

Supreme Court Invalidates NLRB Acting GC's Tenure

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The U.S. Supreme Court affirmed (6-2) a D.C. Circuit ruling that Lafe Solomon improperly served as the acting general counsel (GC) of the National Labor Relations Board (NLRB) while awaiting Senate confirmation to a permanent appointment, in violation of the Federal Vacancies Reform Act (FVRA). *NLRB v. SW General Inc. d/b/a Southwest Ambulance*, Case No. 15-1251 (March 21, 2017) (Justices Sotomayor and Ginsburg dissenting). The FVRA, enacted in 1998, precludes a person who has been nominated by the President for certain positions from fulfilling the job functions for which he/she has been nominated while the nomination is pending. The ruling effectively invalidates Solomon's three-year tenure as the acting GC, and offers employers extraordinary grounds to seek to vacate complaints, and subsequent orders, initiated by Solomon during this time.

In June 2010, President Barack Obama appointed Solomon, a career NLRB attorney, to serve as the acting GC to the NLRB. Six months later, in January 2011, President Obama nominated Solomon to be the permanent GC. The Senate never acted on the nomination, and President Obama ultimately withdrew Solomon's name in favor of a new candidate, whom the Senate confirmed in October 2013. Solomon ended up serving as the acting GC to the NLRB throughout this three year period.

The case before the Supreme Court stemmed from a challenge to an unfair labor practice complaint that the NLRB brought against Southwest Ambulance. The company argued that the complaint was invalid because under the FVRA Solomon could not perform the duties of general counsel to the NLRB, which include the authority to issue unfair labor practice complaints. The D.C. Circuit agreed and ruled that after President Obama nominated Solomon to permanently fill the position of NLRB general counsel—a Presidential appointment that may be filled only by an individual confirmed by the Senate—Solomon's service as acting GC violated the FVRA. On appeal, the Obama administration argued that a FVRA exception for a nominee who served for 90 days as a "first assistant" to the person who previously held the office, excused President Obama's appointment of Solomon because he had been a director at a different NLRB office.

The Supreme Court held that the FVRA prevents any individual who has been nominated to fill a vacant office requiring Senate confirmation from performing the duties of that office in an acting capacity. Writing for the majority, Chief Justice John Roberts concluded that "[o]nce the President submitted his nomination to fill [the GC] position in a permanent capacity, [the law] prohibited [Solomon] from continuing his acting service. This does not mean that the duties of general counsel to the NLRB needed to go unperformed; the President could have appointed another

person to serve as the acting officer in Solomon’s place....The President, however, did not do so, and Solomon’s continued service violated the FVRA.”

Employers will likely raise challenges to the NLRB complaints issued during Solomon’s tenure, in addition to the actions of Presidential appointees who served in an acting capacity pending action by the Senate on confirmation.

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