



United States Government

NATIONAL LABOR RELATIONS BOARD

Office of the Chairman

1015 Half Street, SE

Washington, DC 20570

VIA ELECTRONIC MAIL TO director@oge.gov

January 9, 2020

The Honorable Emory A. Rounds, III
Director, Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, D.C. 20005

Dear Director Rounds:

I am in receipt of your December 19, 2019 letter regarding the National Labor Relations Board's *Ethics Recusal Report*.

I appreciate your plaudits and those of your staff for the NLRB's efforts in undertaking our comprehensive ethics recusal review and for our development of an overarching mechanism to handle complex and novel Board member recusal issues. The Board worked diligently on its *Ethics Recusal Report* with the goal of full compliance with all government ethics requirements and stakeholder confidence in the NLRB's ethics standards.

As you and your staff know, we sought guidance from OGE throughout our review and in drafting our report, although all but one of the communications were done in conversation solely between the NLRB's DAEO and our OGE desk officer, at OGE's request. Thus, our DAEO orally conveyed relevant sections of the report to our OGE desk officer, received oral responses, and then orally transmitted the feedback to NLRB staff working on the report. It is regrettable that OGE declined our request to review in writing the relevant sections of the report before it issued, as perhaps that could have avoided some of the concerns you have now noted to us. Nevertheless, based on our DAEO's communications with OGE, we made many revisions to the report. We also understood certain aspects of the report, most particularly the disqualification protocol, had been orally approved by OGE once recommended changes had been made.

As I understand from your letter and a conversation last month between members of our staffs, OGE agrees that the NLRB has developed a reasonable and effective process for resolving disqualification disputes between the DAEO and a Board member. This robust protocol appropriately features an internal interactive process, informal consultation with OGE, reporting to the President and Congress, and potential judicial review. We appreciate OGE's support for the Board's solution to this novel problem.

In your letter and in last month's staff conversation, however, OGE identified a concern with the report's characterization of OGE as having any formal role in reviewing the DAEO's disqualification determination and ordering corrective action if necessary. If we understand it

correctly, that concern turns on the meaning of OGE’s regulations regarding “Corrective Action Involving Individual Employees,” found at 5 C.F.R. §§ 2638.501-504, which implement Section 402(f)(2) of the Ethics in Government Act. We acknowledge that those regulations contemplate OGE corrective action *only* in limited situations when agencies do not enforce a disqualification determination. *See* 5 C.F.R. § 2638.501. In consultation with our DAEO, we concluded that, if a Board member disagreed with a DAEO disqualification determination, it would likely constitute one of those “limited situations.” In such a case, the Board would be unable to enforce the disqualification determination because the Chairman – as agency head under OGE regulations – is only the “first among equals” and has no supervisory authority over fellow members.

Thus, we understood that in the rare circumstance where a Board member has refused to comply with the DAEO’s disqualification determination, a notification to OGE could trigger the process set forth in 5 C.F.R. § 2638.504, under which “the Director may use the procedures of this section if the Director has reason to believe that an employee is violating, or has violated, any noncriminal ethics law or regulation.” Those procedures culminate in a potential order against the employee directing corrective action. 5 C.F.R. § 2638.504(b)-(i). That order, if issued, would provide substantial support for the DAEO’s determination, due process for the affected Board member, and moral authority to encourage compliance.

In communications with OGE through our DAEO during the drafting of the report, we were advised that OGE did not view the hearing as *necessarily* applicable to a Board member’s non-compliance with a DAEO determination. Neither the Ethics in Government Act nor OGE regulations, however, explicitly *preclude* a hearing in such circumstances. In fact, as noted, the hearing seems to be a logical and advisable response. Moreover, when questions arose in connection with the Board’s *Hy-Brand* matter why the disqualified member was not given a hearing before he was removed from the case (detailed in the report, at 40-48), the response provided was that the Board member should have requested one, not that it was unavailable. For these reasons, without any official written OGE guidance, and not presuming to interpret OGE’s regulations to omit a process contained in both the regulations and the underlying statute, we drafted the report noting that the statutory language of the Ethics in Government Act provides for an investigation and hearing under the circumstances.¹

