

Federal District Court First to Rule “Acting” General Counsel Lafe Solomon’s Appointment Invalid

August 21, 2013

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The order also found that the NLRB Regional Director in Region 19 lacked authority to issue the complaint in the case, citing two recent circuit court decisions as authority—[NLRB v. Enterprise Leasing Company Southeast, LLC](#), (Fourth Circuit, 2013) and [NLRB v. New Vista Nursing & Rehabilitation](#), (Third Circuit, 2013).

Those decisions stand for the following propositions:

- only recess appointments made between sessions of Congress are constitutionally valid;
- since the appointments of former Members Richard Griffin and Sharon Block were not made “intersession,” they were unconstitutional under the Recess Appointments Clause; and
- as a result, the Board lacked a quorum with authority to act (under the Supreme Court’s *New Process Steel, L.P. v. National Labor Relations Board* precedent).

Although not cited in the order, the D.C. Circuit Court of Appeals decision in [Noel Canning v. NLRB](#) also stands for that proposition and its decision is under review by the Supreme Court of the United States.

The case is *Hooks v. Kitsap Tenant Support Services, Inc.* The order of U.S. District Judge Benjamin H. Settle granted Kitsap’s motion to dismiss the Board’s petition for 10(j) injunctive relief. The court granted the

motion because Ronald K. Hooks, the NLRB Regional Director in Region 19, lacked authority to act because the “recess appointments” to the Board were invalid under the case authority cited above and therefore the Board lacked the authority to appoint Hooks as Regional Director in Region 19.

Further, the order held, Hooks did not derive authority delegated to “Acting” General Counsel Lafe Solomon because Solomon’s appointment under the Federal Vacancies Reform Act (FVRA) also was invalid since Solomon had not served as the “first assistant” (i.e., Deputy General Counsel) within the last 365 days under the departing General Counsel, Ronald Meisburg, as required by the FVRA. For 18 years prior to his FVRA appointment, Solomon had been employed on the Board-side of the NLRB, most recently as the head of the Office of Representation Appeals, rather than on the General Counsel’s side of the agency, which is divided by Section 3(d) of the National Labor Relations Act giving the Office of General Counsel independent authority.

What Does This Decision Mean?

First, the order undoubtedly will be appealed. Second, a number of parties will challenge the actions of the “Acting” General Counsel on the same theory. Pending appeal, and even thereafter, [the newly-confirmed five-member NLRB](#) and the “Acting” General Counsel will continue to operate as if nothing has happened. The Board has a long tradition through both Republican and Democratic administrations of not acquiescing to the decisions of a single court or single circuit court, except for the Supreme Court of the United States, on the theory that the NLRB is a national agency charged with the responsibility to enforce Board law. The exception is where the Board is enjoined from acting, as it was by the [Fourth Circuit](#) from enforcing the ill-fated [notice posting rule](#).

Thus, as a practical matter, the order will have little effect on the day-to-day operations of the Board. It could, however, have a significant effect on the potential FVRA appointment of pending General Counsel nominee Richard Griffin if he is not confirmed by the Senate. If the order is correct that in order to be appointed “Acting” General Counsel under the FVRA the appointee must have served as “first assistant” (Deputy General Counsel) under the departing General Counsel—in this case Lafe Solomon—then Griffin will not qualify.

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