

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN BAPTIST HOMES OF
THE WEST d/b/a PIEDMONT
GARDENS

and

SERVICE EMPLOYEES
INTERNATIONAL UNION, UNITED
HEALTHCARE WORKERS - WEST

Cases: 32-CA-25247
32-CA-25248
32-CA-25266
32-CA-25271
through
32-CA-25308
32-CA-25498

RESPONDENT'S MOTION TO DISMISS

Per Section 102.24 of the Board's Rules and Regulations, American Baptist Homes of the West d/b/a Piedmont Gardens ("Employer" and "Respondent") hereby moves for the Consolidated Complaint ("Complaint") in the above-captioned matter to be immediately dismissed and that the decision of the ALJ based thereon be vacated.

The Complaint was issued on March 24, 2011 by Mr. Lafe Solomon, the former Acting General Counsel of the National Labor Relations Board, who was then serving in violation of the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345 *et seq.*

Mr. Solomon became ineligible to serve as Acting General Counsel once President Obama nominated him to be General Counsel on January 5, 2011, and he remained ineligible to serve in that position until his resignation on November 4, 2013. *See* 5 U.S.C. § 3345(b)(1).

Subsection (b)(1) of the FVRA prohibits a person from being both the acting officer and the permanent nominee of an executive agency unless certain conditions are established – neither of which Mr. Solomon ever met at the relevant times (either that he

served as the first assistant to the office in question for at least 90 of the preceding 365 days, or that he was confirmed by the Senate to be the first assistant.)

Accordingly, the Complaint issued by Mr. Solomon at the time he was unlawfully serving as Acting General Counsel against the Respondent was invalid. And, in turn, the Decision and Order by the Administrative Law Judge Burton Litvak issued on August 9, 2011 was and remains void and should be vacated. Moreover, any decision issued by the National Labor Relations Board in review thereof would be void and unauthorized since the Board cannot adjudicate a dispute absent a decision by a validly appointed General Counsel who decides that a charge has merit and then exercises his/her unreviewable discretion to issue a valid formal complaint. *See NLRB v. Highland Park Mfg Co.*, 341 U.S. 322, 325 (1951) (“The Board is a statutory agency, and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid.”). This error is structural in nature and cannot be repaired or rendered harmless.

Thus, the Board must dismiss the Complaint and vacate the decision of the ALJ issued thereon.

Dated: August 12, 2015

Respectfully submitted,

DLA PIPER LLP (US)



DAVID S. DURHAM
CHRISTOPHER M. FOSTER

Attorneys for Respondent
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CERTIFICATE OF SERVICE

I certify that a copy of Respondent's Motion to Dismiss was electronically served on

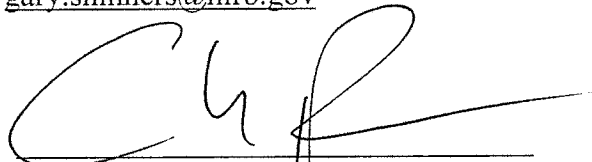
August 12, 2015 on the following:

Bruce A. Harland
Manuel A. Boigues
*Counsel for Charging Party Service Employees
International Union, United Healthcare
Workers – West*
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
bharland@unioncounsel.net
mboigues@unioncounsel.net

George P. Velastegui
Regional Director for Region 32
National Labor Relations Board
1301 Clay Street
Room 300-N
Oakland, CA 94612-5211
george.velastegui@nlrb.gov

Gary Shinnars
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
gary.shinnars@nlrb.gov

DATED this 12th day of August, 2015


Christopher Foster
DLA PIPER LLP (US)
555 Mission Street -- Suite 2400
San Francisco, CA 94105
christopher.foster@dlapiper.com