NEUTRAL NOTES

THE JACOBS CENTER FOR JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION™

February 2013

Volume II, Issue 1

LEGAL NEWS OF NOTE: D.C. CIRCUIT WREAKS HAVOC AT NLRB

The Court of Appeals for the District of Columbia Circuit threw down the gauntlet regarding "Recess" appointments by the President in Canning v. NLRB. In a decision reaching more than forty pages, the Court went back to appointments made by the very first President and discussions in the Federalist Papers to find that appointments made by the President during an intersession recess of the Congress were not "recess" appointments as contemplated by the Constitution of the United States.

The Court stated that two main principles were in effect: (1) it was not a "recess" when appointments were made by President Obama; and (2) he also lacked authority to make those appointments because the vacancy at the NLRB did not "happen" during the recess. In other words, utilizing a two-pronged analysis the Court of Appeals concluded that appointments that were made by the President to the NLRB were unconstitutional. The appointments were not made during a recess. To further complicate the analysis, the Court found, they could not have been made because recess appointments can only be made when the vacancy occurs.

The Court concluded that the Board could not have acted as it did concerning Noel Canning and the Teamsters because the Board did not have a quorum. Lacking a quorum it could not lawfully conduct business.

The decision involved a lengthy historical discussion of precedent from the founding of the Republic to present. The main issues reflecting the quorum were the ability of the

Cont'd on pg. 3, column 2

ARBITRATION UPDATE: EXEMPTIONS TO NJ ARBITRATION ACT PERMIT LIMITED VARIANCE FROM AN AWARD

The Appellate Division, in Harrison and Harrison v. Jones and Jones, et al., rejected a motion to modify an arbitration award regarding a home addition, payments thereunder, and objections to the contract. Albert Harrison (Harrison) was the owner of A&M Harrison Construction, a company that engaged in commercial and residential construction. The Joneses entered into a contract with A&M to build a 6,200 sq. ft. addition to their home at a cost of $825,000 and a written addendum in which the Joneses agreed to pay A&M an additional $150,000 for the work. The addendum stated that if A&M did not complete the work A&M would retain 30% of the $150,000 and the balance would be returned to the Joneses.

Harrison also made a personal loan of $160,000 to Dr. Jones and defendant Central Jersey Emergency Medicine Association (CJEMA).

A dispute arose concerning performance on the construction contract. The Joneses terminated the agreement in June 2009. A demand was made for money due under the construction contract and A&M filed a construction lien claiming that $257,500 was due on the contract. Plaintiffs filed a complaint against CJEMA and the Joneses seeking monies due on the loan and

Cont'd on pg. 6, column 1

INSIDE THIS ISSUE:

The Jacobs Center for Justice and Alternative Dispute Resolution is dedicated to assisting individuals and companies in resolving problems and disputes of all types.

FATAL ATTRACTION

In a decision getting a lot of ink, the Iowa Supreme Court held, in Nelson v. James H. Knight DDS, P.C., et al., that a former employee failed to establish a claim of sex discrimination where her claims included, among other things, that she was too attractive to her employer and might cause him to have difficulty in his marriage. The Court framed the issue as "[c]an a male employer terminate a female employee because the employer's wife, due to no fault of the employee, is concerned about the nature of the relationship between the employer and the employee?" The Court ultimately found no discrimination although there were no work deficiencies and Mrs. Nelson worked for the dentist for more than ten years as a dental assistant. The relationship appeared to become flirtatious with inappropriate comments made by Dr. Knight including that Mrs. Nelson's clothing was too tight, revealing, and distracting. Mrs. Nelson denied these claims and said that she put a lab coat on whenever she was asked to do so.

