

Ole! The 6th Circuit Side-Steps The Noel Canning Challenge And Issues Pro-Employer Ruling On 'Supervisor' Issue

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Just before the Fourth of July, the 6th Circuit delivered a favorable ruling for employers while avoiding the quicksand of *Noel Canning*. In *GGNSC Springfield LLC v. NLRB*, No. 12-1529 (6th Cir. July 2, 2013), the Sixth Circuit reversed the Regional Director's decision and found that a number of Registered Nurses (RNs) were supervisors for purposes of the NLRA thereby relieving the employer of the obligation to collectively bargain with the RNs. [The Court found](#) that the RNs exercised sufficient independent judgment when issuing discipline to constitute supervisor status under the governing *Kentucky River* standard.

Notwithstanding the substantive determination, this decision is most significant for the procedural maneuvering by the Court to avoid getting enmeshed in the *Noel Canning* controversy. First, the Court found that "[e]rrors regarding the appointments of officers under Article II are 'nonjurisdictional.'" Thus, the Court found, because the employer's challenge to the NLRB's authority is not jurisdictional, the Court is not compelled to consider it. Next, the Court held that it need not consider whether the employer forfeited its *Noel Canning* argument by not raising it initially on appeal because the Court was granting relief on "the basis of its non-constitutional challenge."

This decision is instructive to employers for purposes of structuring the duties of supervisors and also a powerful reminder to raise the *Noel Canning* challenge from the outset of – and throughout – the litigation.

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