

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

AMERICAN ELECTRIC POWER
AND ITS SUBSIDIARIES APPALACHIAN
POWER COMPANY, INDIANA MICHIGAN
POWER COMPANY, KENTUCKY POWER
COMPANY, KINGSPORT POWER COMPANY,
OHIO POWER COMPANY, PUBLIC SERVICE
COMPANY OF OKLAHOMA AND
SOUTHWESTERN ELECTRIC POWER COMPANY

and

Case 9-CA-095384

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, SYSTEM COUNCIL U-9
AND LOCALS 329, 386, 696, 738, 876, 934, 978,
1002, 1392 AND 1466, AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE TO
RESPONDENTS' MOTION TO DISMISS**

I. INTRODUCTION:

This case is before the Board on Respondent's exceptions to the Administrative Law Judge's decision, which issued on July 31, 2013. Respondents' filed a Motion to Dismiss concurrently with their exceptions. For the reasons explained below, the Acting General Counsel respectfully requests that Respondents' Motion to Dismiss be denied.

**II. THE REGIONAL DIRECTOR HAD AUTHORITY TO ISSUE A
COMPLAINT IN THIS CASE BECAUSE THE ACTING GENERAL
COUNSEL WAS PROPERLY APPOINTED:**

In their motion to dismiss, Respondents argue that Acting General Lafe Solomon, and Regional Director Gary Muffley on his behalf, lacked authority to issue and prosecute the complaint because Mr. Solomon was invalidly appointed under either Section 3(d) of the Act or the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, et seq. This argument fails.

As an initial matter, while Section 3(d) provides one avenue to fill Board General Counsel vacancies, the subsequently-enacted FVRA clearly provides another. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, n.1 (Mar. 13, 2013) (FVRA is valid alternative procedure to Section 3(d) of the Act). Here, the President chose to appoint Mr. Solomon under the FVRA, and that appointment was lawful. *Id.* Accordingly, Respondents' argument that Mr. Solomon could not issue the complaint in this case because his appointment under Section 3(d) had expired is irrelevant.

Next, Respondents argue that Mr. Solomon was invalidly appointed under the FVRA, based on a ruling of a lone district court, *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), which dismissed an application for preliminary relief under Section 10(j). Although *Kitsap's* rationale is not entirely clear, the district court appears to have accepted *Kitsap's* argument that the Acting General Counsel was not qualified to be designated an acting officer under the Federal Vacancies Reform Act, 5 U.S.C. § 3345, et seq., because he had never served as a first assistant to the departing officer, as assertedly required by Section 3345(b)(1). The text, structure and history of Section 3345 stand against *Kitsap's* construction of its terms.

Subsection (a) of Section 3345 designates three categories of persons who can serve in an acting capacity: first assistants to the vacant office (subsection (a)(1)), a Senate-confirmed officers in the government (subsection (a)(2)), and any other qualified high-level officers or employees of the agency in which the vacancy arises (subsection (a)(3)). The President directed Acting General Counsel Solomon to perform the duties of the office of General Counsel pursuant to subsection (a)(3). To qualify under subsection (a)(3), the person named must have served in the agency in which the vacancy arises for at least 90 days during the 365 days preceding the

vacancy, and the person must have been paid at a rate at least equal to a GS-15. It is undisputed that Mr. Solomon satisfies the requirements of subsection (a)(3).

The employer in *Kitsap* contended, however, that Mr. Solomon was also subject to the minimum service requirements set forth in subsection (b)(1) of Section 3345. That provision states that “[n]otwithstanding subsection (a)(1),” the subsection authorizing service by a first assistant, a person may not serve as an acting officer “under this section” if that person did not serve as a first assistant for a minimum period during the prior year and has been nominated by the President to fill the vacant office. The employer hinged its argument on subsection (b)(1)’s use of the phrase “under this section,” claiming that the conditions set forth in subsection (b)(1) therefore applied to all three categories of acting officials listed in subsection (a).

That argument fails as a textual matter, because it conflicts with other language in subsection (b)(1). By its terms, subsection (b)(1) specifies that its limitations apply “[n]otwithstanding subsection (a)(1).” Subsection (b)(1) thereby expressly directs its limitations toward the class of officials covered by subsection (a)(1) – namely, first assistants. If Congress had meant for the service limitation in subsection (b)(1) to apply to all three categories of officials identified in subsection (a), rather than just to first assistants, it would have said “notwithstanding subsection (a)” rather than referring more specifically and exclusively to subsection (a)(1). The position taken by the employer and the district court in *Kitsap* would render the explicit and specific textual cross-reference to subsection (a)(1) meaningless.

Moreover, even if Respondents’ reading of subsection (b)(1) were “textually permissible in a narrow sense,” it is “structurally implausible.” *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2641 (2010). All of subsection (b)(1)’s limiting conditions are linked to service as a first assistant. In addition, subsection (b)(1) constitutes the sole source of any limitations on a first

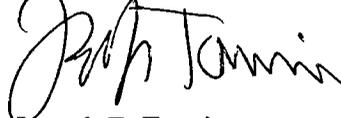
assistant's serving as an acting officer pursuant to subsection (a)(1). By contrast, subsection (a)(3), the provision applicable to Mr. Solomon, has its own self-contained minimum service requirements, noted above. The proposition that a person independently qualified to serve as an officer or employee under subsection (a)(3) must also satisfy requirements linked to service as a first assistant is structurally implausible.

Finally, *Kitsap's* reading of subsection (b)(1) is squarely foreclosed by the legislative history of the provision. The amendment's chief sponsor, Senator Thompson, stated explicitly that subsection (b)(1) applies only to first assistants: "Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that *this subsection applies only when the acting officer is the first assistant*, and *not* when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)." Cong. Rec., 105th Cong., 2nd sess. (Oct. 21, 1998) at p. 27496 (emphasis added). Moreover, Congress' purpose in adding subsection (a)(3) to the bill after it was reported out of Committee would be frustrated by *Kitsap's* construction of Section 3345(b)(1). As Senator Thompson explained, subsection (a)(3) was added because Congress feared that the pool of available first assistants was too small and therefore sought to expand categories from which acting officers could be selected. *Id.* It would seriously undermine Congress's stated goal of expanding the pool of potential acting officials beyond first assistants if subsection (b)(1) were construed, as *Kitsap* construes it, to disqualify Senate-confirmed officials and other senior agency officials who have been nominated to fill the vacancy unless those officials had also served as first assistants.

Moreover, as Mr. Solomon was properly appointed under the FVRA, his delegation of authority to Regional Director Muffley to issue and process complaints is valid. ^{1/} Therefore, the Board should reject Respondents' contention that the complaint should be dismissed.

Dated at Cincinnati, Ohio this 25th day of October 2013.

Respectfully submitted,



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^{1/} The General Counsel has delegated the authority to the Regional Directors for issuing complaints. *See United Elec. Contractors Ass'n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965), *aff'd*, 366 F.3d 776 (2d Cir. 1966).