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AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

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March 23, 2012

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

As the Senior Democratic Member of the U.S. House Committee on Education and the Workforce, I have been deeply concerned about a number of developments over the last year that have threatened to undermine the integrity of the adjudication and rulemaking processes at the National Labor Relations Board ("NLRB" or "Board"). Less than two months ago, I asked the Department of Justice to investigate possible enticement involving a Member of the Board and a private law firm with business before the NLRB.¹ My referral was based in part on evidence included in a January 23, 2012, NLRB Inspector General Report of Investigation. I write today because the Inspector General has once again informed the Committee that additional improper conduct may have occurred at the Board involving another sitting Board Member and two former Board members.

NLRB Inspector General David Berry transmitted this latest Report of Investigation² to the Committee earlier this week. For convenience, I have attached a copy of that report to this letter. Also, I understand that, as part of this investigation, the Inspector General has in fact fulfilled his statutory requirement to report to you information about possible criminal activity.³ To ensure the integrity of this important independent government agency upon which both employers and employees rely for the fair administration of their rights, I urge you to carefully consider the information that the Inspector General has provided to you.

¹ See letter from Congressman George Miller, Senior Democrat, Committee on Education and the Workforce, to United States Attorney General Eric Holder (January 26, 2012).

² See Memorandum, Report of Investigation-OIG-I-468 from NLRB Inspector General David Berry (March 19, 2012).

³ See Pub.L. 95-452, 92 Stat. 1101, Sec. 4(d). "In carrying out the duties and responsibilities under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law."

According to the Report, current Board Member Terence Flynn, “while serving as a Chief Counsel, violated the Standards of Ethical Conduct for Employees of the Executive Branch”⁴ because among other actions, he provided “deliberative, pre-decisional information that was protected from disclosure”⁵ as well as “attorney-client information...protected from disclosure”⁶ variously to former Board Member Peter Kirsanow, former Board Member Peter Schaumber, and others.⁷ The deliberative, pre-decisional information at issue included “lead case lists, pre-decisional votes and positions of the members, the identity of counsel assigned to a case, the status of cases, the researching issues in cases, the deliberation of the former Chairman in [a case], the desire of two members to press forward in [a case], and the analysis of the Board’s resolution on”⁸ a pending rulemaking.

The Inspector General found that Mr. Flynn’s “improper disclosure of information to former Members Kirsanow and Schaumber amounted to a conversion of the information for the private benefit of former Member Kirsanow and his client, the National Association of Manufacturers, and former Member Schaumber’s labor relations consulting and/or legal practice.”⁹

The investigation uncovered an electronic file named “Schaumber business plan.doc” stating: “My practice will be developed in part by leveraging my Agency connections and focusing the attention of senior management on the likely priorities of the Obama Board and strategies to respond to them.”¹⁰ Another file named “Schaumber SuppBusPlan.doc” indicated that former Member Schaumber would “serve as a liaison for the firm on matters requiring high level intervention at the National Labor Relations Board and other Government agencies.”¹¹ The Inspector General describes Mr. Schaumber as having a “labor relations consulting and/or legal practice”¹² and notes a September 12, 2011, announcement that Mr. Schaumber “would serve as a co-chair” of a “Labor Policy Advisory Group” for a candidate for the Republican nomination for President.¹³

The investigation noted that Mr. Kirsanow represented the National Association of Manufacturers in litigation against the National Labor Relations Board.¹⁴ According to the report, an email from Mr. Flynn to Mr. Kirsanow in the midst of that litigation revealed attorney-client information belonging to the Board related to that litigation.¹⁵

⁴ *Supra* note 2 at 1.

⁵ *Id.* at 11.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 11.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.* at 11.

¹³ *Id.* at 10.

¹⁴ *Id.* at 11.

The Honorable Eric H. Holder, Jr.
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It is not clear from the Report whether the Inspector General uncovered the sum total of improper assistance provided to these outside parties. The Inspector General notes that, "in general, we were only able to review e-mail records from May 2011 forward that remained on the NLRB e-mail server through the period of this investigation."¹⁶

In addition to the improper assistance provided, the Report raises questions regarding the actions of the outside parties, including the extent to which any inside information was used for their or their clients' private benefit.

