

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General



Memorandum

January 23, 2012

To: Mark Gaston Pearce
Chairman

Brian C. Hayes
Board Member

From: David P. Berry
Inspector General

A handwritten signature in black ink, appearing to read "D. P. Berry", written over the printed name of the Inspector General.

Subject: Report of Investigation – OIG-I-467

This memorandum addresses an investigation conducted by the Office of the Inspector General (OIG) involving an allegation that improper enticements were made to Board Member Brian Hayes to resign his position to prevent the Board from issuing a rule and that Member Hayes sent a letter to Committee on Education and the Workforce, U.S. House of Representatives, that contained false or misleading information.

As a result of our investigative efforts, we found no evidence that enticements were made to Member Hayes to resign his position as a Board Member. We did, however, determine that Member Hayes sought employment, within the meaning of Subpart F of Part 2635, Standards of Ethical Conduct for Employees of the Executive, with the law firm of Morgan Lewis & Bockius, LLP, between late September and November 30, 2011. During that time, Member Hayes was prohibited from participating personally and substantially in any particular matter that, to his knowledge, had a direct and predictable effect on the financial interest of that firm. Although our investigation disclosed two particular matters involving Morgan Lewis & Backius, LLP, during the relevant period of time, we determined that Member Hayes did not participate personally or substantially in those matters. We also determined that, although the letter sent by Member Hayes to the Committee on Education and the Workforce communicate his opinion regarding the rule making process, it contained inaccurate statements of fact.

FACTS

Enticement to Resign

1. When interviewed on December 6, 2011, Member Hayes stated he had not received any offers of employment nor did he have any knowledge of attempts to entice him to resign his position as a Board Member, but did have conversations with an attorney from Morgan Lewis & Bockius, LLP, that were related to employment at that firm. (IE 1)

2. A review of Member Hayes' Government e-mail account did not disclose evidence that any attempt was made to entice him to resign his position as a Board Member. (IE 2)

Seeking Post Government Service Employment

3. On December 21, 2010, the Board proposed a rule that would require employers to post a notice informing employees of the rights guaranteed by the National Labor Relations Act. (IE 3)

4. On February 22, 2011, Morgan Lewis & Bockius, LLP, submitted comments on behalf of the Coalition for a Democratic Workplace on the proposed notice posting rule. (IE 4)

5. On June 21, 2011, the Board proposed amendments to the rules for representation elections. (IE 5)

6. On August 22, 2011, Morgan Lewis & Bockius, LLP, submitted comments on behalf of the Coalition for a Democratic Workplace on the proposed rule on representation elections. (IE 6)

7. On August 25, 2011, the Board issued the final rule requiring the posting of a notice. (IE 7)

8. On August 27, 2011, Chairman Liebman's term expired leaving the Board with the minimum number of Members for a quorum. (IE 8)

9. On September 9, 2011, the National Association of Manufacturers filed a case in the District Court for the District of Columbia seeking to prevent the NLRB from implementing the notice posting rule. (IE 9)

10. In late September or early October 2011, Member Hayes had a conversation regarding possible employment with an attorney from Morgan Lewis & Bockius, LLP. (IE 1)

11. Member Hayes described the substance of the conversation that was related to employment as "if you ever decide to resign we'd like to talk to you." (IE 1)

12. In mid-October 2011, Member Hayes had a second conversation with the attorney from Morgan Lewis & Bockius, LLP, during which the attorney again mentioned employment for Member Hayes at the firm. (IE 1)

13. Member Hayes described the substance of the second conversation as generally repeating that if he should decide to resign, the firm would be interested in talking with him. (IE 1)

14. According to Member Hayes, by the time of the second conversation, there was increased speculation that he would resign, he also believed that a vote on the proposed rule was less remote, and he thought that he might actually resign. (IE 1)

15. As a result of his assessment of the situation at that time, Member Hayes thought he should “test the water.” (IE 1)

16. On October 19, 2011, Member Hayes and his Chief Counsel spoke to an Ethics Program Officer to obtain guidance on seeking post Government employment. (IE 1 & 10)

17. According to Member Hayes, the Ethics Program Officer confirmed his understanding of recusal; asked if there was a meeting of the minds and stated that a conversation along the lines of “we like you, you like us” does not trigger recusal; and stated that because rulemaking is applicable to everyone, it does not trigger recusal. (IE 1)

