

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

HOSPITAL MENONITA DE GUAYAMA, INC.

and

Cases 12-CA-214830, 12-CA-214908,  
12-CA-215039, 12-CA-215040,  
12-CA-215665, 12-CA-217862,  
12-CA-218260, and 12-CA-221108

UNIDAD LABORAL DE ENFERMERAS(OS)  
Y EMPLEADOS DE LA SALUD

**ACTING GENERAL COUNSEL’S REPLY TO RESPONDENT’S MOTION  
IN OPPOSITION TO MOTION OF THE ACTING GENERAL COUNSEL TO THE  
NATIONAL LABOR RELATION BOARD FOR LEAVE TO WITHDRAW PORTIONS  
OF THE FORMER GENERAL COUNSEL’S BRIEFS TO THE BOARD**

On March 1, 2021, the undersigned Counsel for the Acting General Counsel filed a Motion with the National Labor Relations Board seeking leave to withdraw the argument made by the former General Counsel that the Board should overrule *UGL-UNICCO Service Company*, 357 NLRB 801 (2011), and return to the rule of *MV Transportation*, 337 NLRB 770 (2002) with respect to the successor bar doctrine, which argument had been made in the former General Counsel’s Answering Brief to Respondent’s Exceptions and Brief in Support of Cross-Exceptions in the above cases (AGC’s Motion). On March 4, 2021, Respondent filed an Opposition to AGC’s Motion. (Respondent’s Opposition).

Respondent asserts that if AGC’s Motion were granted it would be denied due process because its Reply Brief to the Counsel for the General Counsel’s Answering Brief to Respondent’s Exceptions (Respondent’s Reply Brief) was predicated on the fact that former General Counsel Peter Robb agreed with Respondent’s view that the Board should overrule *UGL-UNICCO* and return to the rule pronounced in *MV Transportation*. Respondent further argues that the

President's discharge of former General Counsel Robb was unlawful and therefore any action taken by the Acting General Counsel, Peter Ohr, is *ultra vires*. For the reasons forthwith Respondent's arguments are meritless and should be denied.

I. Respondent's due process argument is without merit.

With regard to Respondent's due process argument, the Board has recognized that "the fundamental elements of procedural due process are "notice and an opportunity to be heard." *Earthgrains Co.*, 351 NLRB 733, 735 (2007). Since the beginning of the litigation of these cases, Respondent has been on notice of the allegations that it was a successor employer and that it withdrew recognition of the Union in violation of Section 8(a)(1) and (5) of the Act, as set forth in paragraphs 3(a), 3(b), 8, 10(a) through 10(d) and 13 of the Consolidated Complaint and Notice of Hearing [GC Ex. 1(gg)]. Respondent was provided with further notice of these issues during the hearing in Counsel for the General Counsel's opening statement. (TR 31-33). The facts surrounding Respondent's successorship status and withdrawals of recognition in all five bargaining units were fully litigated at the hearing. Further, in Respondent's Exception 2 to the Administrative Law Judge Decision and Section III(H) of Respondent's Brief in Support of Exceptions, at pages 29 to 40, Respondent argued at length that *UGL-UNICCO* should be overturned and that the Board should return to the doctrine of *MV Transportation*. The fact that Respondent did not repeat this argument in its Answering Brief does not support Respondent's due process argument. In summary, Respondent was given notice and a full opportunity to litigate and argue all issues in this case, and there would be no denial of due process to Respondent if the Board were to grant the AGC's Motion.

II. Respondent’s Challenge to the Authority of AGC Ohr is Without Merit.

The Respondent also contests the question of whether AGC Ohr is acting pursuant to a lawful designation under Section 3(d) of the Act, given that the vacancy he filled was created by the removal of former General Counsel Robb. But as shown below, former General Counsel Robb was lawfully removed and AGC Ohr was lawfully designated.

A. Background: By default, federal officers are removable at the will of the appointing authority.

Before turning to the text of Section 3(d) of the Act, we believe that some background will be of assistance. The basic principle is this: in the absence of any specific statutory provision to the contrary, the power to appoint to office carries with it the power to remove from that office at will. That default rule helps ensure that the President can carry out the functions of the Executive Branch. In this section, we describe the caselaw establishing that principle. In the next section, we show that Section 3(d) does not limit the President’s power to remove the General Counsel.