In closing, the Inspector General's findings about the conversions of sensitive government information for private gain should not go without further scrutiny. The information that was shared is the kind of information that is sacrosanct to the effective operations of the NLRB and the due process rights of the parties appearing before the Board. Disclosure of such information "could have a chilling effect on the operation of the Board and may prejudice the due process rights of the parties in pending and future cases."¹⁷ In short, such actions threaten the integrity of the Board's most vital operations.

If you have questions regarding this letter, please contact me or direct your staff to contact the Committee's minority General Counsel, Megan O'Reilly, who may be reached at (202) 225-3725. I appreciate your attention to this matter.

Sincerely,



GEORGE MILLER
Senior Democratic Member

Enclosure

cc: John Kline, Chairman, Committee on Education and the Workforce
David P. Berry, Inspector General, National Labor Relations Board

¹⁵ *Id.* at 4 and 11.

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 11.

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General



Memorandum

March 19, 2012

From: David P. Berry *DPB*
Inspector General

Subject: Report of Investigation – OIG-I-468

This memorandum addresses an investigation conducted by the Office of Inspector General (OIG) involving allegations of improper conduct by Terence Flynn during the time that he was serving as a Chief Counsel. As a result of our investigative efforts, we found that Mr. Flynn, while serving as a Chief Counsel, violated the Standards of Ethical Conduct for Employees of the Executive Branch and that he lacked candor during the investigatory interview.

FACTS

Background

1. Mr. Flynn began working at the NLRB in 2004 as the Chief Counsel to Board Member Peter Schaumber. (IE 1)
2. After Member Schaumber's term ended on August 27, 2010, Mr. Flynn, along with the rest of the staff members, was assigned to Board Member Brian Hayes. (IE 1)
3. On January 5, 2011, the White House announced that the President intended to nominate Mr. Flynn to be a Board Member. (IE 1)
4. On January 9, 2012, Mr. Flynn received a recess appointment as a Board Member. (IE 1)
5. Mr. Flynn's nomination as a Board Member is pending consideration by the U.S. Senate's Committee on Health, Education, Labor, and Pensions. (IE 1)

Litigation Assistance

6. On August 30, 2011, the Board published a rule that requires employers to post a notice informing employees of their rights afforded by the National Labor Relations Act. (IE 2)

7. On September 2, 2011, Mr. Flynn sent the following request to the NLRB librarian: (IE 3)

From: Flynn, Terence F.
Sent: Friday, September 02, 2011 2:54 PM
To: Law Librarian
Subject: Research question

I don't know if you are the person to ask about this, but I am looking to track down the initial papers (I don't know if it was an injunction proceeding or some other complaint) filed by the American Hospital Association seeking to block the Board's healthcare rulemaking. I'm sure those materials would be lurking around the library somewhere. Any ideas? (I realize you are probably gone for the day and won't be in until Tuesday). Thanks Terry.

8. Thereafter, Mr. Flynn and Peter Kirsanow, a former Board Member, exchanged the following messages: (IE 4)

From: Kirsanow, Peter [pkirsanow@beneschlaw.com]
Sent: Wednesday, September 07, 2011 11:03 AM
To: Flynn, Terence F.
Subject: RE: District Court Case

thanks Terry!

From: Flynn, Terence F. [mailto:Terence.Flynn@nlrb.gov]
Sent: Wednesday, September 07, 2011 11:01 AM
To: Kirsanow, Peter
Subject: FW: District Court Case

Sorry, Pete. Looks like you are going to have to go with Westlaw archive retrieval

From: Law Librarian
Sent: Wednesday, September 07, 2011 10:58 AM
To: Flynn, Terence F.
Subject: RE: District Court Case

I'm afraid we're finding nothing on this case. If the AHA sued to stop a rulemaking then there wouldn't be an inciting NLRB case that would have produced a paper trail. We've looked through all our stuff just in case and blown the fluffy clouds of dust off the microfiche and microfilm, and asked the Records Department to strap on their headlamps and pith helmets and go prospecting, but to no avail.

Since the case predates PACER coverage, I'm afraid the only way to get these documents is going to be to request them from the court, and they'll probably have to dig them up from storage somewhere.

The only other Hail Mary option that we could think of would be checking with the ExecSec's office or the GC to see if they kept something floating around.

Sorry! I wish I could have been more helpful. Let me know if you'd like me to start the process of retrieving the case file from the Court.

