Banking and Finance Law Daily Wrap Up, DIRECTORS, OFFICERS AND EMPLOYERS—D.D.C.: Court reinstates NCUA Board members, (Jul. 23, 2025)

Banking and Finance Law Daily Wrap Up

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By Sherri M. Schroeder, J.D.

The court found the April 2025 termination of Harper and Otsuka from the NCUA Board to be unlawful and declared that the Board members may be removed by the President only for cause.

The U.S. District Court for the District of Columbia has issued a Memorandum Opinion and Order declaring the terminations of National Credit Union Administration (NCUA) Board members Todd M. Harper and Tanya F. Otsuka to be unlawful. President Trump nominated, and the Senate confirmed, Harper and Otsuka to fixed, six-year terms on the NCUA Board that began in 2022 and 2024, respectively. In April of 2025, a White House office emailed both stating, "On behalf of President Donald J. Trump. I am writing to inform you that your position on the National Credit Union Administration is terminated, effectively immediately." The Board members filed suit, claiming their removals were *ultra vires*, violated the Administrative Procedure Act (APA), and violated the separation of powers as outlined in the U.S. Constitution (see *Banking and Finance Daily*, Apr. 29, 2025). After both parties moved for summary judgment, the court entered an order granting summary judgment in favor of the Board members, denied the government's cross-motion, and declared the Board members' terminations to be unlawful, stating that the NCUA Board members may be removed only for cause (*Harper v. Bessent*, No. 25-01294 (AHA) (D.D.C. July 22, 2025)).

At-will removal. The court first looked to whether the 1978 amendments to the NCUA statute afforded protection from at-will removal by the President. In accordance with D.C. Circuit precedent, the court looked to the NCUA statute's plain text and history and the agency's statutory structure and function to determine whether Congress imposed a removal restriction. In the NCUA statute's 1978 amendment, Congress specified that Board members would have staggered six-year terms, with no more than two members affiliated with the same political party. As the D.C. Circuit explained in *Swan v. Clinton*, the legislative history "is revealing" and shows "the Senate Banking Committee believed the six year terms would protect NCUA Board members from at will removal during their appointed terms." In addition, the 1978 amendment removed the statute's prior text stating that NCUA agency leadership served "at the pleasure of the President." According to the court, "In arguing that Board members nonetheless serve at the pleasure of the President, the government asks this Court to read that language back into the statute even though Congress took it out." As to the agency's structure and function, the court concluded the structure of the NCUA's Board closely tracked the traditional multimember board held by the Supreme Court to have removal protection in *Humphrey's Executor*. The court also found that the NCUA's function supported removal restrictions because it has both "quasi-judicial and quasi-legislative functions that are deemed to be operationally incompatible with at-will Presidential removal," according to *Severino v. Biden*.

Separation of powers. The court next considered whether Congress's removal restriction was constitutional. In *Seila Law*, the Supreme Court recognized two exceptions to the President's unrestricted removal power. Apropos here, the first exception applies to "multimember expert agencies that do not wield substantial power." In concluding that the leadership of the Consumer Financial Protection Bureau by a single director with for-cause removal protection violated the separation of powers, the *Seila Law* Court was careful to emphasize that it was "not revisit[ing] *Humphrey's Executor* or any other precedent," which still remained "good law." According to the court at hand, "The NCUA Board fits at the core of the *Humphrey's* exception. The Board is designed in the classic pattern of a multimember, bipartisan, expert agency that does not exercise substantial executive power." The court also stated, "At the end of the day, the government does not point to any difference at all between the

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agencies with respect to the relevant executive power analysis. The overlap in powers wielded by the NCUA Board and the Federal Reserve, and their common role as financial regulators, supports the conclusion that Congress can insulate NCUA Board members from at-will removal." Therefore, the court found that Congress's for-cause removal restrictions for NCUA Board members did not pose any constitutional problem.

Remedy. Finally, the court looked to the proper remedy for the unlawful removals. Here, the court concluded that the Board members were entitled to declaratory and injunctive relief. The court noted that other courts in its district that found the removal of independent agency members unlawful concluded "a declaratory judgment would serve a useful purpose to clarify the legal relations between the parties and afford relief from the underlying challenged actions." Therefore, the court at hand declared the Board members' terminations unlawful and declared they may be removed by the President prior to the expiration of their terms only for cause.

The court also found it proper to order injunctive relief in the form of reinstatement. The court found no support in D.C. Circuit precedent, "which makes clear that reinstatement is available," for the government's position that the court lacked the authority to reinstate principal executive officers removed by the President. The court also found that the Board members were entitled to permanent injunctive relief because they demonstrated irreparable injury, inadequate remedies at law, and a balance of equities and the public interest that weighed in favor of injunctive relief. Therefore, the court declared that Bessant and the other named government defendants were enjoined from removing without cause the Board members from office during their terms, from treating them as if they had been removed, from impeding their ability to fulfill their duties, and from denying or obstructing their authority or access to any benefits or resources.

Statement. Senator Elizabeth Warren (D-Mass.), Ranking Member of the Senate Banking, Housing, and Urban Affairs Committee, released a statement calling the court's decision "a win for credit unions, consumers, and our economy." She also noted, "We will keep fighting to make sure the agency can do its job for the American people—and fighting back against the Trump Administration's lawless actions."

The case is No. 25-01294 (AHA).

Judge: Ali, A.

Attorneys: Christopher Kim (Holwell Shuster & Goldberg LLP) for Todd M. Harper and Tanya F. Otsuka. Elisabeth Neylan, U.S. Department of Justice, for Scott Bessent, Larry Fazio, Kyle S. Hauptman, Trent Morse and Donald J. Trump.

Companies: National Credit Union Administration

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