Probably of more consequence was the heavy texting that occurred during the last six months of the employment relationship regarding work and personal matters. Nelson considered Dr. Knight to be a friend and father figure, although he apparently fantasized more. He made comments regarding having his pants bulging and asked questions about frequency in her sex life and responding "'[T]hat's like having a Lamborghini in the garage and never driving it.'" The record also stated that Dr. Knight also texted her to ask how often she experienced an orgasm. The record does not state that an answer was provided nor does it state that Nelson was clear that she told Dr. Knight to stop texting her or that she was offended.

At some point in 2009 Dr. Knight's wife, who also worked in the practice, found her husband texting and demanded that Nelson be terminated. They consulted the senior pastor of their church who agreed. Mrs. Knight felt that Nelson was a big threat to her marriage and, among other things, objected to Nelson's "alleged coldness at work toward her (Mrs. Knight) and Nelson's ongoing criticism of another dental assistant."

As a consequence Dr. Knight terminated Nelson with the pastor present as an observer. Dr. Knight read from a prepared text and told her that she was a detriment to his family and it was best if they not work together. After more than ten years of employment he gave her one month of severance.

Nelson's husband Steve called and came in to see Dr. Knight. They spoke in the presence of the pastor. Dr. Knight admitted that there was no wrongdoing and that Nelson was the best dental assistant he ever had but that he was concerned he was getting too personally attached to her.

The only count of Nelson's complaint was sex-based termination. The lower Court concluded that she was not fired due to her gender but because she was a threat to Dr. Knight's marriage.

> COMMENT: Interestingly, Dr. Knight only employed women. No finding was made regarding his wife's obvious hostility and insecurity regarding Nelson.

The Court characterized the question it dealt with not as sexual favoritism but whether an employee who had not engaged in flirtatious conduct could be lawfully terminated because the boss "views the employee as an irresistible attraction." In Nelson, the Court rejected plaintiff's argument that her termination was sex-based and said her termination was driven "entirely by individual feelings and emotions regarding a specific person" and was "not gender-based" nor was it based on "factors that might be a proxy for gender."

> COMMENT: Curiously, that distinction seems to lack merit since the entire relationship and Knight's comments about tight pants had only to do with Nelson's gender since he only hired women and seems to have had a specific reaction to Mrs. Nelson. The Court got past this concern by stating that Knight hired a female replacement for Nelson so obviously he did not discriminate against women. Again, the fact that an individual does not discriminate against all women does not suggest that he could not have discriminated against an individual female.

The Court also seemed concerned that pursuing Nelson's argument would allow any termination related to a consensual relationship to be challenged as discriminatory. The comments by Dr. Knight appear to clearly have been inappropriate and solely based upon Mrs. Nelson's gender. On the other hand, the Court only suggested there might be a legitimate concern about discrimination if Dr. Knight had fired several female employees or that his wife demanded that he fire several females.

> COMMENT: The Court seemed to miss the point - the only reason for this decision was plaintiff's sex.

Cont'd on pg. 3, column 1

Fatal Attraction?

(*Cont'd from pg. 2*)

The Court suggested that it was not gender but really the threat to marriage that was a justification for the termination. Since there was no suggestion of any homophobic behavior, this "threat" could only have existed because of plaintiff's sex and Dr. Knight's specific reaction and interaction with Mrs. Nelson. The Court was also dismissive of a sexual harassment claim. Instead, it characterized this incident as an "isolated decision to terminate an employee before such an environment arises."

> COMMENT: Firing an employee after more than ten years of service where there is a long-standing period of banter and at least six months of texting can hardly be considered isolated.

Footnote 6, if anything, buttressed plaintiff's claim because it stated that Dr. Knight allegedly told Nelson's husband that he feared he would try to have an affair with Mrs. Nelson down the road if he did not fire her. The explanation for such a comment is likely to only have been her sex and not the fact that she was a disruption to his marriage. Even assuming, arguendo, that she was a disruption to his marriage, is it possible that the Iowa Supreme Court is now suggesting that a lawful defense to a sex harassment or sex discrimination claim is potential disruption to one's marriage regardless of work performance?

