



United States Government

NATIONAL LABOR RELATIONS BOARD

Office of the Chairman

1015 Half Street, SE

Washington, DC 20570

October 23, 2020

The Honorable Elizabeth Warren
United States Senate
309 Hart Senate Office Building
Washington, DC 20510

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

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

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

Dear Senator Warren and Representatives DeLauro, Pocan, and Lee:

I write in response to your letter dated September 24, 2020. This letter raises the same ethics concerns that you raised in your last letter, sent almost six months ago. I responded on April 7, 2020, addressing each of your concerns regarding the ethics program at the National Labor Relations Board. (My response is attached.) Although I thought, given the passage of time, that we had adequately responded to your concerns, you have raised them once again.

As I explained previously, your allegations regarding the *Hy-Brand* matter are simply incorrect. Member William Emanuel's participation in *Hy-Brand* was *not* deliberate misconduct, and the Inspector General's report did not find that it was. Rather, the ethics controversy raised by the *Hy-Brand* case was the result of internal Agency failures dealing with Board member recusal obligations. To address these internal failures and the public concerns raised at the time, I initiated a comprehensive review of the Board's recusal process and procedures. Based on the 18-month review, on November 19, 2019, I issued the NLRB Ethics Recusal Report (Ethics Report), which included a number of significant findings and recommendations, many of which have been adopted by the Board. We worked closely with the Designated Agency Ethics Officer (DAEO) throughout this review and incorporated her guidance in the Ethics Report, including a memorandum with specific guidance for Board members to consider when overruling precedent.

One important determination from the Ethics Report was the conclusion, confirmed by the Office of Government Ethics (OGE) through our DAEO, that government ethics laws and regulations provide a system to guide Board members in making recusal decisions, but that recusal decisions ultimately belong to the Board member. If a Board member acted improperly, action may be taken against him or her, including removal by the President. With this confirmed interpretation of the law, the Board developed and adopted a protocol to ensure an orderly, fair, and transparent mechanism to handle recusals where there might be a legitimate disagreement over the recusal obligation in a particular matter.

As I also explained in my previous letter, the objective of our comprehensive review, and the resultant Ethics Report, was to create certainty in the recusal process. We were so concerned with obtaining clarity on whether a DAEO's disqualification determination bound an agency to remove a Presidential appointee with Senate confirmation from a particular matter, even over the appointee's reasoned disagreement, that we considered seeking an opinion from the U.S. Department of Justice's Office of Legal Counsel (OLC) to resolve the question.¹ Based on our understanding, conveyed through our DAEO, that OGE agreed with the interpretation of government ethics requirements for Board member recusals as stated in our Ethics Report, we did not seek a formal opinion from OLC. Given your disagreement with this interpretation of the law, which I understand may have been informed by conversations with OGE, the Board will now seek an opinion from OLC to resolve the question.

I disagree that the Board has provided the public with misleading or incomplete information regarding its Ethics Report. The Ethics Report, OGE's follow up letter, my response (which includes the errata sheet noting the precise revisions to the Ethics Report), and my April 7, 2020 reply letter to you have all been readily accessible on our public website as of their respective dates of issuance.² Nevertheless, to the extent it would be helpful to also post a revised version of the Ethics Report directly incorporating our January 9, 2020 revisions, we have created such an updated copy of the Ethics Report and have today posted that on our website.

As to your question about my April 7 letter, the suggestion that I provided misleading or incomplete information is wrong. The letter inadvertently cited the original text of the report instead of the revised language as reflected in the publicly-posted January 9, 2020 errata sheet. More importantly, the omission has absolutely no effect on the NLRB's internal recusal procedures under the protocol. The Board agreed to remove references to an OGE "statutory process" at OGE's request because it was inapplicable to how OGE subsequently advised it would treat a disagreement between a Board member and the DAEO. Notably, while the Ethics in Government Act states that the statutory process may include a hearing if OGE seeks corrective action against an employee to enforce a disqualification decision, OGE's position is that there is no such process. The text of the Ethics Report, as revised on January 9, 2020 and publicly posted as of that date, clearly sets forth the Agency's ethics protocols with respect to recusal matters.

Finally, I must once again strongly condemn your continued attacks on Member Emanuel based on the *Hy-Brand* matter. Although the matter is comprehensively described in the Ethics Report, it is important to address it again here. Prior to the *Hy-Brand* case being considered, Member Emanuel was neither recused by the DAEO, nor had any reason to recuse himself under the Trump Ethics Pledge, Agency procedures, or any other government ethics requirements. Only

¹ As you know, OLC provides binding Executive Branch guidance when there is an intergovernmental dispute over the interpretations of federal statutes. *See generally* David J. Barron, Acting Assistant Attorney General, *Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), available at <https://www.justice.gov/olc/best-practices-olc-legal-advice-and-written-opinions> (last visited Oct. 16, 2020).