From: Flynn, Terence F.
Sent: Tuesday, September 06, 2011 3:11 PM
To: [REDACTED]
Subject: RE: District Court Case

Yes that is it.

From: [REDACTED]
Sent: Tuesday, September 06, 2011 3:00 PM
To: Flynn, Terence F.
Subject: District Court Case

This appears to be the decision in the District Court that eventually ended up at the Supreme Court in 1990. If it's the right one, I can ask if Case Records still has anything associated with it

[The remainder of the message included an excerpt from Westlaw]

9. On September 7, 2011, Mr. Flynn sent an e-mail message to former Member Kirsanow that read "Pete: You may have already pulled a copy of this petition as well" and included as an attachment a document from Westlaw related to a Petition for Review of a rule under, among other citations, the Administrative Procedure Act. (IE 5)

10. On September 8, 2011, former Member Kirsanow, as the attorney for the National Association of Manufacturers, filed a case in the U.S. District Court for the District of Columbia seeking to prevent the NLRB from implementing the notice posting rule. (IE 6)

11. When interviewed, the Law Librarian provided the following information: (IE 7)

a. He recalled performing the research for Mr. Flynn and estimated that he spent 2 or 3 hours on the research and that he used Westlaw, BNA-LERC, and PACER to conduct the research; and

b. During the time that he conducted the research for Mr. Flynn, he had other official work that he could have been doing.

12. On September 19, 2011, Mr. Flynn forwarded the following e-mail message to former Member Kirsanow: (IE 8)

From: Flynn, Terence F
Sent: Monday, September 19, 2011 4:11 PM
To: 'Peter Kirsanow'
Subject: FW: second complaint on the notice posting rule
Importance: High
Attachments: NFIB NRTW complaint.pdf; notice of related cases.pdf

From: HELTZER, LES (Hdq) [mailto:les@nrlb.org]
Sent: Monday, September 19, 2011 4:02 PM
To: Pearce, Mark G.; Becker, Craig; Hayes, Brian
Cc: Hirozawa, Kent; Colwell, John F.; Winder, Peter D.; Murphy, James R.; Flynn, Terence F.; Schiff, Robert; Cowen, William B.; Garza, Jose
Subject: FW: second complaint on the notice posting rule
Importance: High

All—

I am forwarding the attached a Complaint for Declaratory and Injunctive Relief regarding the Final Rule Posting of Employee Rights. The complaint was filed jointly on 9/16/11 in the US Dist Ct in DC by the Right to Work Legal Defense and Education Foundation and the National Federation of Independent Business.

*LES HELTZER
EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD*

From: [REDACTED]
Sent: Monday, September 19, 2011 3:47 PM
To: Solomon, Lyle E.; Mattina, Caiaste J.; Abruzzo, Jennifer; HELTZER, LES (Hdq); Ferguson, John H.; Lieber, Margery E.; Moskowitz, Eric G. [Attorney]
Subject: second complaint on the notice posting rule

Attached, please find the second complaint, this one by both Right to Work and the National Federation of Independent Business. The first claim for relief is largely identical to the NAM complaint (with the exception that it references Section 8(c), but the second claim adds a First Amendment allegation.)

[REDACTED] and I are considering whether to file a motion for consolidation of the two cases. It should not be opposed, b/c the plaintiffs in the second case listed the NAM as a related case in the other attachment. Also, both cases have been assigned to Judge Berman.

[REDACTED]

13. Mr. Flynn also sent the message to former Member Schaumber. (IE 9)

14. The attorney who sent the original e-mail message considered the information regarding the consideration of whether to file a motion for consolidation of the cases to be attorney-client information. (IE 10)

Assistance and Disclosure of Deliberative Information

15. On November 18, 2011, Mr. Flynn stated in an e-mail message to **Name**, a former Chief Counsel, that the D. H. Horton decision may not issue because Member Hayes is recused, but that the majority wanted to press forward and that there is a New Process problem in doing so. (IE 11)

16. On November 18, 2011, in response to a follow-up message from Mr. **Name**, Mr. Flynn disclosed legal advice that the Board received from the Division of Enforcement Litigation regarding going forward with the D. H. Horton decision with the recusal of Member Hayes. (IE 12)

