

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD¹
REGION 32**

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

and

**SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE
WORKERS - WEST**

**Case(s) 32-CA-025247
32-CA-025248
32-CA-025266
32-CA-025271
through
32-CA-025308
32-CA-025498**

**GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS
AND SUPPLEMENTAL MOTION TO DISMISS**

On March 24, 2011, Region 32 of the Board issued a Consolidated Complaint and Notice of Hearing in Cases 32-CA-025247, 32-CA-025248, 32-CA-025266, 32-CA-025271 through 32-CA-025308, and 32-CA-025498 (the Complaint), alleging that American Baptist Homes of the West d/b/a Piedmont Gardens (Respondent) committed various violations of Sections 8(a)(1), (3), and (5) of the Act. On August 12, 2015, Respondent filed a Motion to Dismiss the Complaint. On October 8, 2015, Respondent filed a Supplemental Motion to Dismiss.² In its Motions, Respondent primarily argues that the Complaint should be dismissed because it issued under Acting General Counsel Lafe Solomon, whose appointment was assertedly invalid. Pursuant to Section 102.24 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel files the following response and

¹ Herein called the Board.

² (Supp.) herein refers to Respondent's Supplemental Motion to Dismiss.

respectfully requests that the Board deny the Motion and Supplemental Motion in their entirety.

A. The Complaint Was Validly Issued

Respondent erroneously asserts that Mr. Solomon's appointment was in violation of the Federal Vacancies Reform Act ("FVRA," 5 U.S.C. § 3345, et seq.). Mr. Solomon was lawfully serving as Acting General Counsel pursuant to a valid designation under that statute when he issued the Complaint in this case. *See Benjamin H. Realty Corp.*, 361 NLRB No. 103, slip op. 1 (Nov. 13, 2014). The General Counsel recognizes that the D.C. Circuit recently held that Mr. Solomon's appointment under the FVRA in June 2010 was lawful, but that he could not continue serving after the President nominated him to be General Counsel. *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 78 (D.C. Cir. 2015), *petition for reh'g filed* (Oct. 5, 2015). However, the D.C. Circuit's holding that the President's nomination precluded further service repudiates a longstanding and consistent interpretation of the FVRA on which every President since its enactment has relied and that the Senate has accepted without recorded objection. Accordingly, on October 5, 2015, the General Counsel, on behalf of the Board and with the support of the Department of Justice, filed a petition for rehearing in *SW General* (available at <http://apps.nlr.gov/link/document.aspx/09031d4581e31d37>). As that petition demonstrates, the D.C. Circuit's conclusion is based on a misreading of the FVRA.

B. In any Event, the Current General Counsel Properly Ratified the Issuance of the Complaint and the Continued Prosecution of this Case

Even assuming Mr. Solomon's appointment was not valid, there is no basis for dismissing the Complaint. General Counsel Richard Griffin, who was appointed by the President and confirmed by the Senate in November 2013, ratified Mr. Solomon's actions in

this case in a Notice of Ratification issued September 28, 2015. Citing Section 3348(e)(1) of the FVRA, which exempts the Board's General Counsel from the FVRA provisions that would otherwise preclude ratification of actions taken by persons found to have served in violation of the FVRA, General Counsel Griffin stated that "[a]fter appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act." Respondent's claims that the ratification is invalid ignore the express provisions of the FVRA.

Congress enacted the FVRA in 1998 to bring a halt to the perceived erosion of the Senate's advice and consent powers through the indefinite filling of vacant offices requiring Presidential nomination and Senate confirmation. S. Rep. No. 105-250, 105th Cong., 2d Sess. 4-8 (1998). The FVRA prescribes who may fill such offices in an acting capacity and the length of time a designee may serve. *See* 5 U.S.C. §§ 3345-47. To enforce these new restrictions, Section 3348(d) of the FVRA renders of "no force or effect" actions taken in the performance of the functions or duties of a vacant office performed by a "person who is not acting under section 3345, 3346, or 3347," and further specifies that such actions "may not be ratified." 5 U.S.C. § 3348(d)(1) and (2). Persons who are subject to Section 3348 are by this means stripped of the ratification defense that, under the law in effect at the time of the FVRA's enactment, had often been used to defeat statutory challenges to the actions of Executive acting officers. *See* S. Rep. No. 105-250, 105th Cong., 2d Sess. 6-8.³

³ *See Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 212, 214 (D.C. Cir. 1998) (rejecting statutory challenge brought under the prior Federal Vacancies Act (which the FVRA superseded), because the temporary director of OTS, who was validly seated, ratified the earlier decision to initiate the enforcement proceeding); *Cf. FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 n.6 (D.C. Cir. 1996) (rejecting constitutional

In relying on Section 3348 to challenge General Counsel Griffin's ratification of the Complaint, Respondent refuses to accept that Section 3348(e)(1) explicitly provides that "[t]his section shall not apply to the General Counsel of the National Labor Relations Board." Thus, by the plain terms of that section, the NLRB General Counsel is exempt from all the provisions of Section 3348, including the provisions of Section 3348(d) that render actions taken by officers who were not designated in compliance with the FVRA of no force and effect and incapable of ratification.

Because the NLRB General Counsel is expressly exempted from Section 3348, the traditional ratification defense remains available. The General Counsel's ratification of the Complaint and prosecution, based on a review of the case record and consultation with staff, is in accord with judicial precedent. *See cases cited above n. 1; see also Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009) (in holding that the Board, with only two members, lacked quorum, Court suggested that "a properly constituted Board may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating previous decisions"); *Combat Veterans for Cong. Political Action Comm. v. Fed. Election Comm'n*, 795 F.3d 151, 158 (D.C. Cir. 2015) (any prejudice Combat Veterans might have suffered from FEC using improper voting procedures was rendered harmless by the Commission's subsequent ratification). Thus, the Complaint is properly pending before the Board.

