PUBLICATION

Based on Improper Appointment of Acting General Counsel to NLRB, D.C. Circuit Court of Appeals Voids Unfair Labor Practice Ruling

August 20, 2015

On August 7, 2015, the United States Court of Appeals for the District of Columbia held that former National Labor Relations Board (NLRB) Acting General Counsel Lafe Solomon's appointment violated the Federal Vacancies Reform Act (FVRA). *See SW General, Inc. d/b/a Southwest Ambulance v. National Labor Relations Board*, No. 14-1107 (D.C. Cir. Aug. 7, 2015). Solomon assumed the position of Acting General Counsel of the NLRB at the direction of President Obama after the resignation of Ronald Meisburg in June of 2010. President Obama cited the FVRA, 5 U.S.C. § 3345(a), as authority for the appointment. About six months later – on January 5, 2011 – President Obama nominated Solomon for the General Counsel position, but the Senate returned the nomination. The President again nominated Solomon on May 24, 2013, but withdrew the nomination. Solomon served in the Acting General Counsel role from June 21, 2010, through November 4, 2013.

Southwest Ambulance (Southwest) provides ambulance services to hospitals in Arizona. Southwest's emergency medical technicians, nurses and paramedics are represented by the International Association of Fire Fighters Local I-60, AFL-CIO (the Union). The bargaining agreement between Southwest and the Union provided that Southwest would pay "longevity pay," or annual bonuses, to Southwest employees who had been with the company for at least ten years. In December 2012, after the bargaining agreement expired but before Southwest and the Union could negotiate a new agreement, Southwest stopped paying longevity pay. The Union filed an unfair labor practice charge shortly thereafter, and the NLRB issued a formal complaint on January 31, 2013. After a hearing the NLRB administrative law judge (ALJ) determined that Southwest had committed an unfair labor practice. Southwest excepted to the decision, arguing among other things that Acting General Counsel Solomon was serving in violation of the FVRA. The NLRB adopted the ALJ's decision in May of 2014, and Southwest appealed to the D.C. Circuit.

Southwest argued that Solomon could no longer serve as Acting General Counsel once President Obama submitted his nomination on January 5, 2011, and thus the complaint issued by the NLRB on January 31, 2013, was void. In analyzing Southwest's argument, the D.C. Circuit noted that Section 3345 of the FVRA, the provision cited by President Obama in appointing Solomon in June of 2010, provides in pertinent part that "a person may not serve as an acting officer for an office under this section, if - (A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person - (i) did not serve in the position of first assistant to the office of such officer; or (ii) served in the position of first assistant to the office of such officer for less than 90 days; and (B) the President submits a nomination of such person to the Senate for appointment to such office." 5 U.S.C. § 3345(b)(1).

Since Solomon had never served as first assistant, neither of the exceptions could apply to him. Thus, concluded the D.C. Circuit, Solomon was serving in violation of the FVRA once President Obama submitted his nomination to the Senate. The D.C. Circuit then considered the effect of its holding. The FVRA states that "[a]n action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d)(1)–(2). Likewise, without a valid complaint, Southwest could not be liable for an unfair labor practice. However, the D.C. Circuit also noted that Section 3348(e)(1) exempts "the General Counsel of the National Labor Relations Board" from the provisions of "section [3348]," including the void-*ab-initio* (from the beginning) and no-ratification rules. The Court ultimately concluded that the provisions

of the FVRA rendered the actions of the Acting General Counsel merely voidable, not void, but since Southwest had timely raised the defense, the Court vacated the NLRB's order.

In its closing paragraphs, the Court attempted to limit the reach of its opinion, stating that it did not "expect it to retroactively undermine a host of NLRB decisions" as with *Noel Canning*. Still, it is possible that we will see further judicial review of similar orders, and it is unclear whether the opinion might still reach beyond Southwest Ambulance.