Although the Constitution details how executive-branch officers may be appointed,<sup>1</sup> it is “silent with respect to the power of removal from office,”<sup>2</sup> aside from the power of Congress to impeach and convict. Through the years, therefore, the Supreme Court has repeatedly been called upon to construe the nature of, and limitations on, the power to remove officers. These cases dictate a clear standard. Where Congress has not spoken to the question of removal of an officer, that officer may be removed at any time by the person or body authorized to make the appointment.<sup>3</sup>

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<sup>1</sup> See U.S. Const., Art. II, Sec. 2, Cl. 2.

<sup>2</sup> *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839).

<sup>3</sup> *Free Enterprise Fund v. Public Co. Acct’g Oversight Bd.*, 561 U.S. 477, 493 (2010) (citing *Sampson v. Murray*, 415 U.S. 61, 70, n. 17 (1974); *Myers v. United States*, 272 U.S. 52, 119 (1926); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259-60 (1839)).

But where Congress has limited this authority, such limitations offend the Constitution where they would interfere with the President’s duty to “take Care that the Laws be faithfully executed.”<sup>4</sup>

*Parsons v. United States* established long ago that merely stating a term of years for an office did not imply any limitation upon the President’s authority to remove officials from that office.<sup>5</sup> As the Supreme Court there explained, a statute providing a four-year term of office for United States Attorneys established a limitation on the period of time for which those attorneys could hold office, but did not entitle them “to hold for four years as against any power of the President to remove.”<sup>6</sup> In short, the default rule is that the President has authority to remove, at will, officers he appoints, absent clear congressional indication to the contrary.

B. The NLRB’s General Counsel serves at the pleasure of the President.

The National Labor Relations Act neither expressly nor implicitly creates any removal protections for the General Counsel.

Section 3(a) of the Act establishes the Board, provides that members “shall be appointed for terms of five years each,” and states that “[a]ny member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.”<sup>7</sup> By contrast, Section 3(d) of the Act states that the General Counsel “shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years.”<sup>8</sup>

The plain text demonstrates that the General Counsel, unlike the Board, is not insulated from removal by the President. The Board’s tenure provisions are standard for a multi-member

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<sup>4</sup> U.S. Const., Art. II, Sec. 3, Cl. 5.

<sup>5</sup> 167 U.S. 324, 342 (1897).

<sup>6</sup> *Id.*

<sup>7</sup> 29 U.S.C. § 153(a).

<sup>8</sup> 29 U.S.C. § 153(d).

independent administrative agency.<sup>9</sup> The General Counsel’s tenure provisions—and absence of a removal restriction—are standard for an officer carrying out a prosecutorial function.<sup>10</sup> If the 1947 Congress, when creating the General Counsel position, had wanted to grant tenure protection, it would simply have cribbed the language it had already used regarding Board members in 1935. Cases too legion to count hold that the use of different language in analogous parts of the same statute requires that those sections be construed to have different meanings.<sup>11</sup> Applying the plain language according to its terms also accords with the well-entrenched default rule that removal authority follows appointment authority.<sup>12</sup> When Congress wants to alter the President’s ability “to keep [executive] officers accountable—by removing them from office, if necessary,” it does (and must) clearly express its intent to do so.<sup>13</sup>

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<sup>9</sup>*E.g.* 12 U.S.C. § 242 (Federal Reserve Act) (“each member [of the Board of Governors] shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President”); 15 U.S.C. § 41 (FTC Act) (“Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”).

<sup>10</sup> *Parsons*, 167 U.S. at 342.

<sup>11</sup> *E.g.*, *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (“This Court generally presumes that when Congress includes particular language in one section of a statute but omits it in another, Congress intended a difference in meaning.”) (cleaned up); *Intel Corp. Inv. Pol’y Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (“Instead we ‘generally presum[e] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.’”) (quoting *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 537 (1994)); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (“Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.”) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Fairbanks v. Superior Court*, 46 Cal. 4th 56, 62 (2009) (“The use of differing language in otherwise parallel provisions supports an inference that a difference in meaning was intended.”); accord *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1659 n.18 (2015) (quoting *Russello*, 464 U.S. at 23), *overruled on other grounds*, *Valley Hosp. Med. Ctr.*, 368 NLRB No. 139 (2019), *review granted and remanded sub nom. Loc. Joint Exec. Bd. of Las Vegas v. NLRB*, \_\_\_ F. App’x \_\_\_, 2020 WL 7774953 (9th Cir. Dec. 30, 2020).

