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Supreme Court Holds that Lafe Solomon Improperly Served as NLRB General Counsel

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The Supreme Court has dealt another blow to the stability of the ***National Labor Relations Board***. In a 6-2 decision, in National Labor Relations Board v. SW General, Inc. DBA Southwest Ambulance, USSC Case No. 15-1251 (March 21, 2017), the Court held that the NLRB's prior Acting General Counsel, Lafe Solomon, who served as acting GC while awaiting Senate confirmation that never came amidst political gridlock, improperly served in that role from January 2011 through the fall of 2013. The Court concluded, based on its interpretation of the Federal Vacancies Reform Act ("FVRA"), a statute enacted in 1998, that someone who is nominated serve in an acting office could not also serve as the permanent nominee.

Article By Joshua S Fox
Mark TheodoreProskauer Rose LLP
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The Supreme Court affirmed the DC Circuit Court's ruling that resulted in an unfair labor practice complaint issued against the employer SW General, Inc. was void. As we noted in our previous decision of this case, here, the ruling appears to be limited to those cases involving Solomon decisions where the issue was expressly raised by a party. This ruling casts a significant shadow over the hundreds of actions undertaken by Solomon directly during his tenure that have been challenged by a party as lacking authority. Such decisions may include, besides the issuance of complaint, the appointment of Regional Directors and the authorization of injunctive relief. The Supreme Court remarked that any such actions are "voidable."

Background

In June 2010, President Obama directed Lafe Solomon, a career NLRB employee, to serve as Acting General Counsel. In January 2011, the President nominated Solomon to serve in this role on a permanent basis. The Senate never took action on this nomination, and President Obama ultimately withdrew Solomon's name in favor of Richard Griffin, who was confirmed in October 2013; Griffin still holds the position.

In January 2013, an NLRB Regional Director, acting on Solomon's behalf, issued an unfair labor practices complaint against SW General, Inc. An Administrative Law Judge found that SW General had committed unfair labor practices. SW General appealed the ruling, raising among other things, that the complaint itself was improper, asserting Acting General Counsel Solomon was not properly appointed. The NLRB rejected the appeal and the employer petitioned the D.C. Circuit Court of Appeals for review, arguing that the Regional Director's issuance of the Complaint was invalid because subsection (b)(1) of the FVRA precluded Solomon from performing the duties of the General Counsel after having been nominated to fill the position. The D.C Circuit agreed with SW General and voided the complaint. The NLRB appealed.

Holding

The Supreme Court affirmed the D.C. Circuit's decision, finding that application of the statute to these circumstances was fairly "straightforward." After analyzing the plain language of the statute, the Court concluded that subsection (b)(1) of the FVRA clearly prevents a person who has been nominated to fill a vacant office requiring Presidential appointment and Senate confirmation (referred to as a "PAS office") from performing the duties of that office in an acting capacity.

The Court rejected the NLRB's contention that government-issued "guidance" construing this provision to apply

only to “first assistants” trumps the plain language of the statute, and the Court also dismissed the argument that Congress had acquiesced to this practice by failing to “speak up” to prior circumstances where permanent nominees had served as acting officers in violation of the FVRA.

Impact of the Decision

There is no way to tell how many of the hundreds of prosecutorial decisions made by Lafe Solomon were challenged as “voidable” but it is possible the number could be very high. Only time will tell the impact. For example:

- Some employers may have been found to have violated the NLRA based on a voidable complaint which they contested but did not appeal beyond the NLRB. Those decisions may be erased from an employer’s record
- Similarly, some employers may have had a bargaining unit certified by a Regional Director who was appointed by Solomon. There may no longer be an obligation to bargain in such a unit.

Solomon worked and made decisions in his capacity as Acting General Counsel from January 2011 to October 2013. Actions taken by the Acting General Counsel during this period of time should be reviewed.

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