



United States Government

**NATIONAL LABOR RELATIONS BOARD**

Office of the Chairman

1015 Half Street, SE

Washington, DC 20570

April 7, 2020

The Honorable Elizabeth Warren  
United States Senate  
309 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Mark Pocan  
United States House of Representatives  
1421 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Rosa DeLauro  
United States House of Representatives  
2358-B Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Barbara Lee  
United States House of Representatives  
2470 Rayburn House Office Building  
Washington, D.C. 20515

Dear Members of Congress:

This is in response to your March 11, 2020 letter regarding the Agency's *Ethics Recusal Report*.

Your letter expresses a number of criticisms about the report and its guidance. The chief concern appears to be our conclusion that Presidentially appointed Board members have the right and responsibility to make their own recusal decisions, which you deem a "twisted legal analysis that ignores the basic tenets of ethics law and public integrity." Your quarrel with this legal conclusion, however, is not with me or the NLRB's report. It is with the Ethics in Government Act. Indeed, while it is clear that your staff has analyzed the NLRB's report in great detail, the one aspect of the report that your staff appears to have overlooked is the fact that we confirmed every one of our conclusions with OGE, through the Board's Designated Agency Ethics Officer (DAEO).

Ethics rules for government officials, particularly with respect to recusals, are too important not to be clear and unequivocal, and they should not be politicized. Yet, when I started as Chairman at the NLRB, the Agency was embroiled in a government ethics controversy created by a lack of clarity surrounding recusal requirements. And that uncertainty led to politicization of the Board's decision-making process, with unfortunate results all around. Recognizing that the Board required a full understanding of everyone's roles and responsibilities in the ethics process, the Board commenced our comprehensive ethics recusal review. That review, which evaluated all aspects of the NLRB's ethics program to ensure full compliance with government ethics requirements, considered the issue of Board member recusals. After significant work, and in consultation with OGE through our DAEO, we confirmed what we state in the report:

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.

We did not set out to reach this conclusion. Our goal was solely to find the answer and ensure clarity and predictability in all future Board member recusal matters. Although we would have preferred written guidance from OGE, they chose not to provide it. Nevertheless, OGE has assured us, through our DAEO, that our conclusion is correct.

So concerned were we that there be total clarity on this issue that we considered seeking an opinion from the U.S. Department of Justice's Office of Legal Counsel (OLC), which provides advice to federal agencies on important interpretations of federal statutes. To obtain such an opinion, however, our understanding was that the legal question must be the subject of a concrete and ongoing dispute between two or more executive agencies. Ultimately, we were advised that OGE did not believe there was a dispute regarding the interpretation of the law, which precluded resort to OLC. Given that you (and apparently others cited in your letter) continue to question what we have confirmed to be the proper interpretation of this important area of ethics law, perhaps further consideration of an OLC opinion is warranted.

With respect to OGE, your letter seems to misunderstand OGE Director Emory Rounds' December 19, 2019 letter to me. His letter did not raise questions or concerns about the underlying conclusions in our report or guidance. In fact, OGE's concerns had nothing to do with the NLRB's internal process. Rather, OGE only questioned the report's characterization of OGE's role in our process and the report's interpretation of OGE's regulations regarding "Corrective Action Involving Individual Employees," 5 C.F.R. §§ 2638.501-504 (implementing Section 402(f)(2) of the Ethics in Government Act). Specifically, our guidance suggested that OGE would have a role under 5 C.F.R. §§ 2638.501-504 to help obtain corrective action in the event of a disqualification dispute between the DAEO and a Board member. But OGE clarified that it technically would have no formal role in resolving the conflict, and Director Rounds explained that OGE would not initiate corrective action proceedings under its regulations in the event of Board member non-compliance with a DAEO disqualification determination. He did not criticize the Board's internal protocol in any other way. Thus, Director Rounds' letter raises no concerns about the NLRB internal protocol, and any suggestion in your letter that OGE has any role beyond informal consultation in enforcing our DAEO's recusal determination is contrary to OGE's own views.

To be clear, our recusal guidance is not intended to permit Board members to “circumvent” ethics rules, as your letter suggests. To the contrary, our guidance creates an appropriate procedure consistent with existing ethics laws to carry out what the law contemplates. As noted, ethics laws contemplate Presidentially appointed Board members having the right and responsibility to make their own recusal determinations. This is not to say that Board members are to make such determinations without DAEO guidance or to make determinations that conflict with government ethics requirements. Rather, it is to say there may be a time that a Board member disagrees with the DAEO, and we have established a protocol – defining roles and responsibilities and a very specific set of procedures – for dealing with this potential situation, which we hope will be rare.

As our guidance makes clear, there may be serious repercussions for a Board member who disagrees with a DAEO’s determination, including external notifications to the President, the Inspector General, the Department of Justice, and Congress. The member may also be subject to potential removal from office. *See* 29 U.S.C. § 153(a). It also is important to note that a Board member’s recusal decision does not go unchecked. Like the judicial recusal jurisprudence you discuss in your letter, a Board member’s recusal decision is reviewable by an appellate court if an aggrieved party files a petition for review in one of the U.S. Courts of Appeals. *See* 29 U.S.C. § 160(f).

Your letter also criticizes our report’s discussion of the DAEO and other career ethics officials as subjecting them to public and political pressure. Calling the report shameful, you claim that it is an “attack” on our DAEO and civil servants. Unfortunately, you misread as a criticism of career ethics officials what was actually meant to be one of the fundamental purposes of the report – to protect these very people from outside pressure. Indeed, what *is* shameful is Congressional staff mistreating and even screaming at our DAEO, as occurred during the *Hy-Brand* situation. The NLRB DAEO’s independence and the integrity of the NLRB’s ethics program will never be compromised under my watch. That was the objective of our report.

Finally, I want to clarify some misstatements in your letter regarding the *Hy-Brand* matter. First, contrary to your continued assertions, Member William Emanuel was not found to have intentionally violated any ethics regulations. As our report details, Member Emanuel had been cleared to participate in *Hy-Brand* at the outset, and he was only recused *retroactively* after the case was already decided based on a novel theory of ethics law. The criticisms of the *Hy-Brand* situation were about the ethics process at the NLRB, and the controversy that ensued was because of ambiguity over that process. That is what our report set out to correct. Nevertheless, apparently in further reference to Member Emanuel, you state that our report permits NLRB members with “long records of representing anti-worker companies and industries to flout the ethics laws.” We submit that ethics rules should have nothing to do with whether a Board member represented workers or management. Rather, ethics rules should be based on government ethics law and should apply equally to all members, regardless of their professional background. Again, that is what our report and guidance ensure.


Letter to Senator Warren and Representatives DeLauro, Pocan, and Lee

April 7, 2020

Page 4

Let me assure you that the NLRB's actions have been and will continue to be conducted in compliance with all applicable Federal ethics standards and guidelines. The Agency's ethics and recusal procedures are strong. Congress and all stakeholders of the NLRB should have full confidence in the Board's ethical standards.

Sincerely,

A handwritten signature in black ink, appearing to read "John F. Ring". The signature is written in a cursive style with a large, looped initial "J".

John F. Ring  
Chairman