<sup>12</sup> *See supra* n. 3.

<sup>13</sup> *Free Enterprise Fund*, 561 U.S. at 483.

The Act's context further supports this plain reading of its text. Here, Section 3(d)'s language reflects that Congress had every reason to want to treat the General Counsel differently from the Board with respect to tenure. The General Counsel and Board have entirely distinct functions. The Board makes rules, 29 U.S.C. § 156, issues certificates of representative, 29 U.S.C. § 159, adjudicates unfair labor practice cases, 29 U.S.C. § 160(c), and subpoenas evidence, 29 U.S.C. § 161.

In contrast, the General Counsel's sole statutory functions are to supervise attorneys and regional office officials, 29 U.S.C. § 153(d), and litigate unfair labor practice complaints, 29 U.S.C. § 160(b). In performing those functions, the General Counsel acts with significant prosecutorial discretion, holding the sole power to initiate or refuse to initiate an unfair labor practice case.<sup>14</sup> The remainder of the General Counsel's functions are delegated to that position by the Board, pursuant to Section 3(d)'s authorization to perform "such other duties as the Board may prescribe." And while the Board has delegated *executive* functions to the General Counsel,<sup>15</sup> two powers that the General Counsel has no authority whatsoever to exercise are the enactment of quasi-legislative rules under Section 6 and the adjudication of cases under Sections 9 and 10.<sup>16</sup>

In short, the General Counsel is a purely executive position under the plain text of the Act. Congress's decision to provide tenure protections for the Board-member office in no way suggests

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<sup>14</sup> *E.g.*, *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint").

<sup>15</sup> Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board, 20 Fed. Reg. 2175 (April 1, 1955), at § 1(b) (court litigation to enforce the Act).

<sup>16</sup> Regional offices do supply hearing officers in most representation and jurisdictional-dispute cases, but such hearing officers are acting on behalf of the Regional Director and the Board, respectively, and all such cases are subject to review *by the Board*, not the General Counsel. 29 C.F.R. §§ 102.67; 102.71; 102.90.

Congress intended such restrictions to implicitly extend to the very different General Counsel role. The difference in treatment of those two offices was no coincidence.

Nor is this some recent *ad hoc* interpretation of the Act. To the contrary, the Executive Branch has so understood the Act since it was enacted. Current Chief Justice John Roberts, then a member of the White House counsel's office, explained the Executive Branch position on this very question in a memorandum written in 1983.<sup>17</sup> And as that memorandum makes clear, this merely reaffirmed long-held views. *Id.*

Finally, any construction that would limit the President's power to remove the General Counsel may raise questions about whether such a construction would be constitutional.<sup>[1]</sup> If there were any ambiguity, the Board would have to construe the Act to avoid any such questions about the constitutionality of Section 3(d) the Act.<sup>[2]</sup> And given that a construction of Section 3(d) consistent with the constitutionality of the Act is not only readily available here, but also the best reading of the statute, there is no reason to follow the Respondent's invitation down the proverbial primrose path.

C. Respondent's contrary arguments are without merit.

In the teeth of this overwhelming authority, Respondent makes two brief counterarguments. First, it observes that the General Counsel has a four-year term of office pursuant to Section 3(d). (Opp. at 2, 3). As already noted above, however, the creation of a term

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<sup>17</sup> Memo from John Roberts to Fred Fielding, White House Counsel re: NLRB Dispute 1, 3 (July 18, 1983), attached as **Exhibit 1** ("clear" that General Counsel is "a purely executive officer and that the President has inherent constitutional power to remove him from office at pleasure") (cleaned up).

<sup>[1]</sup> *Seila Law*, 140 S. Ct. 2182, 2199 (2020) (unconstitutional to insulate Director of the Consumer Finance Protection Bureau from removal at the President's pleasure).