17. Prior to his employment at the NLRB, Mr. Flynn was employed by the law firm Crowell & Moring, LLP. (IE 1)

18. On June 17, 2011, Mr. Flynn forwarded an e-mail message to an attorney at Crowell & Moring, LLP, stating that the proposed representation rules would be published on June 22, 2011, and that comments would be due on August 22, 2011. (IE 13)

19. On June 21, 2011, the NLRB issued its public announcement of the proposed representation rules and the date that the comments would be due. (IE 14)

20. On August 17, 2011, Mr. Flynn sent an e-mail message to two attorneys at Crowell & Moring, LLP, that discussed an action filed under the Freedom of Information Act in the U.S. District Court for the District of Columbia seeking documents related to the Boeing unfair labor practice case that stated he "would love to see something juicy emerge out of these fishing expeditions" and "[u]nfortunately, these guys would readily destroy anything embarrassing." (IE 15)

21. On August 25, 2011, Mr. Flynn sent an e-mail message that provided advice on practicing before the NLRB to an attorney from Crowell & Moring, LLP. (IE 16)

22. On September 16, 2011, Mr. Flynn had an exchange of e-mail messages with an attorney at Crowell & Moring, LLP, that discussed agreements that an employer and union could make prior to the employer's voluntary recognition of the union. (IE 17)

23. On September 16, 2011, Mr. Flynn sought the assistance of Board staff in responding to the request for information from the attorney at Crowell & Moring, LLP, about agreements that an employer and union could make prior to the employer's voluntary recognition of the union. (IE 18)

24. On October 28, 2011, Mr. Flynn responded to a question from an attorney at Crowell & Moring, LLP, regarding "10(j)" approval by stating that a Board Member would dissent on a matter that had not been voted on. (IE 19)

25. An examination of the hard drive from Mr. Flynn's Government computer disclosed that, on July 6, 2010, a document identified as "Schaumber business plan.doc" was edited. (IE 20)

26. The business plan included the following: (IE 21)

My practice will be developed in part by leveraging my Agency connections and focusing the attention of senior management on the likely priorities of the Obama Board and strategies to respond to them. I have worked closely with the Chairman of the current Board for over seven years and with the other two Democrat Members for six months. I have had many discussions with the newly confirmed Republican Member, Brian Hayes, and will be working with him regularly for the balance of my current term. I know well all of the significant players on the Board-side of the Agency and many on the General Counsel side, including most of the Regional Directors, who are responsible for much of the day-to-day decision making regarding prosecutions of alleged unfair labor practices. . . .

27. An examination of the hard drive from Mr. Flynn's Government computer disclosed that, on September 3, 2010, 6 days after former Member Schaumber's term ended, a document identified as "Schaumber SuppBusPlan.doc" was edited. (IE 1 & 20)

28. The supplemental business plan included, among other things, that former Member Schaumber would "serve as a liaison for the firm on matters requiring high level intervention at the National Labor Relations Board and other Government agencies" and would "provide advice and counsel to existing clients both unionized and un-unionized on current Board developments." (IE 22)

29. The documents identified as "Schaumber business plan.doc" and "Schaumber SuppBusPlan.doc" were both found in the file directory path "Documents and Settings\flynn\My Documents." (IE 20)

30. A file identified as "sHAUMBER wsj ARTICLE.doc" was found on the Government computer that is assigned to Mr. Flynn in the file directory path "Documents and Settings\flynn\My Documents" with a file creation date of September 21, 2010. (IE 20 & 23)

31. An examination of the hard drive from Mr. Flynn's Government computer disclosed that a file identified as "sHAUMBER wsj ARTICLE.doc" was edited. (IE 20 & 23)