> COMMENT: This case bears watching since the facts do not seem to have been fully and adequately developed. The thesis behind the decision seems to leave out much and open the door for abuse in permitting terminations where sex was the only reason.

The Jacobs Center for Justice and Alternative Dispute Resolution™

Roger B. Jacobs, Esq.
103 Eisenhower Pkwy
Suite 103
Roseland, NJ 07068

973-226-0499 Phone
973-226-0110 Fax
jacobsjustice@gmail.com
E-mail

WWW.JACOBSJUSTICE.COM

D.C. Circuit Wreaks Havoc at NLRB

(*Cont'd from pg. 1*)

President to make recess appointments; what recess is a recess; and when does a vacancy occur.

The case itself had to do with an unfair labor practice charge against Noel Canning for failure to bargain and whether or not the parties had actually reached an agreement after bargaining in 2010. The dispute was whether or not the union had agreed to terms or was to put a proposal to a vote by its members. The company permitted the union to use a company conference room to hold the vote and the negotiators shook hands and departed. The next day Canning management e-mailed the union the wage and pension terms of the two proposals. The e-mail by the company conflicted with the union negotiator's notes which left the allocation of the increase up for a vote of the membership. When the union's negotiator called Noel Canning's president to discuss the discrepancy, the president responded that since the agreement was not in writing it was not binding. The union vote took place anyway and it was ratified by the union. When Canning advised the union that it considered the ratification vote to be a counteroffer the union ultimately filed an unfair labor practice charge regarding Canning's refusal to execute the written agreement.

The Board found a ULP and the matter was submitted for a hearing. The ALJ determined that the parties had achieved *consensus ad idem* - that Canning had, in fact, committed an unfair labor practice. The Board affirmed and the matter was submitted to the D.C. Circuit.

The Circuit Court noted that although no party raised a constitutional challenge to its jurisdiction, and no effort was made by petitioner to raise the threshold issues related to recess appointments, the Court considered whether the failure to present this objection to the Board was an "extraordinary circumstance." It found no governing precedent directly on point. The Court found an extraordinary circumstance in this case and a basis to review the Board's jurisdiction.

The Court concluded that it could exercise jurisdiction under section 10(e) of the Act because a constitutional challenge to the Board's composition created "extraordinary circumstances" excusing the failure to raise it below.

The Court circumnavigated the facts by saying that there was no order to enforce because there was "no lawfully constituted Board." It concluded that the present order "is outside the orbit of the authority of the Board because the Board had no authority to issue any order. It had no quorum…. an extraordinary circumstance within the meaning of the NLRA." Thus, using this somewhat inconsistent logic and relying upon Carroll College, Inc. v. NLRB, regarding jurisdiction over a religious institution, the Court said "[j]ust as in *Carroll College*, we hold that where the Board 'had no jurisdiction' to enter the order, 'we have authority to invalidate the Board's order even though the [petitioner] did not raise its jurisdictional challenge below.'"

Cont'd on pg. 4, column 1

D.C. Circuit Wreaks Havoc at NLRB

(*Cont'd from pg. 3)*

The Court then went through a detailed analysis of the appointments of each of the then sitting Board members and their dates of appointment. Significantly, three of the Board members were appointed by the President on January 4, 2012, pursuant to the Recess Appointments Clause of the Constitution. However, the court said that "the Senate was operating pursuant to a unanimous consent agreement, which provided that the Senate would meet in *pro forma* sessions every three business days from December 20, 2011, through January 23, 2012." The Court noted that even though the agreement stated that no business would be conducted, on December 23, 2012 of the *pro forma* session the Senate overrode its prior agreement by unanimous consent and passed a temporary extension to the payroll tax and on January 3, 2013 the Senate acted to convene the second session of the 112th Congress and to fulfill its duty to meet on January 3.

Since the Court concluded that the appointments were constitutionally invalid and the Board lacked a quorum, the petition for review was granted and the Board's order vacated.