<sup>[2]</sup> *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1987).

of years for a position does not give it for-cause removal protection.<sup>18</sup> It has been standard practice for well over one hundred years for United States Attorneys to be appointed for terms of years, yet the Supreme Court in *Parsons* held squarely that such terms, without for-cause removal protection language, merely set an outer limit upon the duration of an appointment and do not allow the appointee to hold the position against the President’s will.<sup>19</sup> Respondent’s effort to reverse the standard presumption—to suggest that the absence of language *permitting* removal somehow implies that Congress wished to *prohibit* such removal—thus contravenes controlling precedent.

Second, Respondent asserts there is “no doubt” that Congress intended to provide the General Counsel with the same removal protections afforded to Board Members. (Opp. at 4). But it provides no support for its assertion, save a cursory reference to unspecified “legislative history.” (Opp. at 4). And regardless, its bare assertion is disconnected from the text of the Act. The nature of what Respondent urges—for the Board to, in effect, copy and paste its own for-cause removal provisions into Section 3(d)—far exceeds the limits of the Board’s authority. It seeks “not a construction of a statute, but, in effect, an enlargement of it by the [Board], so that what was [allegedly] omitted . . . may be included within its scope. To supply omissions transcends the judicial function.”<sup>20</sup>

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<sup>18</sup> See *supra* n.10.

<sup>19</sup> 167 U.S. at 342. Indeed, *Parsons* is so nearly on all fours with the present case that it virtually disposes of Respondent’s argument on its own.

<sup>20</sup> *Iselin v. United States*, 270 U.S. 245, 251 (1926).

In short, President Biden had the constitutional and statutory power and authority to remove former General Counsel Robb, and he exercised that power.<sup>21</sup> The AGC's authority to request withdrawal of portions of earlier briefs is thus beyond question.

Dated at San Juan, Puerto Rico, this 19<sup>th</sup> date of March 2021.

*/s/ Isis M. Ramos Meléndez*

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<sup>21</sup> *See Myers*, 272 U.S. at 119 (“This principle [that the power of removal of executive officers was incident to the power of appointment] as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since [the First Congress].”)

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Acting General Counsel's Reply to Respondent's Motion in Opposition to Motion of the Acting General Counsel to the National Labor Relation Board for Leave to Withdraw Portions of the Former General Counsel's Briefs to the Board* in the matter of Hospital Menonita de Guayama, Inc., Cases 12-CA-214830, 12-CA-214908, 12-CA-215039, 12-CA-215040, 12-CA-215665, 12-CA-217862, 12-CA-218260, and 12-CA-221108, was electronically filed with the Executive Secretary of the National Labor Relations Board and served by electronic mail upon the below listed parties on this 19<sup>th</sup> day of March 2021, as follows:

By Electronic Filing to:

Roxanne L. Rothschild  
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By Electronic Mail to:

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JGR July

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 18, 1983

FOR: FRED F. FIELDING  
FROM: JOHN G. ROBERTS *JGR*  
SUBJECT: NLRB Dispute

On July 14, Donald Dotson sent Mr. Hauser a note advising that Dotson and NLRB member Robert Hunter wanted to meet with him to "discuss alternatives" in connection with the dispute at NLRB concerning the respective powers of the Solicitor and the General Counsel. Dotson enclosed a legal analysis of the dispute and noted that it was urgent that the matter be resolved. Hauser asked that I review the question and determine (1) whether the Board had the authority to act as it did in transferring authority from the General Counsel to the Solicitor, (2) whether the General Counsel may be removed by the President, (3) if the General Counsel's defiance of the Board directive constitutes "cause" for removal of the General Counsel, and (4) how Mr. Meese's office is involved in the dispute.

I first reported on this dispute in a memorandum of May 18, 1983 (attached). You will recall that on May 4, 1983, the Board required the General Counsel to submit "all pleadings and briefs in proceedings involving enforcement, review, Supreme Court litigation, contempt, and miscellaneous litigation" to the Solicitor for his review, and directed that such pleadings and briefs may be filed only after approval of the Solicitor, acting for the Board. The Board also assumed authority to "transfer, promote, discipline, discharge" and take other appropriate personnel action with respect to NLRB attorneys engaged in the activities to be reviewed by the Solicitor. The General Counsel, however, was directed to exercise "general supervisory responsibility" over those attorneys.