18. When interviewed, the Ethics Program Officer provided the following information: (IE 10)

a. She and another Ethics Program Officer met with Member Hayes at his request on October 19, 2011;

b. Member Hayes stated that he would most likely be leaving before the end of his term and that he wanted to know what the rules were regarding seeking employment and post employment;

c. Member Hayes did not state whether he was in fact having discussions with potential employers;

d. She discussed with Member Hayes the obligations with regard to seeking employment, which was the same advice that is routinely given to Presidential appointees in the seeking employment counseling memorandum;

e. She stated to Member Hayes that a meeting with a firm that was just a “meet and greet” would not necessarily require recusal, but if either side expressed an interest in employment the obligation to recuse would be in effect;

f. She also discussed the post employment restrictions with Member Hayes;

g. Members Hayes requested that she and the other Ethics Program Officer keep confidential the information that he might be leaving; and

h. The meeting with Member Hayes lasted about 10 minutes.

19. After the meeting with the Ethics Program Officer, Member Hayes instructed his Chief Counsel to put a recusal on any cases involving Morgan Lewis & Bockius, LLP – there was only one such case before the Board. (IE 1 & 11)

20. On October 31, 2011, Member Hayes' Chief Counsel notified the staffs for other Board Members that Member Hayes was recused from participation in the case involving Morgan Lewis & Bockius. (IE 11)

21. Member Hayes recalled one additional brief conversation with the attorney from Morgan Lewis & Bockius, LLP, during which he informed the attorney that he had not yet made up his mind about resigning. (IE 1)

22. According to Member Hayes, the attorney responded that they should wait until he made up his mind before having further discussion. (IE 1)

23. The attorney from Morgan Lewis & Bockius, LLP, provided the following information: (IE 12)

a. He recalled conversations with Member Hayes regarding a potential position at his firm if Member Hayes should resign;

b. The conversations were similar to conversations along the lines of "what if" and "interests down the road," but the conversations did not include negotiations, discussion of an actual position, or salary;

c. The conversations occurred after there was some discussion in the public domain about the possibility that Member Hayes would resign;

d. He believed that the last discussion occurred on or about November 1, 2011, before the American Bar Association session in Seattle or shortly thereafter;

e. During the last discussion, he told Member Hayes that he could not discuss a future position until Member Hayes made an independent decision to resign and that decision was made public; and

f. The reason for declining to talk further about a possible position with the firm was that the firm did not want to influence Member Hayes' decision regarding his resignation or to create such an appearance.

24. On November 10, 2011, Morgan Lewis & Bockius, LLP, met with the NLRB's Special Litigation Branch to discuss the firm's representation of certain Members of Congress in litigation that had been filed in the U.S. District Court for the District of Columbia on or about September 9, 2011 by the National Association of Manufacturers. (IE 13)

25. On November 15, 2011, Morgan Lewis & Bockius, LLP, filed a Brief of Amici Curiae on behalf of certain Members of Congress in support of the National Association of Manufacturers. (IE 14)

26. On November 16, 2011, a copy of the brief that was filed by Morgan Lewis & Bockius, LLP, was provided to Member Hayes as well as other NLRB officials. (IE 15)

27. On November 30, 2011, the Board held an open meeting to discuss and take action on the rule regarding representation elections during which Member Hayes stated that he was not resigning and that he intended to continue to serve as a Board Member. (IE 16 & 17)

28. The Chief, Special Litigation Branch, was not aware of any participation by any Board Member in the litigation filed by the National Association of Manufacturers between the dates of November 10 and 30, 2011. (IE 18)

29. On December 21, 2011, the Board adopted a final rule amending the representation election procedures. (IE 19)

29. On December 22, 2011, Member Hayes notified Morgan Lewis & Bockius, LLP, that he was not seeking employment with the firm – he also noted that the claim that he had been seeking employment with the firm is not correct. (IE 20)

30. On December 23, 2011, the Board agreed to postpone the effective date of the notice posting rule. (IE 21)

Correspondence with the Congressional Committee

31. On November 18, 2011, Member Hayes sent a letter to the Committee on Education and the Workforce, U.S. House of Representatives, that contained the following statements: (IE 22)

Utilizing a team of attorney and examiners from their own staff, the office of the Executive Secretary, various offices of the Acting General Counsel, and regional offices, quite possibly in violation of Section 4(a) of the Act, they are drafting a final rule with responses to comments filed without my participation or input;

Fn 5: I note that my colleagues did not provide you with the requested list of Board staff involved in this process, although that information is available to them, but not to me. . . . ;

Until this week, my colleagues and team of attorneys that they have enlisted from throughout the Agency have shared absolutely nothing with me or my staff save for a single CD which merely sorts or “codes” the over 65,000 public comments in differing degrees of support or opposition to the rule; and

There have been no comprehensive summaries of the over 65,000 public comments circulated or shared with my staff, no drafts of the proposed responses to the comment circulated or shared, and with one exception, no indication of what portions of the 185 page proposed rule my colleagues intend to include, exclude, modify or add to their draft of the final rule.

