

**GRIEVANCE PURSUANT TO ARTICLE 8**  
**OF THE COLLECTIVE BARGAINING AGREEMENT**  
**BETWEEN EOIR AND NAIJ**

**Date:** August 8, 2018

**To:** Christopher Santoro, Deputy Chief Immigration Judge  
Office of the Chief Immigration Judge  
Executive Office for Immigration Review  
5107 Leesburg Pike, Suite 2500  
Falls Church, Virginia 22041  
*via email*

**Grievants:** Hon. Steven A. Morley, Immigration Judge, and  
National Association of Immigration Judges

**Grievants'** Mimi Tsankov, Grievance Chair  
**Representative:** National Association of Immigration Judges

**Matters and**  
**Violations Grievated:** The grievance is brought under Article 8.3 of the Collective Bargaining Agreement (CBA) because the Agency's actions have violated, misinterpreted, or misapplied a law, rule and/or other regulations affecting the conditions of employment, including but not limited to the following:

Violation of the authority of an immigration judge to make decisions based on independent judgment and discretion pursuant to 8 CFR 1003.10;

Violation of the immigration judge's authority to grant a continuance for "good cause" pursuant to *Matter of Sibrun*, 18 I&N. Dec. 354 (BIA 1983) and 8 CFR 1003.29;

Violation of the immigration judge's authority to grant a reasonable adjournment at his own instance pursuant to 8 CFR 1240.6;

Violation of the authority of the immigration judge to take appropriate action pursuant to 8 CFR 1240.1(a)(1)(iv);

Violation of 8 CFR 1003.9(c)- prohibiting the Agency from directing the result of a pending assigned matter before a judge;

Violation of OPM 17-01's recognition that the decision to

continue a matter and any resulting outcome based on that decision is within the sound discretion of the immigration judge- "...is not intended to limit the discretion of an Immigration Judge, and nothing herein should be construed as mandating a particular outcome in any specific case."; and/or

Taking personnel action against an immigration judge for his refusal to obey an order that would require him to violate a law, rule, or regulation. 5 USC § 2302(b)(9)(D).

Violation of the Due Process Clause of the United States Constitution.

**Relevant Facts:**

Judge Morley was assigned the case of Castro-Tum on the juvenile docket. Castro-Tum failed to appear for his hearing on two occasions. The Court initially administratively closed the matter rather than terminating the case or entering an *in absentia* order of removal because the Court found that the address furnished to EOIR by the Office of Refugee Resettlement (ORR) for service of the hearing notice may not have been sufficiently reliable based on numerous instances of error that the Court had observed in other cases. The Court had made the same finding in other cases.

DHS appealed Castro-Tum, as well as approximately 30 other such cases. The BIA remanded some cases finding that the Court had erred in failing to issue orders of removal *in absentia*. The Court certified 26 cases to the BIA to reconcile its finding with conflicting controlling circuit court precedent which had not been addressed.

Separately, the Attorney General certified the Castro-Tum case to himself on the issue of the scope of administrative closure shortly before Judge Morley certified the cases to the BIA.

On Wednesday, May 17, 2018, the Attorney General issued his decision in Castro-Tum, finding that immigration judges lack the authority to administratively close cases. On Friday May 19, 2018, Director McHenry instructed, via email, that the hearing in Castro-Tum be held within 14 days, even though the AG decision only required a hearing notice be *issued* within 14 days. Therefore, a hearing notice was issued on Friday May 19, 2018, directing Respondent Castro-Tum to appear at a hearing on Thursday May 31, 2018, in Philadelphia.

On May 31, 2018, Attorney Matthew Archambeault entered his appearance as "friend of the court" and requested a continuance so

that he could engage in efforts to locate Castro-Tum. The Court granted a continuance for two related reasons. First, the time between the issuance of the hearing notice and the hearing, although legally sufficient, was too brief as a practical matter, to ensure adequate notice. Consistent with its past practices, the Court noted that because the hearing was set for less than two weeks from the hearing notice, there was insufficient time to determine if the notice had been returned by the U.S. Postal Service and matched with the ROP, a vital piece of evidence in assessing whether to enter an *in absentia* order of removal. Second, the Court directed briefing on the issue of the adequacy of the ORR notices as a foundation for an *in absentia* order of removal as the Court found that the issue remained unresolved by the BIA and the Attorney General.

On July 19, 2018, ACIJ Jack Weil sent an email to Judge Morley stating that the Castro-Tum case had been reassigned because the Court had been expected to make a decision at the May 31, 2018 hearing, either by terminating proceedings or entering an *in absentia* order of removal. ACIJ Jack Weil telephoned Judge Morley later the same day and the two discussed the contents of the email. ACIJ Weil conveyed the position of management that Judge Morley should not have continued the matter “at the request of the friend of the court,” but rather should have issued a final order in the case. ACIJ Weil asserted that the AG’s decision stated that if the Respondent did not appear, the Judge “should” proceed by way of an *in absentia* order of removal. In addition, ACIJ Weil asserted that Judge Morley’s “criticism” of the BIA’s and the AG’s decisions during the May 31, 2018, hearing was “unprofessional.” ACIJ Weil informed Judge Morley that he could choose to respond or not respond to the email.