The legal memorandum submitted by Dotson defends the Board's action by noting the statutory authority of the Board to "appoint... attorneys... necessary for the proper performance of its duties... Attorneys appointed under this section may, at the discretion of the Board, appear for and represent the Board in any case in court." 29 U.S.C. § 154(a). The Board recognizes that the General Counsel, under 29 U.S.C. § 153(d), has independent authority to investigate charges and issue unfair labor practice complaints. The Board's action does not affect attorneys employed in these areas. The Board maintained, however, that the General Counsel's

authority to represent the Board in court is based not on any similar statutory grant of authority but rather on a revocable delegation of authority from the Board. The Board's legal memorandum notes that a similar dispute between the Board and its General Counsel arose in 1950, and was resolved when the President requested and obtained the General Counsel's resignation.

We have not been provided with a copy of the General Counsel's legal analysis, but I understand that it focuses on the language of 29 U.S.C. § 153(d): "The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board..." This clear statutory language, according to the General Counsel, flatly prohibits any effort by the Board to place control over enforcement and appellate attorneys in the hands of the Solicitor. Simply stating, as the Board did, that the General Counsel will continue to exercise "general supervisory responsibility" over such attorneys is a meaningless assertion in the face of the Board's requirement that the Solicitor review and approve briefs and pleadings and the Board's assertion of authority over attorney promotions, disciplining, transfers, and terminations.

As I pointed out in my earlier memorandum, the Board's position is not illogical, nor does it contravene the intent of the Taft-Hartley Act, which established the office of NLRB General Counsel. It was the purpose of that Act to insulate the General Counsel from the Board with respect to the presentation of complaints before the Board. Such insulation with respect to enforcement of orders issued by the Board was not necessary (no problem of commingling adjudicative and prosecutive roles being present once the Board had issued an order), and accordingly this question was not specifically addressed by the Taft-Hartley amendments. In addition, there is a great deal of common sense appeal to the proposition that the Board should be able to control the legal arguments presented on its behalf before the courts.

On the other hand, the plain language of 29 U.S.C. § 153(d) presents a major hurdle to the Board's legal analysis. Even if the intent of Congress was only to insulate NLRB attorneys from the Board with respect to the filing of complaints, the language chosen -- giving the General Counsel "general supervision over all attorneys employed by the Board" (emphasis supplied) -- is not so limited. In sum, it is not apparent which side in this dispute would prevail if the matter were put to the proof, which in this case would presumably entail an Attorney General opinion rather than a court test.

There is a clear answer to the second query posed by Mr. Hauser. In an opinion dated March 11, 1959, Malcolm Wilkey, then Assistant Attorney General for the Office of Legal Counsel, concluded that "the General Counsel of the Board is a purely Executive Officer and that the President has inherent constitutional power to remove him from office at pleasure under the rule of Myers v. United States, 272 U.S. 52." We were advised in April of this year that the Department of Justice still adhered to the Wilkey opinion. Since the General Counsel serves at the pleasure of the President, it is unnecessary to consider Mr. Hauser's third question, viz., whether the General Counsel's conduct constitutes "cause" justifying Presidential dismissal for cause.

With respect to the fourth question, Ken Cribb advised me on July 15 that it was his understanding that Craig Fuller would be meeting with Dotson to discuss the matter, at Mr. Meese's direction. Hauser called Fuller, who seemed unaware of any such arrangement. In any event, Hauser advised Fuller that our office was looking into the matter and should be kept apprised of any developments.

In light of the NLRB's status as an independent agency, we should keep some distance from the legal dispute. Dotson may want a meeting to discuss firing the General Counsel, the step taken over thirty years ago when the NLRB was similarly deadlocked. Since such a move can only come from the President, we are inevitably involved if Dotson seeks that solution. I would, however, recommend against taking sides in the legal dispute. Dotson took this action without consulting us or, more appropriately, the Justice Department, and we should not be anxious to sleep in a bed not of our own making.