² *See* <https://www.nlr.gov/reports/regulatory-reports-and-notice/ethics-recusal-report> (last visited Oct. 16, 2020).

after the case was decided and issued was Member Emanuel deemed to have a *retroactive* recusal obligation that emerged at some undefined point during the deliberations in the case. This unprecedented, after-the-fact interpretation of ethics law created a situation that made it impossible for Member Emanuel to comply with the recusal determination because he had already participated in the issued decision. Member Emanuel should not be scapegoated for internal Agency failures.

The answers to your specific questions are below:

1. Provide our offices, and make publicly available online, a final version of your report and guidance, and an explanation of the changes that were made in response to OGE's concerns.

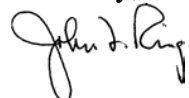
As noted above, the Ethics Report, our correspondence with OGE, and our January 9, 2020 changes to the report have all been posted on our public website, linked above, as of the respective dates of those documents. Also as noted above, today we have added an updated copy of the Ethics Report that incorporates the January 9, 2020 revisions.

2. An explanation of what would happen in the case that an NLRB Member is advised by an agency ethics official to recuse from a case due to a conflict of interest, and the Member decides to ignore that advice.

As stated in the Ethics Report, to ensure that difficult recusal matters are addressed consistently and with transparency, the Board has adopted a written Board member disqualification protocol. This protocol is set forth in ES Memo 19-1, which is included as Appendix 3 to the Ethics Report (Attached). The protocol provides a system to guide Board members in making recusal decisions and ensures an orderly, fair and transparent mechanism to handle recusals where there might be a legitimate disagreement over the recusal obligation. The protocol explicitly details the various required notifications, both internal to the NLRB and potentially to external entities, including the Department of Justice, the White House, the Inspector General, and Congress. Moreover, a Board member's decision to participate in a particular matter may also be subject to judicial review in the courts of appeals under Section 10(f) of the National Labor Relations Act.

If you or your staff have any further questions or concerns, please do not hesitate to contact Edwin Egee, Director of the Office of Congressional and Public Affairs, at (202) 273-1991.

Sincerely,



John F. Ring
Chairman

Attachments



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

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The Honorable Barbara Lee
United States House of Representatives
2470 Rayburn House Office Building
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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

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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



UNITED STATES GOVERNMENT
National Labor Relations Board

MEMORANDUM

E.S. MEMO 19-1

To: Board Front Offices

From: Roxanne L. Rothschild, Executive Secretary

Date: November 18, 2019

Subject: NLRB Board Member Recusal Process

At the Board's direction, I am issuing this Memorandum setting forth the process that is to be followed when the Agency's Designated Agency Ethics Official ("DAEO") makes a recusal determination regarding a Board member's participation in a case or other proceeding or matter pending before the Board.

Either upon request or *sua sponte*, the NLRB's DAEO makes a recusal determination regarding a Board member's participation in a case or other proceeding (matter) under 18 U.S.C. § 208, 5 C.F.R. §§ 2635.502(c), 502(e),¹ or the Ethics Pledge. This determination will be made in writing. Where the Board member accepts the DAEO's determination as his or her decision, the Office of the Executive Secretary ("ES Office") will note the recusal in JCMS and will screen the Board member off the matter.

While Board members almost always concur with the DAEO's recusal determination, in the rare circumstance where a Board member reaches his or her own decision to disagree with the DAEO's determination and intends instead to participate in a matter, the following procedures will apply:

1. STEP ONE: Board Member-DAEO Determination Review

- Matter temporarily placed on hold by the ES Office.
- Within 10 days of the DAEO's written recusal determination, there shall be a mandatory meeting between the Board member and the DAEO to review and discuss the DAEO's determination and the Board member's reasons for disagreement.

¹ 5 C.F.R. § 2635.502(e) provides: "*Disqualification*. Unless the employee is authorized to participate in the matter under paragraph (d) of this section, an employee shall not participate in a particular matter involving specific parties when he or the agency designee has concluded, in accordance with paragraph (a) or (c) of this section, that the financial interest of a member of the employee's household, or the role of a person with whom he has a covered relationship, is likely to raise a question in the mind of a reasonable person about his impartiality. Disqualification is accomplished by not participating in the matter."