Judge Morley explained to ACIJ Weil during the telephone call that the record reflected two related reasons for the continuance which the email of reassignment failed to adequately appreciate - specifically the Court’s concern regarding the reliability of the address provided to the Court by ORR and the Court’s concern regarding insufficient time for the Postal Service to notify the Court of any service issues with the notice of hearing. Hence the Court had exercised its proper authority, including the authority under 8 CFR 1003.10, to continue the matter for sufficient passage of time and for briefing on the issues. Moreover, Judge Morley denied that his comments about the BIA and AG decisions were unprofessional. ACIJ Weil followed up later that day with an email summarizing the Agency position.

On July 27, 2018, Judge Morley spoke with ACIJ Jack Weil on an unrelated matter. Judge Morley brought to ACIJ Weil's attention that he had learned through his Court Administrator that a number of other cases where Judge Morley had raised similar concerns regarding the sufficiency of ORR notice on the juvenile respondents. Both those on remand from the BIA and those pending motions to recalendar by DHS, were to be reassigned. ACIJ Weil confirmed that he had been instructed to reassign those matters by DCIJ Mary Cheng. ACIJ Weil stated that he was unaware of the reason for the reassignment and provided none to Judge Morley.

The Castro-Tum case was apparently reassigned from Judge Morley within days of the May 31, 2018, hearing, but Judge Morley was only officially notified of the decision and the Agency's rationale for the decision, via email on July 19, 2018. The email asserted that Judge Morley had been obligated to make a final decision on that day with the only choice being to terminate or enter an order of removal *in absentia*. The binary nature of this assertion is disputed. The remand did not direct Judge Morley to enter his decision at the first hearing after remand. In fact, had the remand so instructed it might well have been in violation of law as well.

In addition, Judge Morley learned that the 26 cases in which he sought certification due to the identical issue of the adequacy of the ORR documentation were also being reassigned. Most, but not all, were remanded from the BIA. Furthermore, Judge Morley next learned that approximately 60 cases which Judge Morley had administratively closed due to the inadequacy of ORR documentation, and for which DHS had filed motions to recalendar, were to be reassigned. Although there has been no official notice of these reassignments provided to Judge Morley, these actions have been confirmed in telephone conversation with Judge Morley and ACIJ Jack Weil on Friday July 27, 2018.

**Manner in Which the**

**Violations Occurred:** The reassignment of the *Castro-Tum* case violated Judge Morley's decisional independence, his discretion to grant a continuance "for good cause" or to grant a reasonable adjournment, and his ability to take any action deemed appropriate under law or to take any action he deems appropriate pursuant to law. 8 CFR 1003.10; 8 CFR 1003.29; 8 CFR 1240.6; 8 CFR 1240.1. This reassignment directly flies in the face of the prohibition, under 8 CFR 1003.9(c),

on the Agency in directing the result of a pending assigned matter before an immigration Judge.

The Agency lacks the authority to interfere in such a manner with Judge Morley's decisions and subject him to a false binary choice - terminate or remove a youth. The re-assignment was a directive to select one of two decisions when other decisional options were available within the sound discretion of the Judge. It was a deliberate encroachment on a Judge's decisional independence to secure a particular result in violation of all applicable rules, regulations and laws. Further, Judge Morley's exercise of his judicial independence led the Agency to reassign Castro-Tum – a personnel action taken against him for his refusal to obey an order that would have required him to violate the above cited regulations.

EOIR management has not alleged that the continuance was not granted for "good cause" or violated any statute, case or regulation. Therefore, the reassignment was punitive and without legal foundation.

No formal written notice of reassignment of other 26 remanded cases and 60 formerly administratively closed cases has been furnished. No statement of reason for the reassignment has been furnished to Judge Morley. Inasmuch as the cases of the respondents in those matters share the same legal issues as Castro-Tum, and since the Agency removed Castro Tum for improper reasons, it is reasonable to conclude that the Agency's decision to remove these cases were equally motivated by the same improper reasons.

**Meeting/Hearing Requested:**

Yes.

**Remedy Sought:**

A full make-whole remedy, including but not limited to:

1. A written acknowledgment by the Agency of its error in reassigning the Matter of Castro-Tum from Judge Morley, and unfairly impugning the integrity and competency of Judge Morley well known and respected for being fair and impartial.
2. A return of all cases in to Judge Morley from the groups of 26 certified cases and 60 administratively closed cases to allow him to render decisions in a manner consistent with law and within his discretion as governed by 8 CFR 1003.10, et al.

3. A written acknowledgment from the Director to all Judges that no case assignment or reassignment may be done in a manner that would interfere with the Judge's independent decisional authority.

4. Any other relief as appropriate.

/s/ \_\_\_\_\_  
**Hon. A. Ashley Tabaddor. President**  
**National Association of Immigration Judges**  
Date: August 8, 2018

/s/ \_\_\_\_\_  
**Hon. Steven A. Morley**  
Date: August 8, 2018