Non-Union Social Security Judges Doing Same Work as Their Union Counterparts

The situation, which dates back 15 years, could be remedied by the Biden administration, which has vowed to make the federal government a 'model employer.'

BY DAVID DAYEN MAY 19, 2022

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The Biden administration has not yet acted to correct an egregious anti-union effort inside the federal government.

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President Joe Biden prides himself on being the most pro-union president in history. He has called out unionizing campaigns from the podium, and met with Amazon and Starbucks organizers in the White House. Biden has sought to make the federal government a "model employer." A report from a White House task force on worker organizing and empowerment speaks to this, vowing to "provide greater access and information to unions seeking to represent and build membership among the federal workforce."

But the administration has not yet acted to correct an egregious anti-union effort inside the federal government, one that began 15 years ago and continues today. The Social Security Administration has two sets of administrative law judges (ALJs), who resolve appeals about retirement, Supplemental Security Income, disability insurance, and survivors' benefits. These judges conduct the same hearings and make the same rulings, but one group is unionized and the other group is not, for reasons that critics have deemed erroneous.

"There was no reason to create a unit of non-union judges that do the same thing as bargaining unit judges," said Judge Som Ramrup,

president of the Association of Administrative Law Judges (AALJ) union and an ALJ in New York. “Not letting these judges have a voice with respect to working conditions is disrespectful and demoralizing.”

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The setup is famously known in union circles as “double-breasting,” where non-union and union workers perform the same tasks. Five U.S. senators sent a letter to acting Social Security Administration commissioner Dr. Kilolo Kijakazi last month, urging an end to the exclusion. “We continue to have questions whether SSA committed an anti-union hiring practice” when establishing the double-breasting back in 2007, Sens. Sherrod Brown (D-OH), Bob Casey (D-PA), Ron Wyden (D-OR), Ben Cardin (D-MD), and Chris Van Hollen (D-MD) wrote.

SSA has not responded to a request for comment. The White House has also yet to respond.

THE SITUATION DATES BACK to George W. Bush’s administration in 2007, when the Social Security Administration saw an influx of appeals cases across the country. (Bush also had sought to privatize Social Security, but the congressional support needed for such a change was clearly lacking.) This was demographically predictable, said Nancy Altman, president of Social Security Works and a member of the Social Security Advisory Board. “Baby boomers were at their peak disability years before retirement,” she explained. “It made sense to staff up.”

At the same time, SSA was led by Michael Astrue, a longtime Republican aide who served three GOP presidents. Just this March, Astrue laid out his philosophy with respect to unions in an interview with Federal News Network, complaining that “you can’t make the changes that you need to improve the quality of work unless the union approves them.”

Astrue’s solution to the hearing backlog was to institute the National Hearing Centers (NHC), with offices in five cities across the country (Baltimore, St. Louis, Chicago, Albuquerque, and Falls Church, Virginia), where judges would conduct video hearings. But from the beginning, these NHC judges were excluded from the Social Security judge bargaining unit, which had existed since 2001. “When he set them up, [Astrue] didn’t give the union notice, even though there was a clear change in working conditions,” said Judge Ramrup. “It’s clear that the only reason that the NHCs were created was an anti-union plot.”

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Astrue's agency claimed that the NHC judges performed supervisory duties and were therefore managers. The distinction hinged on the fact that NHC judges are assigned dedicated decision writers. This has evolved over time to where there is a pool of decision writers, and NHC judges get that writer from the pool, without hiring them specifically.

NHC judges do write up performance evaluations of the writers, which is the hallmark of a supervisor, but Judge Ramrup pointed out that ALJs provide input on evaluations of their writers as well, which go to the technical supervisor of the writers. She also noted that NHC judges get feedback on their evaluations from higher-ups. "Under the statute, the supervision must not be routine or clerical," said Judge Ramrup, "but must exercise consistent independent judgment." The NHC judges are not able to exercise that independent judgment, she alleged.

Meanwhile, every other part of the job is identical, involving hearing cases and making rulings. Since the pandemic, ALJs have also done primarily video or telephone hearings, making the distinctions between them and NHC judges even narrower.

There are about 1,200 ALJs, and only about 65 NHC judges who are excluded from the bargaining unit. These NHC judges were initially pulled from the population of bargaining unit judges who did their work at hearing offices across the country; the Albuquerque NHC office was initially in the same location as the hearing office, with a wall constructed to divide the two. The position description for hiring ALJs and NHC judges uses the same language.

Most NHC judges accept the assignment because their spouses have work in the assigned city or they want to get back to that city because they have ties there. Many don't initially realize that they will lose union privileges if they go to the NHCs, Judge Ramrup explained.

When the NHCs were established, the AALJ filed a grievance, and in 2008 an arbitrator ruled that the NHC judges "carry out identical duties" as other ALJs and did not have supervisory status, therefore making them part of the bargaining unit. However, the SSA filed a unit clarification with the Federal Labor Relations Authority, and in 2011 the agency found that the NHC judges were supervisors. The FLRA did agree with the arbitrator, however, that the SSA committed

an unfair labor practice by not notifying the union about the creation of NHCs and showing anti-union animus.

Nevertheless, the practice has continued. Astrue was kept on by President Obama for four years, and he never got a replacement confirmed. In fact, Democrats have not had a confirmed commissioner of the Social Security Administration since Kenneth Apfel in the Clinton years. Altman, who calls the NHC creation "a classic case of union-busting," said that this lack of a confirmed commissioner has made changing the practice difficult. "Acting commissioners are not the same," Altman said. "If they want to be confirmed themselves, they don't want to rock the boat."

Today, however, the White House has identified anti-union activity as a serious problem to be remedied. The five senators noted President Biden's commitment to making the federal government a model employer, and that the White House task force on worker empowerment specifically recommended federal agencies to determine "whether non-bargaining unit positions are correctly excluded from bargaining unit coverage" and to "correct the bargaining unit status of federal sector positions"—precisely the issue in this case.

Judge Ramrup laid out the consequences of the NHC judges having no union affiliation. At one of the NHC locations in Chicago, she said, the SSA relocated the office to a floor of a building with no windows. To better get light into people's workspaces, they put up glass walls, so everyone can see into everyone else's offices, a lack of privacy made worse by the fact that NHC judges adjudicated sensitive hearings about retirement and disability. "If they were in the bargaining unit, we would have bargained that," Judge Ramrup said.

The Senate letter shows that Congress has become attuned to this matter. It's unclear what level of discussions have been had with the SSA or the White House over this matter, though the AALJ has been advocating to end the exclusion for many years. "This should have been fixed a long time ago," Altman said. "But [now] you have a president who claims to be a model employer and pro-union."

The SSA could simply reverse the decision to make the NHC judges exempt from the bargaining unit. Altman says that would raise morale at an agency that has scored low on surveys of work satisfaction. The NHC situation, she added, was a by-product of leaders who weren't fans of either Social Security or government action. "This was a trifecta, you get to be anti-union, anti-government, and anti-Social Security all at once!" she said.

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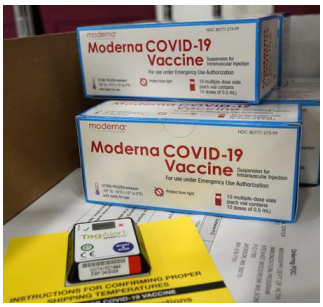

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