ANALYSIS

The Court stated that "[i]t is further undisputed that a quorum of three did not exist on the date of the order under review unless the three disputed members (or at least one of them) were validly appointed." The analysis following was a lengthy discussion of the "Recess Appointments Clause" which gives the President power to fill vacancies that may happen during the recess of the Senate. The real question then becomes whether the Senate was in recess at the time of the appointments.

The Court looked carefully at the definition of "the Recess" in the Recess Appointments Clause and its application to the intercession recess of the Senate. This period is between sessions of the Senate when the Senate is, by definition, not in session and, therefore, unavailable to receive and act upon nominations from the President. The Board, according to the Court, said that a simple "recess" or break in the Senate's business was sufficient to give the President the constitutional authority to appoint. The Court characterized this position as follows:

> The Board never states how short a break is too short, under its theory, to serve as a "recess" for purposes of the Recess Appointments Clause. This merely reflects the Board's larger problem: it fails to differentiate between "recesses" and the actual constitutional language, "the Recess."

The Court relied, in part, on Samuel Johnson's Dictionary of the English Language from 1755 defining "the" to differentiate between "the Recess" and "a recess" and said this is not an insignificant distinction: "In the end it makes all the difference." It also counted that six times the Constitution used some form of the verb "adjourn" or the noun "adjournment" to refer to breaks in the proceedings of one or both houses of Congress noting that all of this points to the inescapable conclusion that the framers intended something specific by the term "the Recess."

Perhaps more simply, the Court stated that "[e]ither the Senate is in session, or it is in the recess." From that it interpolated that "[t]herefore 'the Recess' should be taken to mean only times when the Senate is not in one of those sessions." The Court also went through a detailed historical analysis and concluded that from available evidence no President attempted to make an intrasession recess appointment for 80 years after the Constitution was adopted. It found that only three documented intrasession recess appointments occurred prior to 1947 with two during the Presidencies of Calvin Coolidge and Warren Harding. Primarily relying upon the first eighty years after adoption of the Constitution, the D.C. Circuit said "we conclude that the infrequency of intrasession recess appointments during the first 150 years of the Republic 'suggests an assumed *absence* of [the] power' to make such appointments."

> COMMENT: It is unclear to me why such a historical analysis is helpful particularly since times have changed so dramatically since the adoption of the Constitution. As if to prove its point the court further noted that "[w]hile the Board seeks support for its interpretation in the practices of more recent Administrations, we do not find those practices persuasive." In other words, only the earlier practice of not making appointments is relevant and a later practice of making appointments is not relevant.

> COMMENT: Part of the problem here is that we have moved from buggy whips to ultrasonic movement in all phases including the law and we must be more adaptable than locking in to the Framers' exact language for literal interpretation.

Interestingly, the Court seems to get to the heart of the dispute when it noted that "[t]he President could simply wait until the Senate took an intrasession break to make appointments, and thus 'advice and consent' would hardly restrain his appointment choices at all."

Cont'd on pg. 5, column 1

D.C. Circuit Wreaks Havoc at NLRB

(*Cont'd from pg. 4*)

> COMMENT: In other words, the very heart of the matter has to do with the President's power to make appointments and when the President's power can be invoked. Since there actually are recesses in the Congress it is unclear why the President did not simply either wait until the actual recess or reappoint during the next recess. But, in order to make sure that even such an approach was unconstitutional the Court went further in its opinion to strike down that approach as well as if by anticipating such a move.

The Court continued by stating that a stretch of this interpretation might make it possible for the President to make appointments "any time the Senate so much as broke for lunch." The Court also raised a significant concern that part of the problem is that if the President has the discretion to determine that the Senate is in recess there is a significant challenge to the notion of separation of powers.