¹ The Ethics in Government Act, 5 U.S.C. App., Sec. 402 et seq., provides that the Director of OGE is responsible for “ordering corrective action on the part of agencies *and employees* if he deems it necessary.” Sec. 402(b)(9) (emphasis added). In turn, the provisions of Section 402(f)(2) seemingly provide authority and process for the Director to investigate non-compliance, order corrective action, and recommend discipline. Specifically, in drafting the report, we relied upon the following provisions of the Ethics in Government Act:

- Sec. 402(f)(2)(A)(ii)(I). If the OGE Director has reason to believe that an officer or employee has violated an ethics rule, he may recommend that the agency head investigate the possible violation and take appropriate disciplinary action; and he is required to notify the President if the agency head does not conduct an investigation.
- Sec. 402(f)(2)(A)(iii). If the OGE Director finds that an officer or employee is violating an ethics rule, he may order that individual to take specific action such as recusal; and if the individual does not comply, the Director is required to notify the agency head regarding the noncompliance. (If the officer or employee is the agency head, the notification is to be made to the President.)

Based on the concerns you raise in your letter, we now understand that a hearing would *not* be an option, and, moreover, that OGE would not initiate corrective action proceedings under its regulations in the event of Board member non-compliance with a DAEO disqualification determination. OGE does not view those regulations as applicable to Board member non-compliance with a recusal obligation. Accordingly, under the NLRB protocol developed and set forth in ES Memo 19-1, the process would proceed without a role for OGE, except for the Board's DAEO ensuring OGE's general situational awareness and obtaining informal behind-the-scenes advice.

As noted, our goal in drafting the report was always full compliance with government ethics requirements. We are certainly willing to amend our report to assure OGE that the Board will not attempt to invoke OGE's regulatory corrective action framework, and we want to avoid characterizing ethics procedures in a way that may be misconstrued. Unfortunately, your letter provides no specific guidance, other than to ask us to remove provisions suggesting OGE will adjudicate disagreements between Board members and the DAEO. Based on the instructions you have provided, I am attaching our attempt to amend the provisions of the report as you request. We will assume these revisions address your concerns unless we hear otherwise from OGE.

One area that remains particularly unclear, however, is the notice requirements to OGE. In our report, we state that the Board has an obligation to provide notice to OGE of Board member non-compliance and that providing such notice would ensure that other Board members did not violate their ethical responsibilities. Report at 25. On page 2 of the addendum to your letter, you highlight that conclusion as objectionable. We are extremely troubled that you have flagged this as objectionable, as this provision of the report was based directly on guidance from OGE as communicated through our DAEO. We have not made any proposed amendments to that language. If your intent is that we do so, please advise us as to what those revisions should be.

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- Sec. 402(f)(2)(A)(iv). If the OGE Director finds that an officer or employee is violating or has violated an ethics rule, he may recommend to the agency head that appropriate disciplinary action be taken; and he may notify the agency head if the individual does not take such action. (If the officer or employee is the agency head, the recommendation is to be made to the President.)
 - Sec. 402(f)(2)(B)(i). The OGE Director may conduct investigations and make findings concerning possible violations of ethics rules by officers and employees of the executive branch.
 - Sec. 402(f)(2)(B)(ii)(I). Before the Director makes any finding that an officer or employee has violated an ethics rule, the employee must be given notification of the alleged violation and an opportunity to comment on the allegation.
 - Sec. 402(f)(2)(B)(iii). Before any action is ordered against an officer or employee because of the violation of an ethics rule, the employee "*shall be afforded an opportunity for a hearing,*" which must be conducted on the record. (Emphasis added).
 - Sec. 402(f)(3). The OGE Director is required to send a copy of any order finding a violation of an ethics rule to the officer or employee and to the agency head. (If the officer or employee is the agency head, the order is to be sent to the President.)

Director Rounds, OGE
January 9, 2020
Page 4

We trust this letter addresses your concerns. As an Agency committed to upholding the highest ethical standards, the NLRB appreciates your continued assistance in providing clear, authoritative interpretative guidance on ethics laws.

Sincerely,

A handwritten signature in black ink that reads "John F. Ring". The signature is written in a cursive style with a large, looping initial "J".

