

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NLRB DIVISION OF JUDGES**

DELAWARE VALLEY FLORAL GROUP, INC. d/b/a
DELAWARE VALLEY WHOLESALE FLORIST

and

Case 05-CA-96037

PAUL DARMAFALL, AN INDIVIDUAL

OPPOSITION TO RESPONDENT’S MOTION FOR SUMMARY JUDGMENT

Respondent requests summary judgment based on two flawed assertions, namely that: (1) the Acting General Counsel was invalidly appointed, and (2) the Board lacked a quorum to issue complaint or otherwise act. For the reasons below, Respondent’s motion should be denied.

1. As an initial matter, Respondent is incorrect when it asserts that “the Board issued the complaint at a time when it had no General Counsel,” because the Acting General Counsel’s appointment was not in compliance with Section 3(d) of the Act.¹ To the contrary, the Board recently held that although Section 3(d) provides one avenue to fill Board General Counsel vacancies, the subsequently-enacted Federal Vacancies Reform Act (“FVRA”) clearly provides another. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013) (FVRA is valid alternative procedure to Section 3(d) of the Act). The express terms of the FVRA, with four immaterial exceptions, apply to all federal appointments requiring Senate

¹ Section 3(d), enacted 40 years before the FVRA, authorizes the President to designate an individual to act as General Counsel during a vacancy, but prohibits an Acting General Counsel from serving “for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate.” 29 U.S.C. § 153(d).

confirmation. 5 U.S.C. § 3345(a). In consequence, Section 3(d) of the Act is no longer the sole means of filling Board General Counsel vacancies, even though 5 U.S.C. § 3347(a)(1)(A) preserves the option of using Section 3(d).² Accordingly, the President had the option of appointing an Acting General Counsel under either Section 3(d) of the Act or the FVRA. Here, he chose to appoint Mr. Solomon under the FVRA, and as shown below, that appointment was lawful. *Accord Belgrove, supra* at 1, n.1 (citing *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 540 n.1 (4th Cir. 2009) (upholding authorization of 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act), *aff'g Muffley v. Massey Energy Co.*, 547 F. Supp. 2d 536, 542 (S.D.W.Va. 2008).

Effective June 21, 2010, President Obama appointed career Board attorney Solomon to serve as the Board's Acting General Counsel, following the June 20, 2010 resignation of General Counsel Ronald Meisburg. President Obama expressly based his appointment of Mr. Solomon on "the Constitution and the laws of the United States, including § 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345, et seq." *See* June 18, 2010 Appointment Memorandum. On January 5, 2011 (198 days after Mr. Solomon's appointment), the President submitted Mr. Solomon's nomination to the Senate to serve as the Board's General Counsel. 157 Cong. Rec. S68 (Jan. 5, 2011). That nomination remained pending before the Senate until January 3, 2013, when the Senate returned his nomination to the

² The language of Section 3347(a) provides that the FVRA is "the exclusive means" for the President to appoint such an official in an acting capacity "unless—(1) a statutory provision expressly—(A) authorizes the President" to make such an appointment. Given that framework, the FVRA is the exclusive means for appointments only in the absence of independent statutory authority. Where, as here, there is independent statutory authority, the FVRA is not the "exclusive" means, but provides an option.

President. On May 24, 2013, the President submitted anew Mr. Solomon's nomination to the Senate to serve as the Board's General Counsel.

Mr. Solomon's appointment, nomination, and current actions as Acting General Counsel are proper under the FVRA. Mr. Solomon's initial appointment fell within the FVRA's time limitation, which allows acting officials to serve for no longer than 210 days after the vacancy occurs or as long as the nomination is pending. 5 U.S.C. § 3346. Here, Mr. Solomon served as Acting General Counsel for 198 days before his nomination on January 5, 2011. Next, because his nomination remained pending before the Senate until January 3, 2013, the 210-day limitation on appointments under the FVRA was suspended until January 3, 2013.

Further, once the nomination was returned to the President on January 3, 2013, Mr. Solomon received an additional 210 days to serve as the Acting General Counsel. Section 3346(b)(1) of the FVRA specifically states, "If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return." Therefore, Mr. Solomon's appointment was valid on March 27, 2013, when complaint issued in this case, as that date was within 210 days of January 3. In addition, with the submission anew of Mr. Solomon's nomination to the Senate on May 24, 2013, Mr. Solomon may continue to serve as the Acting General Counsel as long as his nomination remains pending. Therefore, the Acting General Counsel has properly held his office at all times relevant to this matter.

2. Respondent's remaining assertion, which challenges the Board's composition based on *Noel Canning v. NLRB*, ___ F.3d ___, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013) (petition for certiorari filed April 25, 2013), is also misplaced. To begin, regardless of the issue

of the Board's composition, and contrary to Respondent's assertions, the Acting General Counsel has independent authority to issue and prosecute complaints. *Bloomington's*, 359 NLRB No. 113 (2013), at *1 (“[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel” (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987) (“*UFCW*”); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010))). Thus, “[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any ‘power delegated’ by the Board, but rather directly from the language of the NLRA.” *Id.* Accordingly, the authority of the Acting General Counsel and Regional Director to issue complaints is unaffected by any issue concerning the composition of the Board.

Finally, and in any event, it is correct that *Noel Canning* held that Members Griffin and Block, current Board Members serving alongside Chairman Pearce, were not validly appointed because they were appointed during an intrasession recess. However, the Board has filed a petition for certiorari with the United States Supreme Court seeking review of the D.C. Circuit's decision. Furthermore, in *Belgrove*, *supra* at 1, n.1, the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus, in *Belgrove*, the Board concluded that because the “question [of the validity of the

recess appointments] remains in litigation,” until such time as it is ultimately resolved, “the Board is charged to fulfill its responsibilities under the Act.”³ The Board’s conclusion in *Belgrove* is equally applicable to the continued processing of the instant case. Accordingly, Respondent has failed to provide grounds for summary judgment, and its motion so requesting should be **DENIED**.

Respectfully submitted,

/s/ Chad M. Horton

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³ The Third Circuit’s decision in *NLRB v. New Vista Nursing and Rehabilitation*, -- F.3d --, 2013 WL 2099742 (3d Cir. May 16, 2013), should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Counsel for the Acting General Counsel's Opposition to Respondent's Motion for Postponement of Hearing were served by e-mail on this 13th day of June 2013 on the following parties:

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