The Court chose to rely most heavily on the "dearth of intrasession appointments in the years and decades following the ratification of the Constitution" as far more significant than other considerations. The Court concluded that that "dearth" in the years and decades following the ratification "speaks far more impressively than the history of recent presidential exercise of a supposed power to make such appointments."

> COMMENT: It is unclear why such a balance is accurate particularly since failure to challenge this power earlier may also be viewed as acquiescence.

The Court concluded that the recess is limited to intersession recesses; the Board lacked the quorum of three members when it issued the decision in this case; and its decision must be vacated.

While Circuit Judge Griffith, concurring, said he would "stop our constitutional analysis there," meaning at this particular point, his two colleagues (on the D.C. Circuit) did not and went into a lengthy discussion on the meaning of "happen" in the Recess Appointments Clause. Through a similarly detailed and historical analysis, the Court concluded that recess appointments can only be made when the vacancy occurs during the actual recess, rejecting the Board's interpretation. The Board argued that "the vacancy need merely exist during 'the Recess' to trigger the President's recess appointment power." The Court, again, went back to George Washington's Presidency and discussed the appointment and vacancies when folks left Washington. Appointments were made in their absence and ratification was sometimes delayed. Obviously, communications, travel, and everything else, have changed since the first President took office.

Other circuit courts had adopted a different interpretation of this point not focusing their analysis on the original public meaning of the word "happen." This division suggests the matter will ultimately be resolved by the Supreme Court.

Practically speaking, the majority noted that Congress chose not to provide for acting NLRB members and could have done so if it chose to do so. But, in light of the extrinsic evidence regarding the meaning of "happen," the Court held that "the President may only make recess appointments to fill vacancies that arise during the recess." Thus, in the instant dispute since the relevant vacancies did not arise during the intercession recess of the Senate itself, those appointments were invalid the Court ruled.

The court concluded that the President must make the recess appointment during the same intersession recess when the vacancy for that office arose concluding that "[c]onsistent with the structure of the Appointments Clause and the Recess Appointments Clause exception to it, the filling up of a vacancy that happens during a recess must be done during the same recess in which the vacancy arose."

Practical Note: By its decision, the D.C. Circuit has invalidated at least the Board majority in Canning and perhaps innumerable other cases. As of this writing the President has, in fact, re-nominated each of those recess appointments for full appointment on the Board. However, the more significant constitutional and legal issue is what happens to other recess appointments at other agencies and to the decisions made relying upon the votes of those bodies.

The Canning decision no doubt will have a huge impact on administrative decisions throughout the entire federal system. Several options are possible including legislative change by Congress; or a clarification by the Supreme Court regarding the nature of "recess" appointments; and whether or not the vacancy must occur during the recess. By requiring the "vacancy" to occur during the recess, the D.C. Circuit has perhaps forced the President's hand to make very rapid appointments at the time of the expiration of the term. Assuming such an appointment would be consistent with the court's opinion and an actual recess occurred, the appointments would be valid. The more complicating factor seems to be that the vacancies might not occur during a recess thereby making it impossible to make recess appointments consistent with the expiration of terms. Surely, Canning is a historic decision that bears watching in all three branches of our democracy.

Exemptions To NJ Arbitration Act Permit Limited Variance From An Award (*Cont'd from pg. 1)*

the construction contract. The Joneses then filed a third-party complaint against A&M asserting claims under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20 as amended by the Contractors Registration Act N.J.S.A. 56:8-136 to –152, and the home improvement regulations adopted by the Division of Consumer Affairs, N.J.A.C. 13:45A-16.1 to –17.14. The Jones filed a motion for summary judgment and partial summary judgment was granted. The judge found that A&M:

> (1) failed to include its contractor registration number on the contract in violation of N.J.A.C. 13:45A-17.11(d)(2); (2) did not include a provision allowing the Joneses to cancel the construction contract within three days after they received it, as required by N.J.S.A. 56:8-151 (b); and (3) did not attach its certificate of commercial general liability insurance to the contract, as required by N.J.S.A. 56:8-151(a)(2). The order also stated that the Joneses' application for summary judgment on their claim for damages and an award of counsel fees, pursuant to the CFA, was denied without prejudice.