John F. Ring
Chairman

Cc: The Board
Lori Ketcham, Designated Agency Ethics Official, NLRB
Fred B. Jacob, Solicitor

Errata Sheet for the National Labor Relations Board’s Ethics Recusal Report
January 9, 2020

Page 17

“Through subsequent discussions, ~~OGE identified~~ the enforcement mechanisms that come into play when a Board member disagrees with a DAEO recusal determination **were identified**. These mechanisms allow the Board member the ability to challenge that determination by seeking a higher-level review. The Standards of Conduct (~~5 C.F.R. §§ 2638.501–504~~) provide that where a DAEO decision is challenged, certain notifications are required. Internally, the Chairman must be notified, as the head of the Agency. Where a Board member pursues his or her dispute of a DAEO recusal determination beyond the head of the Agency, that continued disagreement would require external reporting ~~to OGE and~~ potentially to the Department of Justice and/or the White House.”

Page 33

~~“In addition to these external notification and enforcement procedures, the Ethics in Government Act provides a Board member who disagrees with a DAEO disqualification determination the opportunity to request an investigation and hearing, in which the Board member's position presumably would be fully reviewed.”~~

Page 34

“Through this Review and with the concurrence of ~~OGE and~~ the DAEO, the Board has been able to resolve this issue and answer this complex legal ethics question as follows: The DAEO’s expert guidance and disqualification determinations are worthy of respect and should be presumptively followed by all agency employees, including Board members. However, there may be unusual circumstances in which an individual Board member disagrees with a DAEO’s recusal determination. In that rare case, although the DAEO’s determination is considered "binding," it is not self-enforcing, which means that the Board member can ~~invoke statutory process to challenge the~~ DAEO’s recusal determination, and, ultimately, insist on participating in the matter.”

Page 35

“In addition, if the member insists on participating in the matter notwithstanding the opposition of ~~OGE,~~ the DAEO, and potentially the IG and DOJ, the Chairman of the Agency will notify the President (who has supervisory authority over the Board members) and may inform the Agency’s Congressional oversight committees.¹⁶ Of course, the member may be correct, ~~and if OGE agrees with the member that the DAEO’s determination was incorrect,~~**in which case** there will be no need for Presidential or Congressional **oversight action**.

The Review also resolved the question regarding the obligation of other Board members who participate in a matter with a Board member who is challenging a DAEO disqualification determination. According to OGE, the Agency institutionally has certain ethics "objectives and obligations," which include providing Board members with ethics guidance and notifying OGE of any noncompliance with ethics

rules. Therefore, Board members could have an individual obligation to report a fellow Board member's non-compliance. OGE has advised that these guidance and notice obligations can be satisfied for the Agency as well as for individual Board members if the Board adopts a recusal procedure that includes notification to OGE of a Board member's decision to participate in a matter despite the DAEO's recusal determination."

"Notably, an employee of any level may choose not to comply with a DAEO's determination. For a career federal employee, refusal to comply with the DAEO's determination will likely result in reassignment of a particular matter and may be grounds for a misconduct action under 5 U.S.C. Sections 7501-7515; for a presidential appointee, refusal to comply with a DAEO determination will be adjudicated by OGE and the President." (footnote 16)

Report Appendix 3; E.S. Memo 19-1, Page 3-4

"STEP FOUR: Mandatory External Notifications of Non-Compliance by Board Member with DAEO Recusal Determination

- Other Board members notified of status for situational awareness.
- ~~The DAEO refers the recusal determination to the Director of the Office of Government Ethics~~
 - ~~If non-criminal, OGE reviews and enforces under 5 C.F.R. § 2638.501 and 504.~~
 - ~~Under these procedures, the Interactive Process may continue with OGE's assistance.~~
 - ~~OGE will review the determination and may initiate proceedings to direct the Board member to comply with the recusal determination under OGE rules and the Ethics in Government Act.~~
 - ~~If criminal (18 U.S.C. § 208), OGE rules require the Director of OGE to refer the matter to the Board's Inspector General (IG) or the Department of Justice, per 5 C.F.R. § 2638.502.~~
- The Chairman and/or DAEO also may refer the Board member's refusal to comply with the recusal determination to the IG, and, if a criminal conflict of interest under 18 U.S.C. § 208 or a violation of the Trump Ethics Pledge (see Sec. 5), to the Department of Justice.
- The Chairman (as Agency Head) notifies the President, who has supervisory authority over Board members under Section 3(a) of the Act and may remove a Board member for "malfeasance in office" of the Board member's refusal to comply with the DAEO's (and potentially OGE's) recusal determination.
- The Chairman also may provide this same notification to the Board's Congressional oversight committees."