



December 19, 2019

The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Dear Chairman Ring:

This regards the “National Labor Relations Board’s Ethics Recusal Report” (Report) issued by NLRB on November 19, 2019. The Report reflected a comprehensive review of the agency’s internal recusal process and made recommendations for improvements. While I applaud the NLRB for its detailed review and recommendations, I am very concerned that portions of the Report characterize ethics requirements and processes in ways that could be misconstrued. Therefore, I am requesting that NLRB clarify the language of the Report.

Specifically, I ask NLRB to clarify various portions of the Report that could be misconstrued to suggest that that the U.S. Office of Government Ethics (OGE) will adjudicate disagreements between Board members and the NLRB Designated Agency Ethics Official (DAEO). I understand that your staff have informally acknowledged that these provisions are not intended to be construed as stating that there is a right to review or appeal recusal disagreements to OGE; therefore, all that remains is to clarify the text of the Report itself. I have enclosed for your convenience a listing of the most relevant portions of the Report at issue.

As always, OGE stands ready to provide NLRB ethics officials with authoritative interpretive guidance on the ethics laws. We appreciate the NLRB’s focus on its recusal process and look forward to continuing to work with you and your ethics officials. If your staff have any questions or require further information, please contact David Apol, OGE’s General Counsel, at 202-482-9205.

Sincerely,

A handwritten signature in blue ink that reads "Emory Rounds" with a stylized flourish at the end.

Emory A. Rounds, III
Director

Enclosure

CC: The Honorable David P. Berry, Inspector General, NLRB
Lori Ketcham, Designated Agency Ethics Official, NLRB



Enclosure

Excerpts of the National Labor Relations Board's Ethics Recusal Report to be Modified

Page 17

“Through subsequent discussions, OGE identified the enforcement mechanisms that come into play when a Board member disagrees with a DAEO recusal determination. 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, there will be no need for Presidential or Congressional oversight.

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.”