A few months later the Joneses, CJEMA, and A&M agreed to submit the remaining issues to binding arbitration. An arbitrator was appointed and held ten days of hearings and issued a written decision and award on February 17, 2012. In the decision, the arbitrator noted that he was bound by the motion judge's determination that A&M had committed certain technical violations of the CFA and home improvement regulations.

However, the arbitrator found "that the Joneses had not established that they sustained an 'ascertainable loss' as a result of those technical violations, which is required for the award of damages under the CFA." The arbitrator found while the Joneses incurred additional costs to complete their home, they were aware of the additional costs, and they permitted the scope of the project to expand. The arbitrator stated that the amount charged by A&M for the work outside the original scope of the contract was reasonable and completed in a workmanlike manner. The arbitrator also found that the Joneses' failure to establish an ascertainable loss did not preclude the award of attorney's fees.

The arbitrator determined that the Joneses were entitled to a credit of $45,800 for certain building allowances due to them under the construction contract and found they were entitled to $75,000 for legal fees incurred to remove the construction lien improvidently filed by A&M. The arbitrator also ruled that A&M had not presented evidence to support its claim that the additional construction manager fees were justified. The arbitrator found that Dr. Jones and CJEMA owed Harrison $155,000 on the loan.

The Joneses moved to modify the award and plaintiffs sought an order confirming the award. The court entered an order denying the Joneses' motion and granting plaintiffs' motion and the matter moved to the appellate division. The Joneses argued that trial court erred by refusing to award them damages and fees.

The appellate panel focused on the fact that the matter had been submitted to binding arbitration. The Arbitration Act in New Jersey allows a court to vacate an arbitration award on six grounds:

> (1) the award was procured by corruption, fraud or undue means;
> (2) the court finds evident partiality by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
> (3) an arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to [N.J.S.A. 2A:23B-15], so as to substantially prejudice the rights of a party to the arbitration proceeding;
> (4) an arbitrator exceeded the arbitrator's powers;
> (5) there was no agreement to arbitrate,...; or
> (6) the arbitration was conducted without proper notice…. [N.J.S.A. 2A:23B-23(a).]

The Act also provides a basis for a court to modify or correct an arbitration award when:

> (1) there was an evident mathematical miscalculation or an evident mistake in the description of the person, thing or property referred to the award;
> (2) the arbitrator made an award on a claim not submitted to the arbitrator…; or
> (3) the award is imperfect in a manner of form not affecting the merits of the decision on the claims submitted. [N.J.S.A. 2A:23B-23(a).]

The appellate division was very clear that the Joneses' claim of legal error by failing to award them treble damages and counsel fees under the CFA was not a cognizable basis to set aside the award where the parties had not agreed to expand the scope of judicial review. The court found that the Joneses did not establish any basis for the award of damages under the CFA. The court said the motion judge found that A&M committed certain "technical violations of the CFA and the home improvement regulations." The arbitrator determined that they sustained no monetary loss as a result of those violations. Instead, the arbitrator awarded the Joneses $45,800 as a result of A&M's statutory and regulatory violations.

The court also concluded that the arbitrator's refusal to award counsel fees was not a basis to modify the award. The appellate court concluded that neither N.J.S.A. 2A:23B-23(a) or –24(a) empowered the court to modify the award or find that the arbitrator's denial of counsel fees was a basis to set aside the arbitrator's award.

Practice Tip: Arbitration agreements should be spelled out. Parties seeking to litigate and arbitrate should make sure that the basis for the arbitration is clear and the parameters of the arbitrator's authority are in writing and specific. Few exceptions to the parties' agreement for arbitral authority permit courts to intervene. Adherence to the exceptions in the Arbitration Act generally govern.