WestRock Services, Inc. *and* Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M. Case 10–CA–195617

August 6, 2018

ORDER DENYING MOTION

BY CHAIRMAN RING AND MEMBERS PEARCE, MCFERRAN, KAPLAN, EMANUEL

On October 19, 2017, the Respondent filed a motion to dismiss the complaint in this proceeding, asserting that the Board lacks subject-matter jurisdiction because Administrative Law Judge Robert A. Ringler's appointment is invalid under the Appointments Clause of the United States Constitution. On October 26, 2017, the General Counsel and the Charging Party filed separate oppositions to the Respondent's motion. On November 15, 2017, the Deputy Executive Secretary of the National Labor Relations Board sent a letter to the parties stating that the Board had decided to take the Respondent's motion under advisement, and, pending the Board's further consideration and resolution of the motion, the parties and the judge were directed to proceed with the hearing. On June 21, 2018, the Supreme Court issued its decision in *Lucia v. SEC*, 585 U.S. ___,138 S.Ct. 2044 (2018), holding that administrative law judges of the Securities and Exchange Commission (SEC or Commission) are officers of the United States and thus are subject to the Appointments Clause. For the reasons discussed below, we deny the Respondent's motion.

The Respondent contends that the judge in this matter is an inferior officer and therefore must be appointed pursuant to the Appointments Clause. Although the Court's holding in *Lucia* was specific to SEC administrative law judges, its reasoning supports a determination that Board judges, like SEC judges, are inferior officers, and as such we agree that they must be appointed pursuant to the Appointments Clause.[1]

The Respondent further contends that Judge Ringler's appointment is constitutionally defective because he was not appointed by the President, a Court of Law, or a Head of Department, as authorized by the Appointments Clause.[2] Specifically, the Respondent argues that the Board is not a Department under that provision, claiming that the term encompasses only the Cabinet-level agencies or Executive Departments listed at 5 U.S.C. § 101, such as the Departments of State, Treasury, and Defense, or in the U.S. Government Manual. However, the Supreme Court held in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 512 (2010), that the SEC, as a "freestanding component of the Executive Branch, not subordinate to or contained within any other such component, . . . constitutes a 'Departmen[t]' for the purposes of the Appointments Clause." The Court's holding on this issue in *Free Enterprise Fund* applies equally to the Board as a "freestanding component of the Executive Branch." Therefore, contrary to the Respondent's contention, the Board is a Department within the meaning of the Appointments Clause.

We also reject the Respondent's argument that the Board's Members do not collectively constitute a Head of Department. In *Free Enterprise Fund*, the Court held that the SEC's Commissioners collectively constituted a Head of Department under the Appointments Clause. Id. at 512–513. The Court reasoned that the SEC's authority was vested in the Commissioners jointly, with a Chairman who is designated by the President and "exercises administrative and executive functions subject to the full Commission's policies." Id. at 512. Furthermore, the determination that the entire Commission was the Head of Department, the Court found, was consistent with the Reorganization Act, which provides that "'the head of an agency [may] be an individual or a commission or board with more than one member.'" Id. (quoting 5 U.S.C § 904). In *Lucia*, the Court reiterated this holding, stating of the SEC, "To be sure, the Commission itself counts as a 'Head[ ] of Department[ ]'" (138 S.Ct. at 2050) (alterations in original) (citations omitted), and noting that the parties "acknowledge[d] that the Commission, as a head of department, can constitutionally appoint [administrative law judges]," id. at 2051 fn. 3, although it further held that the administrative law judges at issue there were invalidly appointed by other staff members, rather than the entire Commission, id. at 2051, 2055.

Like the SEC, the Board collectively is a Head of Department. Section 3(a) of the Act defines "the Board" as the five members appointed by the President, with one member designated by the President as the Chairman.

[1] The General Counsel initially argued that the Board's administrative law judges are employees, but subsequently withdrew that contention.

[2] U.S. Const., Art. II, § 2, cl. 2. That provision states:

> [B]y and with the Advice and Consent of the Senate, [the President] shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Section 4(a) provides in part, "The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties."[3] Consistent with those provisions, Section 201 of the Board's Rules and Regulations states in part, "The Board appoints administrative law judges and, subject to the provisions of the Administrative Procedure Act and section 4(a) of the National Labor Relations Act, exercises authority over the Division of Judges." Pursuant to the Board's established procedures, each of the Board's existing administrative law judges has been validly appointed by the Board collectively as the Head of Department. Judge Ringler was appointed by the Board in November 2010, and he began serving as an administrative law judge in January 2011.

In sum, the Board collectively, as the Head of Department, validly appoints its administrative law judges in accordance with the Appointments Clause and has validly appointed each of its existing administrative law judges, including Judge Ringler. Therefore, we find that the Respondent has failed to show that it is entitled to judgment as a matter of law, and we deny the Respondent's motion to dismiss the complaint.

Dated, Washington, D.C. August 6, 2018

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John F. Ring, Chairman

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

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Marvin E. Kaplan, Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] The title "administrative law judge" was adopted in 5 U.S.C. § 3105 in 1978, in place of "examiners." See Pub. L. No. 95-251 §2, 92 Stat.183, 183 (1978). Sec. 3105 states in part: "Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title."