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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 RONALD K. HOOKS, Regional Director
7 of the Nineteenth Region of the National
8 Labor Relations Board, for and on behalf
9 of the NATIONAL LABOR RELATIONS
10 BOARD,

Petitioner,

v.

11 KITSAP TENANT SUPPORT
12 SERVICES, INC.,

Respondent.

CASE NO. C13-5470 BHS

ORDER GRANTING
RESPONDENT'S MOTION
TO DISMISS

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14 This matter comes before the Court on Respondent Kitsap Tenant Support
15 Services, Inc.'s ("Kitsap") motion to dismiss (Dkt. 12). The Court has considered the
16 pleadings filed in support of and in opposition to the motion and the remainder of the file
17 and hereby grants the motion for the reasons stated herein.

18 **I. PROCEDURAL HISTORY**

19 On June 13, 2013, Petitioner Ronald K. Hooks ("Hooks"), Regional Director for
20 Region 19 of the National Labor Relations Board (the "Board"), filed a petition for
21 preliminary injunctive relief pursuant to § 10(j) of the National Labor Relations Act.
22 Dkt. 1.

1 On July 18, 2013, Kitsap filed a motion to dismiss. Dkt. 12. On August 5, 2013,
2 the Board responded. Dkt. 14. On August 9, 2013, Kitsap responded. Dkt. 41.

3 **II. FACTUAL BACKGROUND**

4 The Board consists of five members who are appointed for five-year terms by the
5 President with the advice and consent of the Senate. 29 U.S.C. § 153(a).

6 On January 4, 2013, President Obama appointed members Terence Flynn,
7 Shannon Block (“Block”) and Richard Griffin, Jr. (“Griffin”) to the Board. Although the
8 Senate was in session that day, President Obama chose not to nominate these individuals
9 for confirmation by the Senate.

10 On February 28, 2013, Hooks issued an Amended Consolidated Complaint in the
11 underlying administrative action. On March 27, 2013, Hooks subsequently issued a
12 Second Amended Consolidated Complaint, which was then amended on April 16, 2013.
13 On May 28, 2013, Hooks again amended the Complaint.

14 On July 16, 2013, the President submitted new nominations to the Board. On July
15 30, 2013, the Senate confirmed all five positions on the Board.

16 **III. DISCUSSION**

17 The Recess Appointment clause provides that the President “shall have Power to
18 fill up all Vacancies that may happen during the Recess of the Senate, by granting
19 Commissions which shall expire at the End of their next Session.” U.S. Const. art. II, §
20 2, cl.3.

21 In this case, Kitsap contends that the Board is without power to act because it
22 lacks a properly appointed quorum. Kitsap has provided numerous recent cases for the

1 proposition that “Recess” means the period of time between an adjournment *sine die* and
2 the start of the Senate’s next session. *See* Dkt. 41 at 2–3 (listing cases). While none of
3 these cases are binding, the Court has reviewed each case and finds the legal analysis
4 persuasive. There is no need to add to what is thoroughly explained in *N.L.R.B. v.*
5 *Enterprise Leasing Co. Southeast, LLC*, --- F.3d ----, 2013 WL 3722388 (4th Cir. 2013),
6 and *N.L.R.B. v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3rd Cir. 2013).
7 Therefore, the Court adopts the reasoning in these cases and holds that “Recess” in the
8 Recess Appointment Clause means the period of time between an adjournment *sine die*
9 and the start of the Senate’s next session.

10 As applied to the facts of this case, Hooks was without power to file the
11 complaints against Kitsap in the underlying administrative matter. A petition for
12 injunctive relief brought under Section 10(j) may be brought only “upon issuance of a
13 complaint as provided in [29 U.S.C. § 160(b)].” 29 U.S.C. § 160(j). Without a valid
14 complaint, Hooks is precluded from filing a petition for preliminary relief. Therefore, the
15 Court grants Kitsap’s motion to dismiss on this issue.

16 Hooks contends that, even if the Board lacks authorization, the actions of the
17 Acting General Counsel Lafe E. Solomon (“Solomon”), including his delegation of
18 authority to initiate legal action to Hooks, are still valid. First, Hooks asserts that
19 President Obama validly appointed Solomon pursuant to the Federal Vacancies Reform
20 Act (“FVRA”), 5 U.S.C. § 3345, *et seq.* Dkt. 13 at 14–21. The FVRA, however, only
21 permits the appointment of a person under specific circumstances and the only
22 circumstance that could apply to Hooks is appointing a person who, within the last 365

1 days, has served as a personal assistant to the departing officer. *Id.* § 3345(b). It is
2 undisputed that Solomon has never served as a first assistant. Therefore, Hooks's
3 argument is without merit.

4 Second, Hooks contends that the actions of Solomon are exempted from the
5 penalty provisions of the FVRA and are, therefore, valid. Dkt. 13 at 17. Hooks is correct
6 that the actions of Solomon are exempted from the penalty provision. This fact, however,
7 does not grant him the authority to act pursuant to an improper appointment. Therefore,
8 Hooks's argument is without merit.

9 **IV. ORDER**

10 Therefore, it is hereby **ORDERED** that Kitsap's motion to dismiss (Dkt. 12) is
11 **GRANTED** and Hooks's petition is **DISMISSED**.

12 Dated this 13th day of August, 2013.

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BENJAMIN H. SETTLE
16 United States District Judge
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