

Federal District Court in D.C. Strikes Down Removal Protections for ALJs

Labor Relations Update on **December 13, 2024**

The continued legal challenges to the constitutionality of certain aspects of the National Labor Relations Board (“NLRB”) and National Labor Relations Act (“NLRA”) took a potentially significant turn in a decision issued by the District Court for the District of Columbia on December 10, 2024.

In [VHS Acquisition Subsidiary No. 7 v. NLRB](#), the district court granted summary judgment in favor of the plaintiff Massachusetts hospital, holding that tenure protections for NLRB administrative law judges (“ALJs”) are unconstitutional and that ALJs—as executive officers—must be removable at will by the NLRB, the agency that appoints them. The district court severed the unlawful provision that ALJs may only be removed for “good cause and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”

The district court, however, did not decide that the removal restriction actually inflicted harm, such that declaratory relief was appropriate, which would have provided a basis to block cases that ALJs are currently hearing.

Background

ALJs previously enjoyed multi-tiered protections from removal, as they could only be fired by the NLRB after a determination of good cause. A good-cause determination can only be determined and established by the Merit Systems Protection Board (“MSPB”), and such a finding is only reviewable by the Federal Circuit. Furthermore, the MSPB’s and NLRB’s members are shielded from removal: members of the MSPB can only be dismissed for “inefficiency, neglect of duty, or malfeasance in office,” and NLRB members can only be removed “for neglect of duty or malfeasance in office.” Therefore, to remove an ALJ, the President’s sole course of action was to appeal to the NLRB, which would have then needed to petition MSPB for a good-cause determination.

In March 2024, the Massachusetts Nurses Association filed a charge against VHS Acquisition Subsidiary Number 7, d/b/a Saint Vincent Hospital, for several purported violations of the NLRA. The case was assigned to an ALJ for adjudication. Days before the proceeding was set to begin, Saint Vincent petitioned the D.C. District Court for a temporary restraining order, arguing that “the enforcement action violated the Constitution and that being forced to defend against it would subject the hospital to irreparable harm.” The court denied the request.

Saint Vincent then moved for injunctive relief and summary judgment against the NLRB. Although the court determined it did not have the authority to issue injunctive relief, it reached Saint Vincent’s motion for summary judgment as to the ALJ removal restrictions.

ALJ Tenure Protections Unlawful

Drawing on the Supreme Court’s holding in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) (“Free Enterprise Fund”), Judge Trevor McFadden found that the two-layered tenure protections for NLRB ALJs—one by the NLRB and the second by the MSPB, and for good cause only—are unconstitutional under Article II of the Constitution, because they foreclose the President from deciding whether good cause exists and frustrate attempts to hold ALJs accountable for “unordained and perhaps unwise” decisions.

Judge McFadden rejected the NLRB’s argument that ALJs are excepted from the holding of *Free Enterprise Fund* because they have “adjudicatory functions,” finding instead that as Executive Branch officers wielding “executive power,” ALJs must be subject to the President’s at-will removal power through the NLRB.

Judge McFadden acknowledged a circuit split on the president’s authority to remove an ALJ, with the Fifth Circuit rejecting dual-layered protections, and the Sixth, Ninth and Tenth Circuits holding the other way. Judge McFadden sided with the Fifth Circuit, criticizing the Ninth and Tenth Circuit rulings as “placing too much weight on the adjudicatory ‘functions’ of the ALJs,” and noting that the Sixth Circuit’s ruling was reversed by the Supreme Court on other grounds.

In its order, Judge McFadden declared “that the following statutory language is repugnant to the Constitution and therefore inoperative as applied to administrative law judges in the National Labor Relations Board: ‘only for good cause and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.’ 5 U.S.C. § 7521(a).” Judge McFadden then ordered that NLRB ALJs are governed by the following removal statute: “An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed.’ 5 U.S.C. § 7521(a).”

A Rising Tide?

This decision comes in the wake of ongoing challenges to the NLRB’s authority in the Fifth Circuit. Recently, the Fifth Circuit heard oral arguments in two cases challenging the constitutionality of the NLRB in several respects, which we covered [here](#). The first was *SpaceX v. NLRB*, No. 24-40315 (5th Cir. 2024), where the plaintiffs argued, in part, that the NLRB’s structure unconstitutionally limits the removal of ALJs and NLRB members. The second case was *Amazon.Com Services LLC v. NLRB*, No. 24-50761 (5th Cir. 2024), where the plaintiff presented nearly identical constitutional arguments to SpaceX and argued that an “illegitimate proceeding” presided over by an “illegitimate decision-maker” would cause irreparable injury requiring injunctive relief.

ALJs in other federal agencies have also faced challenges to their removal protections. In *Free Enterprise Fund*, cited extensively in *VHS Acquisition*, the Supreme Court held that “dual-layered” protections for the Public Company Accounting Oversight Board’s members—who can only be fired by agency leaders that are themselves also shielded from removal—were unconstitutional. Similarly, in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), the Fifth Circuit held that in securities fraud cases, defendants must be brought before a court of law where they are entitled to trial by jury, not ALJ-led proceedings. Another recent federal decision, *ABM Industry Groups, LLC v. Department of Labor et al.*, No. 4:2024cv03353 (S.D. Tex. 2024), granted the plaintiff a preliminary injunction against a pending DOL enforcement action on the basis that limiting the president’s authority to remove the ALJ was unconstitutional.

Critically, this most recent decision also comes during a broad attack on agency deference in the wake of *Loper Bright v. Raimondo* (which we covered [here](#)). While the D.C. District Court has [previously been reluctant](#) to abrade NLRB deference, this decision reflects a broader nationwide trend towards decreasing the power of executive agencies by establishing external controls on their adjudicative functions.

Takeaways

The removal of tenure protections for ALJs could potentially have wide-reaching impacts on their decision-making power. Previously, the NLRB and the federal courts were the sole methods of review for ALJ decisions, but now, the threat of removal by the NLRB directly—without the need to show good cause—provides another measure by which ALJs may be checked. The district court decision is subject to appeal before the D.C. Circuit, and could set-up a circuit split that makes its way to the U.S. Supreme Court.

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