom/NAIJ_Signed_Version_-_Agency_Signed_Version_NAIJ_-_Agency_Settlement_Agreement_12-7-2021_Final.pdf ("[T]he Agency agrees to recognize the Union as the exclusive representative of non-supervisory [IJs] at the Agency, unless or until such time as the [Authority] denies the Union's pending [m]otion for [r]econsideration of [*EOIR 2020*], and the [Authority] or the [RD] issues a new certification or revokes the Union's recognition or certification of representative.").

³⁰ See January 6, 2022 Mot. for Leave to File and Mot. to Vacate, Dismiss, and Remand at 2.

³¹ See *Dep't of HHS, Health Care Fin. Admin.*, 44 FLRA 145, 145 (1992) (denying a motion for reconsideration of an order denying a motion for reconsideration because the petitioning party failed to demonstrate extraordinary circumstances); *U.S. Dep't of HHS, Pub. Health Serv. & Ctrs. for Disease Control, Nat'l Inst. for Occupational Safety & Health, Appalachian Lab'y for Occupational Safety & Health*, 43 FLRA 1394, 1395-96 (1992) (same).

³² Mot. at 3.

³³ *U.S. Dep't of HUD*, 71 FLRA 794, 796 (2020) (then-Member DuBester concurring) (citations omitted) (denying a motion for reconsideration and finding the request for a stay moot); *U.S. Dep't of VA, St. Petersburg Reg'l Benefit Off.*, 71 FLRA 1, 3 (2019) (then-Member DuBester dissenting) (same); see also 5 C.F.R. § 2429.17 ("The filing and pendency of a motion [for reconsideration] under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority.").

³⁴ See, e.g., *Otis Air Force*, 3 FLRA at 115 (directing RD to take action consistent with the Authority's decision within a specified time period).

Chairman DuBester, concurring:

For reasons expressed before, I continue to believe that both *U.S. DOJ, Executive Office for Immigration Review (EOIR 2020)*¹ and the majority's subsequent denial of the Union's motion for reconsideration of that decision (*EOIR 2022*)² were wrongly decided. However, I agree that, here, the Union has not established extraordinary circumstances that would warrant reconsideration of *EOIR 2022*.

¹ 71 FLRA 1046, 1049-52 (2020) (Dissenting Opinion of then-Member DuBester).

² *U.S. DOJ, Exec. Off. for Immigr. Rev.*, 72 FLRA 622, 630-33 (2022) (Dissenting Opinion of Chairman DuBester).