Respondent asserts (Supp. 2) that Section 3348(e)(1) exempts the General Counsel only to preserve the separation between the General Counsel's prosecutorial role and the

separation of powers challenge brought against congressionally appointed FEC members in an enforcement action because, after it was reconstituted, the FEC ratified its earlier decision to proceed with litigation).

Board's adjudicatory role by preventing the "Head of the Agency" from performing the General Counsel's role pursuant to Section 3348(b) of the FVRA.⁴ From that premise, Respondent reasons that Section 3348(e)(1) "was never intended to exempt" the General Counsel from Section 3348(d)'s no-ratification provision. Supp. 2. Congress' intent is manifestly to the contrary. As shown, Section 3348(e)(1) categorically exempts the General Counsel from all subsections of Section 3348, including Section 3348(d). Congress' recognition that because of the NLRA's separation of prosecutorial and adjudication functions, members of the Board, unlike the heads of other Executive departments, could not themselves perform the General Counsel's essential duties when that office was vacant⁵ does not limit the categorical exemption of the General Counsel from the entirety of Section 3348.

Respondent's argument (Supp. 3) that a properly appointed General Counsel may have taken different and "unknowable" actions in this case does not undermine the ratification, but rather supports it. Here a confirmed General Counsel undertook a review of the investigation of the charge and prosecution, consulted with staff, and determined that the "issuance of the complaint in this case and its continued prosecution" were proper. The General Counsel's ratification of all prosecutorial actions, and not just the initial issuance of the Complaint, redresses the precise harm complained of by Respondent. Significantly, while objecting to the 2015 ratification of a 2011 Complaint, Respondent makes no claim that the ratification process denied it a full opportunity to litigate its case.

⁴ Section 3348(b) of the FVRA provides that, absent designation of an acting officer, "the office shall remain vacant" until the President appoints someone to the office, and, in that circumstance, only the head of the agency "may perform any function or duty of such office." 5 U.S.C. § 3348(b)(1) and (2). See S. Rep. No. 105-250, 105th Cong., 2d Sess. 20 (1998).

⁵ See S. Rep. No. 105-250, 105th Cong., 2d Sess. 18-19, 20 (1998).

There is also no merit to Respondent’s argument (Supp. 2-3) that any defect in Acting General Counsel Solomon’s temporary appointment was “a structural error and thus ‘subject to automatic reversal’” or “derivatively tainted” General Counsel’s ratification. The D.C. Circuit recently rejected similar arguments in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 796 F.3d 111, 121-24 (D.C. Cir. 2015). The court found that a Copyright Royalty Board decision issued by members appointed in violation of the Constitution’s Appointments Clause did not “incurably taint” a validly appointed board from issuing a new decision based on an independent, de novo review of the written record in the earlier proceeding. The D.C. Circuit concluded that the Copyright Board was not required to conduct a new hearing, and nothing in the Appointments Clause barred the Board from reaching the same conclusion as its predecessor. *Id.* at 121 (citing *Legi-Tech*, 75 F.3d at 708-09; *Doolin*, 139 F.3d at 213-14; *Andrade v. Regnery*, 824 F.2d 1253, 1257 (D.C.Cir.1987)). The court also rejected the claim that a structural error could not be remedied by an independent consideration by a properly appointed Board. 796 F.3d at 123-24.⁶

The General Counsel’s ratification of the issuance and continued prosecution of the Complaint, based on his independent review of the case record, redressed any defect stemming from Acting General Counsel Solomon’s assertedly invalid service under the FVRA. Accordingly, the Board should deny Respondent’s motion to dismiss the Complaint and to vacate the administrative law judge’s decision.

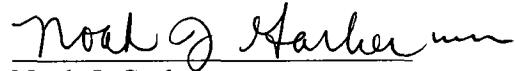
⁶ Respondent’s reliance (Supp. 2) on *Neder v. U.S.*, 527 U.S. 1, 7-8 (1999), in which the Supreme Court narrowly defined the class of errors that “are so intrinsically harmful as to require automatic reversal” is inapposite in light of these cases. 527 U.S. 1, 7-8 (1999) (citing, as examples of errors requiring automatic reversals the complete denial of counsel, a biased trial judge, racial discrimination in the selection of grand jury, denial of self-representation at trial, denial of public trial, and defective reasonable-doubt instruction) (internal citations omitted).

C. Conclusion

For the reasons set forth above, Counsel for the General Counsel respectfully requests that Respondent's Motion to Dismiss and Supplemental Motion to Dismiss be denied.

DATED AT Oakland, California this 11th day of December 2015.

Respectfully submitted,



Noah J. Garber
Counsel for the General Counsel
National Labor Relations Board
Region 32
1301 Clay Street, Room 300N
Oakland, CA 94612-5224

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Date: December 11, 2015

**AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S RESPONSE TO
RESPONDENT'S MOTION TO DISMISS AND SUPPLEMENTAL
MOTION TO DISMISS**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

David S. Durham, Esq.
DLA Piper LLP
555 Mission Street
Suite 2400
San Francisco, CA 94105
VIA E-MAIL.
david.durham@dlapiper.com

David A. Rosenfeld, Esq.
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-6430
VIA E-MAIL.
drosenfeld@unioncounsel.net

Christopher M. Foster, Attorney At Law
DLA Piper LLP
555 Mission Street
Suite 2400
San Francisco, CA 94105-2933
VIA E-MAIL.
christopher.foster@dlapiper.com

Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
VIA E-MAIL

December 11, 2015

Date

Frances Hayden, Designated Agent of NLRB

Name

Signature