32. When interviewed about the letter to the Committee, Member Hayes stated the following:
(IE 1)

a. He had a brief conversation with the Chairman during which the Chairman told him that “we intend to go forward with the final rule;”

b. He asked the Chairman if they would go forward with the rule if he does not join them and the Chairman stated “yes;”

c. He expressed concern to the Chairman about the plan to go forward with the final rule because if they follow the usual timeline for cases there would not be sufficient time for a dissent;

d. In the letter to the Committee, his reference to a timeline meant “before Member Becker leaves the Board” and he believes that the letter is accurate on that point;

e. He was told by his Chief Counsel that Regional personnel were involved in drafting the memorandum in support of the rule;

f. He believed that the coding of the comments was part of the rulemaking process;

g. The staff member that he designated to assist with coding the comments was given only one opportunity during a time that she was not available and she was not contacted again;

h. He did not review the CD that was provided to him, but he did ask his Chief Counsel to review it;

i. His Chief Counsel and other management staff reviewed the letter before he sent it;

j. He was not aware that the staff member that he designated to assist in coding comments reviewed the CD and he could not recall seeing the memorandum that was provided to the Chief Counsel describing the contents of the CD;

k. He did not see the e-mail message from Member Becker to his Chief Counsel that provided a summary of a group of comments that were of interest to him and his staff;

l. He stated that he sent the letter to the Committee after speaking to the Committee staff about his concerns that the Agency response to a Committee request was misleading;

m. He provided a draft of the letter to the Chairman and Member Becker several days before he sent it and neither of them pointed out any errors or attempted to convince him not to send it; and

n. Member Becker suggested an alternate proposal, but it did not address his concerns so he sent the letter.

33. The Chief Counsel for Member Hayes, who participated in drafting and reviewing the letter to the Committee, provided the following information: (IE 23)

a. In early October 2011, he was given two copies of a CD that contained information related to the coding of comments for the representation rule;

b. He did not know how to navigate through the information on the disk;

c. In early November 2011, he gave one of the CDs to a Senior Counsel who had been trained in the coding process and asked her to review it and report back to him on what the disk contained;

d. He received a report back from the Senior Counsel;

f. Although he did not provide the report to Member Hayes, he did use the information to explain to Member Hayes what was on the disk;

g. He could not recall if he drafted the sentence about the CD that was in the letter to the Committee, but he believed that Member Hayes contributed to it;

h. He acknowledged that, as of the time of the interview, the sentence about the CD does not completely describe the information that is on the CD in terms of identifying unique comments, significant comments, and varying degrees of summary;

i. His observation was that the CD did not contain the comprehensive summaries of the type that he received for the notice posting rule;

j. The phrase “until this week” was added because at that time, Member Hayes’ staff was given access to the E-Room that contained additional information regarding the comments;

k. He drafted the sentence that stated that a team of attorneys from various offices were drafting the rule, quite possibly in violation of Section 4(a) of the Act, without the participation of Member Hayes;

l. He now understands that part of the letter is not accurate, but at the time he drafted the letter he had been told by an Associate Executive Secretary that a number of people from those offices were working on the rule to include drafting it;

m. It was his understanding that, at that time he spoke to the Associate Executive Secretary, the coding process was over;

n. The Associate Executive Secretary showed him an E-Room where work was being done on the rule and gave him a list of personnel that were working on the rule that included an attorney and examiners from Regional Offices;

o. It was his understanding that the list had been prepared by the Chief of Staff to the Chairman and, based upon the list, he came to the conclusion that individuals listed were doing something other than coding and to him that would logically include drafting or legal research;

p. He was also told by Member Hayes that a person outside the Agency stated that Regional personnel were working on the rule;

q. Several weeks after the conversation with the Associate Executive Secretary, he requested access to the E-Room;

r. He received the access to the E-Room on November 15, 2011;

s. Prior to the letter being sent to the Committee, he made a request to Member Becker for information related to comments that addressed a certain part of the rule; and

t. He received the requested information.