32. On May 4, 2011, Mr. Flynn forwarded a copy of an e-mail message to former Member Schaumber that originated from the Executive Secretary requesting information on cases that present a certain issue that the Board would like to modify or overrule the precedent. (IE 24)
33. On June 10, 2011, former Member Schaumber requested assistance by e-mail message from Mr. Flynn with finding out information about a hearing because he wanted to make a recommendation to the attorney representing South Carolina regarding intervening in the Boeing case based upon the delay of the Acting General Counsel in filing the complaint. (IE 25)
34. On June 10, 2011, Mr. Flynn responded to former Member Schaumber in a reply e-mail message by stating that he was not sure of which hearing, but for the notice posting the details will go out with the "NPRM" and if it is the "Hill" he should contact Member Hayes. (IE 25)
35. On July 28, 2011, former Member Schaumber sent an e-mail message to Mr. Flynn stating that he had a debate with Andy Stern that night on the Boeing legislation and asking about cases involving unlawful transfers. (IE 26)
36. On July 28, 2011, Mr. Flynn responded to former Member Schaumber by describing two cases that he could recall. (IE 26)
37. On July 29, 2011, Mr. Flynn forwarded an e-mail message to former Member Schaumber that had as an attachment internal memorandums between the Office of the General Counsel and the Board. (IE 27)
38. An official from the Division of Enforcement Litigation reviewed the memorandums and stated that one of them contained legal advice to the Board. (IE 28)
39. On August 3, 2011, Mr. Flynn sent an e-mail message to former Member Schaumber stating that the Beck decisions were "flowing out" and disclosed the Acting General Counsel's recommendation regarding whether the Board should join in certain litigation as an amicus party. (IE 29)
40. On August 10, 2011, Mr. Flynn sent an e-mail message to former Member Schaumber discussing the deliberations of a former Chairman in the Mezonos Maven Bakery Inc. decision. (IE 30)
41. On August 22, 2011, Mr. Flynn sent an e-mail message to former Member Schaumber stating that the final rule for the notice posting, with a dissent by Member Hayes, would be posted that day or the next day. (IE 31)
42. On August 31, 2011, Mr. Flynn sent former Member Schaumber an e-mail message stating that a certain Member was researching the authority of the Board to act in a certain situation. (IE 32)

43. On August 30, 2011, Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a document titled "NoticePosting8-29.doc." (IE 33)
44. The track changes for "NoticePosting8-29.doc" recorded that Mr. Flynn edited the document on August 30, 2011, from 10:42 a.m. to 11:42 a.m. (IE 33)
45. A file titled "Schaumber NoticePosting8-29.doc" was found on the Government computer that is assigned to Mr. Flynn in the file directory path "Documents and Settings\fflynn\My Documents." (IE 20)
46. On September 2, 2011, the *National Review Online* published an article by former Member Schaumber that appears to be a further revised version of "NoticePosting8-29.doc." (IE 34)
47. On September 15, 2011, Mr. Flynn responded by e-mail message to a request from former Member Schaumber to look at a list of cases. Mr. Flynn responded that he did not see any Beck cases and that he would pass it "around" to see if anyone else had additions. (IE 35)
48. On September 15, 2011, Mr. Flynn forwarded the list of cases provided to him by former Member Schaumber to four NLRB attorneys. (IE 36)
49. On September 19, 2011, Mr. Flynn sent an e-mail message to former Member Schaumber stating that there were no additional thoughts on the list of cases. (IE 37)
50. On September 19, 2011, Mr. Flynn forwarded to former Member Schaumber an e-mail message that had as an attachment a document known as "Lead Cases 9 16 11.doc" that provided the Member and attorney assignments and the status of certain cases pending before the Board. (IE 38)
51. On September 23, 2011, Mr. Flynn forwarded to former Member Schaumber an e-mail message that had as an attachment a document titled "Lead Cases 9 22 11 (2).doc" that provided the Member and attorney assignments and status of certain cases pending before the Board. (IE 39)
52. On September 30, 2011, Mr. Flynn responded to an e-mail message from former Member Schaumber with comments on pending legislation regarding the Specialty Healthcare decision. (IE 40)
53. On October 11, 2011, Mr. Flynn, in response to a question about a pending case, forwarded to former Member Schaumber an e-mail message that named the counsels who were assigned to a case and that a certain Member had circulated a draft that had been approved by another Member, but not yet considered by a third Member. (IE 41)
54. On November 30, 2011, at 8:07 a.m., Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a document containing an analysis that had been

prepared by three Board counsels of the resolution for the representation rule that would be considered at the Board's open meeting. (IE 42)

55. On November 29, 2011, the day prior to sending the counsel's analysis to former Member Schaumber, Mr. Flynn received an e-mail message from him that read: (IE 43)

From: peter@schaumber.com
Sent: Tuesday, November 29, 2011 8:23 AM
To: Flynn, Terence F., Terry Flynn Personal
Subject: Hayes

