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DC Circuit Reverses FLRA Decision Requiring NLRB General Counsel and Board to Bargain with Combined Unit of NLRB Employees

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In an important institutional decision for the National Labor Relations Board ("NLRB"), the United States Court of Appeals for the District of Columbia Circuit has reversed a decision of the Federal Labor Relations Authority ("FLRA") requiring the NLRB and its General Counsel to bargain with a combined unit of NLRB attorneys, investigators and support staff, which had previously been in separate units. *National Labor Relations Board v. Federal Labor Relations Authority,* No. 09-1119 (July 23, 2010).

In 2007 the FLRA issued a decision requiring the NLRB to bargain with the National Labor Relations Board Union ("Union") in a single bargaining unit consisting of certain employees of the Board in the same unit with certain employees of the Office of the General Counsel. Before that ruling, the Board and General Counsel had independently bargained only with separate units, each consisting only of employees of the Board or employees of the General Counsel, respectively.

Following the 2007 ruling, the then General Counsel of the NLRB, Ronald Meisburg, refused to bargain with the Union in the combined unit in order to gain judicial review of the FLRA decision. The General Counsel took the position that combining Board-side and General Counsel-side employees in the same unit undermined the independence of the General Counsel and the statutory separation between the Board and the General Counsel mandated by Section 3(d) of the National Labor Relations Act ("Act").

The Union claimed that the General Counsel's refusal to bargain with the combined unit constituted an unfair labor practice and filed a charge with the FLRA. After a hearing and appeal, the FLRA ruled in favor of the Union. The NLRB appealed the FLRA's decision to the D.C. Circuit, and the FLRA simultaneously filed a petition to enforce its decision.

In reversing the FLRA, the D.C. Circuit stated that Section 3(d) of the Act "divides responsibility over private-sector labor relations between the National Labor Relations Board and the General Counsel of the Board . . . [and grants the General Counsel] general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices." Slip Op. at 5. The principal issue was whether the FLRA's "combining Board-side and GC-side employees in the same unit, impermissibly interferes with the General Counsel's independence" created under Section 3(d). Slip Op. at 10. The court answered in the affirmative and vacated and denied enforcement to the FLRA's decision.

Among the factors supporting its decision were concerns that in the combined unit "the General Counsel would need the Board's consent in order to negotiate an agreement with the representative of his employees" (Slip Op. at 10); and concerns over "how a disagreement between the Board and the General Counsel could be resolved were one to develop" in bargaining with a combined unit (Slip Op. at 11). The court also rejected the FLRA's contention that such concerns could be addressed by cooperation between the Board and the General Counsel:

> [N]or is there good reason to assume the history of coordination between the [Board and the General Counsel] will survive consolidation of their employees into a single bargaining unit. Good fences make good neighbors, as Robert Frost observed, but the Authority proposes to take down the fence. Neither we nor the Authority can blithely disregard the potential for discord in what have hitherto been viable collective bargaining relationships.

Slip Op. at 11.

The D.C. Circuit's decision is an important judicial recognition of the principle that the independence of the General Counsel's office extends beyond the role of prosecuting complaints, and includes the function of supervising the General Counsel's personnel in the regional and headquarters offices without interference from the Board. The decision provides additional assurance to parties appearing before the NLRB that the prosecution of cases is independent of the adjudication of them, and that one body does not constitute "prosecutor, judge and jury."

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