34. The Associate Executive Secretary provided the following information: (IE 24)

a. He recalled a conversation with the Chief Counsel for Member Hayes that first occurred in the hallway, moved to the Chief Counsel's office, and then to his office;

b. He told the Chief Counsel that he was working on a second run through the comments and that they were adding issues to them;

c. They then went to the Chief Counsel's office so that he could show the Chief Counsel the E-Room where the work was being done;

d. The Chief Counsel did not have the same access to the E-Room that he had so they then went to his office;

e. Once in his office, he showed the Chief Counsel the E-Room folders and provided a copy of a list of employees who were working on the bullet point issues for the comments; and

f. He did not tell the Chief Counsel that he or anyone was working on drafting the rule.

35. The Chief of Staff stated that a meeting was held October 3, 2011, with staff who were tasked to do issue coding. (IE 25)

36. The Chief of Staff provided the staff with a list of who was working on the issue coding that is titled "R-Case Rulemaking – Assignments for Second Review of Comments." (IE 25)

37. On July 27, 2011, a Senior Counsel on Member Hayes' staff was notified by the Chief Counsel that she was being made available to organize the comments on the proposed representation rule and that training would be provided in two stages – one involving the rule and the other involving the coding process and software. (IE 26)

38. When interviewed, the Senior Counsel stated that: (IE 27)

a. She was trained on coding comments, but she was told by the Chief Counsel that she should do her case work and that, if she had time, she should work on coding;

b. She was never specifically told how to prioritize her work regarding the rule making, but when given a research project involving the rule making she assumed it was a high priority;

c. During the summer of 2011 she focused primarily on casework in anticipation of the end of Chairman Liebman's term;

d. In the fall of 2011, she did research projects for the proposed rule in addition to her case work;

e. Given her case work and other responsibilities she did not have time to work on coding comments;

f. At the beginning of October 2011, she was asked by the Chief Counsel for the status of the coding;

g. When asked to provide information about the status of the coding process, she reviewed her e-mail messages that she received from the Special Litigation Branch, checked the regulations.gov Web site, spoke to her colleagues that participated in the coding, and used the software that she had been trained on to try to ascertain how many comments had been coded;

h. On November 1, 2011, she was given a copy of the CD that had been provided to Member Hayes' office and she was asked to review it;

i. She provided a memorandum to the Chief Counsel that summarized the contents of the CD; and

j. She was later given access to an E-Room that contained the same information that was on the CD.

39. The memorandum provided to the Chief Counsel by the Senior Counsel describes the disk as containing Dataset Coding Summary Reports that range from 3 to 197 pages that

provide blocks of text from comments and annotations; a summary of codes and location of the comments; and 29 files that appeared to be the most prominent comments. (IE 27)

40. The memorandum also notes that the annotations provided in the reports appear to be summaries of the comments and do not appear to analyze the comments. (IE 27)

41. Between August 3 and October 13, 2011, the Senior Counsel on Member Hayes' staff received approximately 21 e-mail messages about the process and status of the coding comments effort. (IE 28)

42. On September 1, 2011, Chairman Pearce requested that Member Hayes allow the senior attorney to work on the comment coding project -- the request lists the Board staff that had been assigned to the coding project at that time. (IE 29)

43. On September 2, 2011, Member Hayes and his Chief Counsel exchanged e-mails regarding the Chairman's request. (IE 30)

44. On September 6, 2011, Members Hayes responded by e-mail message to Chairman Pearce stating that he thought that the senior attorney could be made available, but that he needed to check with the Chief Counsel. (IE 31)

45. A review of e-mail accounts disclosed that between September 2 and November 18, 2011, the Senior Counsel on Member Hayes' staff was assigned various assignments related to the rule making process by Member Hayes or his Chief Counsel. (IE 32)

46. The Board utilized separate E-Rooms for the coding and drafting process. (IE 25)

47. Other than staff from Special Litigation Branch, General Counsel staff does not have access to the E-Room used for drafting the rule. (IE 33)