I am on Fox twice today. Can I say Brian will be at the public "deliberations" tomorrow?
I would add that it is not usual for a member to withhold a vote until he sees the majority's proposed rule and the decision supporting it.
Sent from my Verizon Wireless BlackBerry

56. The analysis by the three counsels was not done at Mr. Flynn's request and was for a Board Member. (IE 44)

57. In addition to Mr. Flynn, each of the three counsels provided his comments to the other counsels. (IE 44)

58. A comparison of the document sent by Mr. Flynn to former Member Schaumber and the comments submitted by the counsel shows that the comments were included in the document without change. (IE 42 & 44)

59. On November 30, 2011, at 8:36 a.m., former Member Schaumber replied to Mr. Flynn's e-mail message stating "Thanks. I sent an op ed that went up on NRO to you last night[.]" (IE 45)

60. On November 30, 2011, at 9:04, Mr. Flynn sent an e-mail to Member Hayes with a link to the "op ed" at the National Review Online that was referenced in former Member Schaumber's reply e-mail message. (IE 46)

61. On December 13, 2011, Mr. Flynn sent former Member Schaumber an e-mail message as follows: (IE 47)

From: Flynn, Terence F.
Sent: Tuesday, December 13, 2011 8:48 AM
To: Flynn, Terence F., 'peter@schaumber.com'
Subject: RE: Final Rule Resolution thoughts.doc

Peter: In the course of responding to a FOIA request today, I noticed that I inadvertently sent this document to you; it was intended for Peter Carlton. Please return the document to me. Thanks. Hope all is well.

From: Flynn, Terence F.
Sent: Wednesday, November 30, 2011 8:08 AM
To: 'peter@schaumber.com'
Subject: Final Rule Resolution thoughts.doc

Thoughts from counsel on the resolution

62. The November 30, 2011, reply by former Member Schaumber was found in the "Deleted Items" folder of a Outlook PST file created on December 5, 2011, from Mr. Flynn's Government e-mail account on the NLRB's Outlook server. (IE 48)

63. When interviewed, the Board's Solicitor provided the following information: (IE 49)

a. The Board does not release deliberative information to the public;

b. The categories of information that are generally considered to be deliberative information include the Member assigned to a case, the counsel assigned to the case, the active status of a pending case, and the pre-decisional votes of any particular Member;

c. Except for the final votes, the deliberative information remains privileged even after a decision is issued;

d. Communication between a Member and his or her counsel would also be deliberative;

e. When the General Counsel is acting in his capacity as the Board's attorney, his legal advice and analysis would be privileged;

f. In response to requests from Congressional committees, the Board has withheld deliberative information.

64. When asked, Chairman Pearce stated that he did not approve the release of Board documents by Mr. Flynn. (IE 50)

65. When asked, former Chairman Liebman stated: (IE 51)

a. She did not approve the release of Board documents by Mr. Flynn; and

b. She considered any comments that she made to her staff counsels involving decisions on a case to be deliberative information that was confidential.

66. On June 23, 2011, Mr. Flynn received advice from an Agency ethics official regarding making comments on the rulemaking. She stated: (IE 52)

a. There is no ethical prohibition on speaking to someone who calls about mechanical or technical questions, as the rulemaking is public information;

b. Doing so, however, could have implications for him in light of his pending nomination – particularly if it became known publicly that any information someone might submit came from him;

c. It is a thin line between offering public information and offering up personal opinion;

d. He should assume that anything he might say could make it to the press, which could give the appearance that these people are trying to curry favor with him because of his pending nomination, or that he is providing those individuals with inside information that is not available to the general public; and

e. It is probably in his best interest, and the Agency's as well, to refer the individuals to the Office of Executive Secretary or the Office of Public Affairs.

67. On September 12, 2011, a candidate for the Republican nomination for President announced that former Member Schaumber would serve as a co-chair of the campaign's Labor Policy Advisory Group. (IE 53)

68. Mr. Flynn was interviewed on March 15, 2012. A transcript of the interview is at IE 54.

69. Former Member Kirsanow did not respond to our requests for an interview.

70. The NLRB policy for its telecommunications system is at IE 55.

ANALYSIS

The facts as outlined above provide a basis for finding that Mr. Flynn violated the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch and that he lacked candor during the investigatory interview.