- Board member must personally participate in this meeting.
- Based on the Board member-DAEO meeting and possible follow-on discussions, and in no event longer than 30 days, the Board member shall either:
 1. Agree to voluntarily self-recuse from the matter, after which the ES Office will note the recusal in JCMS and screen the Board member off the matter; or
 2. Decline participation (in the substantive issues of the matter) but append a separate statement or personal footnote to the opinion setting forth the reasons s/he disagrees with the recusal determination, thereby preserving the issue for judicial review, which allows the matter to proceed; or
 3. Continue to disagree with the DAEO recusal determination; proceed to Step Two.

2. **STEP TWO: Internal “Interactive Process”**

- Matter continues on temporary hold by ES Office.
- Other Board members notified of Board member-DAEO disagreement for situational awareness.
- DAEO and Chairman (as agency head under Office of Government Ethics (“OGE”) regulations²) engage in an “Interactive Process” with the Board member to try to reach a consensus resolution.
 - Board member must personally participate in this process.
 - This Interactive Process may include DAEO/Board member discussions with OGE and/or with the White House.
 - At all times, the Board member and DAEO will engage in good faith efforts to move the process forward expeditiously.
 - Based on the additional information exchanged in the Interactive Process and/or clarity gained in the course of that process:
 1. Either the Board member or the DAEO may change his or her decision;
 - i. DAEO can reverse the recusal determination, which will be provided in written documentation to the Board member; or
 - ii. Board member can voluntarily self-recuse from the matter (which will be done in writing) after which the ES Office will note the recusal in JCMS and screen the Board member off the matter); or
 2. Board member can decline participation (in the substantive issues of the matter) but append a separate statement or footnote to the

² If the Chairman is the Board member who disagrees with the recusal determination, then the Interactive Process must occur directly between the DAEO and the Chairman, with no involvement from other Board members.

opinion setting forth the reasons s/he disagrees with the DAEO's recusal determination, thereby preserving the issue for judicial review, which allows the matter to proceed without that Board member's substantive participation; or

3. Where the Board member continues to disagree with the DAEO determination, s/he will document in writing that s/he has engaged in the Interactive Process with the DAEO and the Chairman, but that s/he intends to participate in the case or matter; proceed to Step Three.

3. **STEP THREE: Meeting Between Chairman and Board Member³**

- Matter continues on temporary hold by the ES Office.
- Chairman (as agency head under OGE regulations) meets with the Board member to discuss the DAEO recusal determination and the implications of further non-compliance.
 - Chairman and Board member must personally participate in this process.
 - Based on the meeting between the Chairman and Board member, additional information exchanged in the Interactive Process and/or clarity gained in the course of that process, the Board member can:
 1. Voluntarily self-recuse from the matter (which will be done in writing) after which the ES Office will note the recusal in JCMS and screen the Board member off the matter); or
 2. Decline participation in the substantive issues of the matter but append a separate statement or footnote to the opinion setting forth the reasons s/he disagrees with the DAEO's recusal determination, thereby preserving the issue for judicial review, which allows the matter to proceed without that Board member's substantive participation.
 - Where the Board member continues to disagree with the DAEO determination, s/he will document in writing that s/he has engaged in the Interactive Process with the DAEO and the Chairman, but s/he intends to participate in the case or matter; proceed to Step Four.

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.~~

³ If the Chairman is the Board member who disagrees with the recusal determination, move directly to Step 4.

- ~~*—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.~~
 - ~~o 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.⁴
 - 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.

5. **STEP FIVE: Matter Adjudication with Board Member Participation and Recusal Dispute Noted**

- After no more than 60 days from the date of the initial written DAEO recusal determination, unless the Board member agrees to extend the time (e.g., for completion of OGE proceedings), the Board will proceed with adjudication of the matter. A cite to the DAEO's documentation of the recusal determination will be included in the matter or case decision; the Board member whose recusal status is at issue may opt to include an explanation in that decision as to his or her disagreement with the DAEO's recusal determination. These statements will preserve the recusal issue for judicial review. (5 C.F.R. § 2638.107 (d) (agency head) and 5 C.F.R. § 2638.104(c)(9) (DAEO).)

⁴ While this flow chart reserves referral to the IG until after OGE has conducted its formal review, the IG Act and OGE regulations, 5 C.F.R. § 2638.106, permit the IG to intervene *sua sponte* or upon request at any time. There may be situations where it is appropriate for the IG to intervene sooner.