ANALYSIS

Seeking Employment

Our determination is that the communication between Member Hayes and the attorney from the law firm was sufficient to come within the ethics rules meaning of seeking employment. As used in the ethic regulations the term "seeking employment" includes not only bilateral employment negotiations, but also unilateral expressions of interest in employment by an employee. Actual negotiations or discussions of specific terms of employment are not required. See, 5 CFR 2635.603(b)(1)(ii); OGE Information Advisory Memorandum 04 X 13, 2004. Once engaged in seeking employment, an employee may not participate personally and substantially in a particular matter that, to his or her knowledge, has a direct and predictable effect on the financial interest of the prospective employer. 5 CFR 2635.604(a). Although the definition of "particular matter" does not include rules that have general applicability, litigation involving a rule does have specific parties and is a particular matter. Decisions about that litigation would have a direct and predictable effect on the financial interest of the law firms involved in the

litigation. As such, Member Hayes was prohibited from participating personally and substantially in decisions involving the litigation for the notice posting rule. The restriction was in place until Member Hayes communicated to the prospective employer that he was no longer seeking employment. See, 5 CFR 2635.603(b)(2). We believe that the earliest communication of such intent was at the public meeting on November 30, 201, when Member Hayes stated that he was not resigning as a Board Member. Our investigation did not disclose any evidence that Member Hayes participated personally and substantially in the notice positing litigation after the law firm became engaged in that litigation or before he announced that he was not resigning. We note that we are concerned about the superficial nature of the discussion of this issue with the Ethics Program Officer. We coordinated this part of our analysis with the U.S. Office of Government Ethics.

Letter to the Committee

We considered the letter to the Committee to express Member Hayes' opinion on the rule making process. Each Board Member is entitled to express his or her opinion to Congress whenever the Member determines it is appropriate or necessary. In forming such an opinion and deciding what and when to communicate to Congress, the Member should be able to rely on his or her staff for accurate and complete information. In this matter, we found that Member Hayes' staff did not adequately fulfill that duty, but given that the factual statements in the letter are used to explain the basis for opinions expressed therein, the misstatements of fact in the letter are not material within the meaning of 18 U.S.C. § 1001. We therefore found that reasonable cause does not exist to determine that the letter contains false statements within the meaning of 18 U.S.C. § 1001, and that referral of this matter to the Department of Justice is not required under the provisions of the Inspector General Act. Nevertheless, Member Hayes should consider what, if any, administrative action should be taken as a result of the facts discussed above.

We found no evidence that Regional personnel were involved in the drafting process. According to the Chief Counsel, the basis for his belief that Regional personnel were drafting the rule was the conversation with the Associate Executive Secretary. The information obtained from that conversation, however, does not support the assertion that Regional personnel were participating in drafting the representation rule. If the Chief Counsel was confused by the information from the Associate Executive Secretary, the list of personnel that was provided to him should have cleared any such confusion in that it was identified as "R-Case Rulemaking – Assignments for Second Review of Comments." That title should have indicated to him that the effort to review comments was ongoing and that those individuals were involved in that effort rather than drafting.

The statement in footnote 5 "I note that my colleagues did not provide you with the requested list of Board staff involved in this process, although that information is available to them, but not to me. . ." is inaccurate. The Chief Counsel based his mistaken belief that the General Counsel offices were drafting in part on the list provided to him by the Associate Executive Secretary. That list was in the Chief Counsel's possession and therefore within the control of Member Hayes. We note that when asked for the list, the Chief Counsel provided a copy of it to the OIG.

We also note that staff from the Special Litigation Branch, a branch of the General Counsel's Division of Enforcement Litigation, participated in the drafting process. The participation of the Special Litigation Branch could not reasonably be construed as violating Section 4(a) of the Act, given that the branch routinely acts as counsel for the Board and its participation is well within the scope of its duties.

The information on the CD is more than coding or sorting and an analysis of the CD was available to Chief Counsel. While it is true that no comprehensive summary or analysis of the comments was circulated with Member Hayes or his staff, the CD is the key or map to compile such summaries or analysis. Moreover, the CD was the same information that was shared with all the Board Members to allow them to begin their deliberation. Under these circumstances, Member Hayes and his staff were in the same position as Chairman Pearce and Member Becker and their staffs. Additional information and analysis was available to Member Hayes' staff in the E-Room. Had Member Hayes or his staff desired to create a comprehensive summary or analysis, they could have done so.

Overall, the letter to the Committee creates the impression that Member Hayes and his staff were excluded from the rule making process. That impression is not completely accurate. While Member Hayes and his staff were not part of the drafting effort, his staff was provided an opportunity to participate in reviewing, coding, and summarizing the comments. The result of that work was provided to Member Hayes and his staff to be used in whatever manner he deemed appropriate. Rather than participating in that reviewing and analysis process, Member Hayes' staff engaged in researching issues related to concerns that Member Hayes had about the process. While we do not question the appropriateness of such activity, the decision to not participate in reviewing, coding, and analyzing comments appears to have created a void of information for Member Hayes and his staff. This void may have contributed to what appears to have been a needlessly adversarial environment.