Standards of Ethical Conduct for Employees of the Executive Branch

The standards state that an employee shall not "allow the improper use of nonpublic information to further his own interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure." 5 C.F.R. 2635.703(a). "Nonpublic information is information that the employee gains by reason of Federal employment and that he knows or reasonably should know had not been made available to the general public." 5 C.F.R. 2635.703(b).

Information regarding the deliberations of the Board is protected from disclosure by the *Guide for Staff Counsel of the National Labor Relations Board*. The information protected from disclosure includes the identity of the Board Member or staff assigned to a case and the status of a case. Additionally, staff counsels are only authorized to discuss pending cases with personnel on the Board-side of the Agency. Unauthorized disclosure of information either before or after a case is issued is grounds for discharge. In addition to those restrictions, all NLRB employees are prohibited from releasing Agency documents without written consent by the Chairman or General Counsel. 29 C.F.R. 102.118. Attorney-client information in intra-agency memorandum is protected by both Federal statute, 5 U.S.C. 552(b)(5), and the rules of professional responsibility in every U.S. jurisdiction.

The manner in which the Board has implemented its policies to protect its deliberative information was described by the Solicitor in a May 25, 2011, letter to the U.S. House of Representative's Committee on Education and the Workforce. In refusing to provide deliberative information to the Committee, the Solicitor explained that "deliberative, pre-decisional documents and communication are treated with the highest confidentiality" and "it is very rare for any deliberative, pre-decisional communication to be distributed more broadly than those persons directly involved in the consideration of a case."

The information provided by Mr. Flynn involving the lead case lists, pre-decisional votes and positions of the members, the identity of counsel assigned to a case, the status of cases, the researching issues in cases, the deliberation of the former Chairman in Mezonos Maven Bakery Inc., the desire of two members to press forward in D.H. Horton, advice to the Board on D.H. Horton, and the analysis of the Board's resolution on the representation rule, were all deliberative, pre-decisional information that was protected from disclosure and considered by the NLRB to be the most confidential of Agency information. Likewise, the information in the e-mail message from the attorney involved in the notice posting litigation and advice of the Acting General Counsel were attorney-client information and protected from disclosure.

Given Mr. Flynn's position as a Chief Counsel and his years of service, he knew, or should have known, that he had a duty to maintain the confidence of the information that he received in the performance of his official duties.

We also find that the improper disclosure of information to former Members Kirsanow and Schaumber amounted to a conversion of the information for the private benefit of former Member Kirsanow and his client, the National Association of Manufacturers, and former Member Schaumber's labor relations consulting and/or legal practice. The improper disclosures of information to former Member Schaumber were particularly detrimental to the Board's deliberative process in that they involved the positions of Board Members and staff prior to the public announcement of Board decisions and disclosure of the type of information that could have a chilling effect on the operation of the Board and may prejudice the due process rights of the parties in pending and future cases. See Page 9 of attachment to IE 48.

The standards state that "[a]n employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation." 5 C.F.R. 2635.705(b). Mr. Flynn's requests to the Law Librarian to research and locate documents for former Member Kirsanow violated that standard. Providing assistance to an individual who is engaging in a legal action against the NLRB is not within the scope of duties of the Law Librarian, nor is it authorized by law or regulation. Also, reviewing case lists or providing assessments of labor law issues for former Member Schaumber and attorneys who are Mr. Flynn's former law firm associates are not within the scope of the duties of Mr. Flynn's subordinate Board counsel.

The standards also required Mr. Flynn, as a Chief Counsel, to use his official time in an "honest effort" to perform official duties. See, 5 C.F.R. 2635.705(a). Mr. Flynn was not authorized to use official time to provide editorial services to former Member Schaumber or otherwise assist him with his labor relations consulting and/or legal practice. Because of the ongoing and continuous nature of the assistance provided by Mr. Flynn to former Member Schaumber, we find that Mr. Flynn violated this standard. We note that, in general, we were only able to review e-mail records from May 2011 forward that remained on the NLRB e-mail server through the period of this investigation.

