

Supreme Court Upholds Decision to Vacate NLRB Order Due to Improper Appointment of NLRB General Counsel

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On March 21, 2017, the Supreme Court upheld an August 2015 opinion by the D.C. Circuit under the Federal Vacancies Reform Act holding that former acting National Labor Relations Board General Counsel Lafe Solomon improperly served as acting general counsel while awaiting confirmation from the U.S. Senate to a permanent appointment. *NLRB v. SW General, Inc.*, Slip Op. 15-1251 (Mar. 21, 2017). Chief Justice John Roberts wrote the opinion for the majority, which was joined by Justices Kennedy, Thomas, Breyer, Alito, and Kagan.

Solomon was originally appointed as the acting general counsel after Ronald Meisberg resigned in June 2010. Six months later, in January 2011, President Barack Obama nominated Solomon for the role on a permanent basis. The Senate did not confirm the nomination and President Obama eventually nominated Richard Griffin, who was confirmed in October 2013. In the interim, Solomon served over three years as acting general counsel after President Obama nominated him for the role permanently.

Subsection (b)(1) of the FVRA applies to any position requiring Presidential appointment and Senate confirmation ("PAS office"). Subsection (b)(1) states "a person may not serve as an acting officer for an office under this section" if the President nominates him for the vacant PAS office and, during the 365-day period preceding the vacancy, the person "did not serve in the position of first assistant" to that office or "served in [that] position ... for less than 90 days." In other words, a person cannot serve as both the acting officer and permanent nominee for the same PAS position. The general counsel for the NLRB is a PAS office.

The Supreme Court upheld the D.C. Circuit's holding that Solomon became ineligible to serve as acting general counsel under Subsection (b)(1) of the FVRA. As Chief Justice Roberts wrote: "Applying the FVRA to this case is straightforward. Subsection (b)(1) prohibited Solomon from continuing his service as acting general counsel once the President nominated him to fill the position permanently. The President could have appointed another person to serve as acting officer in Solomon's place, but did not do so."

The Supreme Court also found that Subsection (b)(1)'s application was not limited to first assistants to an office who automatically assume acting duties after a resignation. Instead, Subsection (b)(1) applies to all acting officers, regardless of whether they serve pursuant to assumption of duties as a first assistant or, as was the case with Solomon, the individual was qualified for active service as a senior employee of the NLRB. Thus, once President Obama nominated Solomon for the position on a permanent basis, he became ineligible to perform the duties of general counsel in an acting capacity.

The implications of this decision could approach the reaction to *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). In *Noel Canning*, the Supreme Court found that the Board lacked a quorum and could not conduct any Board business because three of the five Board members were invalidly appointed through improper recess appointments. As a result, more than 700 reported and unreported decisions issued by the quorum-less NLRB were invalidated. Subsequent decisions grounded in those invalidated decisions were also questioned.

Similarly, the validity of every decision and action by Solomon as general counsel, from his nomination by President Obama for the permanent general counsel role in January 2011 until Griffin was confirmed in October 2013 is now in question.

Noel Canning covered approximately 20 months from January 2012 through August 2013. *SW General* covers approximately 33 months from January 2011 through October 2013. Thus, it expands the period of invalidity by 12 months on the front and one month on the back of the *Noel Canning* period.

If you have any questions on this topic please contact a member of our [Labor & Employment Practice Group](#).

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