The standards also state that an employee shall not use Government property for other than an authorized purpose. 5 C.F.R. 2635.704. The term "Government property" includes telecommunications equipment and services. *Id.* Mr. Flynn was clearly not authorized to use the NLRB's e-mail system to disclose nonpublic information, and his conduct also violated the NLRB's written policy of acceptable use of its information technology resources. That policy states, in part, that it is unacceptable to use the e-mail system for activity that is illegal or inappropriate in the workplace or to send material that is libelous or tends to involve defamation of character. See IE 55. The policy also states that it is unacceptable to use the e-mail resources for commercial purpose or in support of "for profit" activities. The use of the e-mail system by Mr. Flynn violated those provisions.

The ethics advice provided to Mr. Flynn is not sufficient to provide him with safe harbor. See 5 C.F.R. 2635.107. That advice was narrowly tailored and addressed only comments that he might make involving mechanical or technical questions involving rulemaking. The e-mail message to former Member Schaumber involved providing advance notice that the rule would be issued rather than answering a mechanical or technical question. As such, Mr. Flynn did not act in accordance with the advice that he received from the Agency's ethics officer. With regard to forwarding the internal Agency e-mail message about the status of the announcement of the rulemaking to an attorney at Crowell & Moring, LLP, it occurred 5 days before Mr. Flynn requested the ethics officer's advice.

We discussed our interpretation of the standards in this matter with the U.S. Office of Government Ethics and the Designated Agency Ethics Official.

Lack of Candor

When asked about the November 30, 2011, e-mail message to former Member Schaumber that had as an attachment a document containing an analysis that had been prepared by Board counsel of the resolution for the representation rule that would be considered at the Board's open meeting, IE 42, Mr. Flynn stated:

And I did not remember sending this to Peter Schaumber. I don't know why I would have. There's no reason why I would have sent this to Peter Schaumber. And I believe what happened here is that this was an auto-fill option on my Outlook and that was misdirected to Peter. It should have gone to Peter [Name]. And I discovered that error when we were responding to a FOIA request. And I sent

Member Schaumber an e-mail notifying him of -- former Member Schaumber an e-mail notifying him of the error and asking that he return it.

Had Mr. Flynn sent former Member Schaumber the e-mail message in error, he would have realized the error, as early as 29 minutes later, when he received the reply e-mail message from former Member Schaumber thanking him for it rather than 13 days later when reviewing his e-mail messages for a FOIA request. We know that Mr. Flynn was aware of the e-mail reply because Outlook indicates that it was opened and we found it in the "Deleted Items" folder, indicating that Mr. Flynn was aware that he received it and then deleted it. The latest the e-mail message could have been deleted was December 5, 2011, because that is the date the PST file was downloaded from the NLRB's Outlook server. December 5, 2011, is also the date that Mr. Flynn was informed that he was the subject of an OIG investigation involving, in part, his communication with former Member Schaumber. Also, the reply by former Member Schaumber made reference to his article being posted at the *National Review Online*. Twenty-eight minutes after that e-mail message was sent, Mr. Flynn sent Member Hayes an e-mail message with a link to the article on the *National Review Online* Web site. The reference to that opinion piece by former Member Schaumber certainly would have indicated to Mr. Flynn that he sent the message to the wrong "Peter" had he actually done so.

When we reviewed the document that Mr. Flynn sent to former Member Schaumber, we found that it was comprised of counsels' comments that had been sent to Mr. Flynn the prior day by the three counsels via three e-mail messages -- one from each counsel. The counsels' comments appear to have been "cut and pasted" into the document because they were unedited and each remained in its original font. Each of the three counsels who contributed the comments was included as addressees on each of the e-mail messages that transmitted the comments to Mr. Flynn. We could not find that Mr. Flynn made any notations or comments in the document. Given that Peter [Name] already had the comments, there was absolutely no reason for Mr. Flynn to forward the comments, including Peter [Name] own comment, to him. Moreover, we know that the request for comments did not originate with Mr. Flynn nor were the comments intended for use.

We also find that Mr. Flynn's statement that he did not know how former Member Kirsanow was going to use the information that he requested from the Law Librarian is not credible. On September 7, 2011, he sent former Member Kirsanow an e-mail message that read "Pete: You may have already pulled a copy of this petition as well" and included an attached Westlaw document that was a Petition for Review of a regulation that was completely unrelated to the NLRB. The only reason to send such an e-mail message to former Member Kirsanow is if Mr. Flynn knew that he was preparing or considering filing such an action involving the recently issued NLRB rule.