COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2101 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

January 26, 2012

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Holder:

I write to request that the Department of Justice investigate possible enticement involving a Board Member at the National Labor Relations Board ("NLRB" or "Board") and the law firm of Morgan, Lewis and Bockius, LLP ("Morgan Lewis").

The NLRB is an independent federal agency that administers and enforces the National Labor Relations Act[1] for both employers and employees. It functions to both adjudicate cases and issue rules. The U.S. Supreme Court has held that the Board must have "no fewer than three members" to have a quorum and exercise its authority under the law.[2] On August 27, 2011, the term of the Board's Chairwoman expired and the Board was reduced to three members. At that time, special interest organizations and others were calling upon the Honorable Brian Hayes to resign from his position as Member of the Board to reduce it to two members and thereby incapacitate it.[3] If Member Hayes were to resign, the remaining two-member Board would be unable to promulgate any rules or issue any case decisions.

In November 2011, Member Hayes threatened to resign from the Board if the Board attempted to advance a rule reforming union elections.[4] Given the facts and circumstances surrounding his threat and my concern that his resignation would be the direct result of improper influence, I

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[1] Pub. L. 74-198, 49 Stat. 452.
[2] *New Process Steel vs. National Labor Relations Board*, 130 S.Ct. 2635 (June 17, 2010).
[3] *See* An Open Letter to GOP NLRB Member Brian Hayes: Please Resign Immediately, Labor Union Report (August 28, 2011). *Available* at: http://www.laborunionreport.com/portal/2011/08/an-open-letter-to-gop-nlrb-member-brian-hayes-please-resign-immediately/
[4] *See* letter from Board Chairman Mark Pearce to Board Member Brian Hayes (November 21, 2011).

wrote to Member Hayes and asked him to reveal to me and the House Committee on Education and the Workforce information about the requests, recommendations, or demands he or his office received to resign.[5] He failed to produce this information.[6]

In light of my oversight request to Member Hayes and an allegation independent of my inquiry, the Board's Inspector General investigated and uncovered evidence that Member Hayes was in fact engaged in employment discussions with an attorney with the law firm Morgan Lewis around the time he threatened to resign. Morgan Lewis is a firm with significant business before the Board, and it has been actively engaged in opposing the Board's recent actions, including the aforementioned rule on union elections.[7] According to the Inspector General's report,[8] Member Hayes has admitted that in these employment discussions, the Morgan Lewis attorney conveyed to him: "If you ever decide to resign we'd like to talk to you." These discussions between Member Hayes and Morgan Lewis were held on several occasions beginning in late September or early October and ending in December 2011.[9] During this time, the Board was deliberating and finalizing its proposed rule on union election procedures. The Board published its final rule on December, 22, 2011, the same day Board Member Hayes wrote to Morgan Lewis to formally discontinue their employment discussions stating he had "no present interest or intent in pursuing employment with Morgan, Lewis…"[10]

In light of the Inspector General's evidence that employment discussions were taking place between Board Member Hayes and Morgan Lewis for at least two and one-half months, the narrow scope of his investigation, and the many questions that remain about the propriety of the Hayes and Morgan Lewis employment discussions, I do not believe that Member Hayes'

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[5] *See* letter from Congressman George Miller, Senior Democrat, Committee on Education and the Workforce, to Board Member Brian Hayes (November 23, 2011).
[6] *See* letter from Board Member Brian Hayes to Congressman George Miller, Senior Democrat, Committee on Education and the Workforce (December 2, 2011).
[7] Morgan Lewis has filed comments opposing two proposed rules that are now final (i.e., notification of employee rights, 29 CFR 80,410, and rule on union elections, 29 CFR 36,812-36,847). A representative of the firm testified before the Board's open hearing on the proposed rule on union elections. Furthermore, Morgan Lewis is representing clients in their challenge to the Board's rule on union elections. *See*, *Chamber of Commerce, et. al v. NLRB*, D.D.C.,No. 11-cv-02262). Morgan Lewis also represented the charging party in a case before the Board, *DR Horton* (357 NLRB No. 184), which was decided on January 3, 2012. According to the Board's Inspector General, about a month after beginning discussions with Morgan Lewis about employment, Board Member Hayes recused himself from this case after discussions with the NLRB's Ethics Office.
[8] *See* Memorandum, Report of Investigation-OIG-I-467 from NLRB Inspector General David Berry to Board Chairman Mark Pearce and Board Member Brian Hayes (January 23, 2012).
[9] *Id.*
[10] *See* letter from Board Member Brian Hayes to Charles Cohen, Esq., Morgan Lewis (December 22, 2011).

decision not to resign and remain at the Board ends our inquiry. Therefore, I respectfully request that the Department of Justice further investigate the circumstances surrounding the employment discussions between Member Hayes and Morgan Lewis and any other issues the Inspector General brings to your attention related to his investigation. The Board plays a critical role in adjudicating and administering the rights of employees and employers under our nation's labor law, and Board members must be free of coercion and undue influence when executing their responsibilities.

If you have questions regarding this request, please contact me or direct your staff to contact the Committee's Investigative Counsel, Kate Ahlgren, who may be reached at (202) 225-3725. I appreciate your attention to this matter.

Sincerely,

George Miller

GEORGE MILLER
Senior Democratic Member

Enclosures

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

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

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 Members 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 confussion 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.

UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

November 21, 2011

The Honorable Brian E. Hayes, Member
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Dear Member Hayes:

I was greatly disappointed to read your letter, dated November 18, 2011, to Chairman John Kline of the House Committee on Education and the Workforce, which discusses in great detail internal Board deliberations and processes. Your willingness to publicly disclose pre-decision, deliberative conversations constitutes a dangerous departure from over 75 years of Board practice and threatens the ability of future Board members to deliberate freely and openly independent of external political and other pressures. Of even more concern, however, is the inaccurate and misleading nature of your description of those deliberations and processes. It is these inaccuracies that require me to clarify the record today.[1]

Before I address the specific allegations in your letter, it is important to note that you could have voiced all of the views expressed in your letter in an appropriate and public forum, but chose not to do so. In your dissent to the Notice of Proposed Rulemaking concerning the Board's representation case procedures, published on June 22, 2011, you stated, "I believe the Board should also have exercised its discretion to hold an open meeting under the Government in Sunshine Act." On November 10, I informed you that the decision about whether, how, and to what extent the Board would proceed with any final rules would likely be made at a public meeting. Last week, before you sent your letter to Chairman Kline, the Board sent a notice of such a meeting to the Federal Register and announced that the meeting would be held on November 30. At that open meeting, you will have a chance fully to express your views on the proposed rules, the procedures used to consider their adoption, and the propriety of the Board adopting them at this time, and your colleagues will have an opportunity to respond to your concerns. It would have been appropriate for you to express any views, however strongly held and however contrary to those of any of your colleagues, face to face, across the Board's conference table, and in public.

[1] Your letter and its release to the public have forced me to correct the record as to internal Board processes. I have, however, endeavored not to further compromise the deliberative process and thus have refrained herein from any disclosure of discussions of the substance of the proposed rules or pending cases.

Instead, upon the announcement of the public meeting, you immediately directed your Chief Counsel to inform the Board's Executive Secretary and the Board's Solicitor that you would not participate. You thus decided to refuse to participate in an open, deliberative process in favor of a one-sided and inaccurate letter to a congressional committee released late on a Friday afternoon.

No decision has been made on the proposed rules

In your letter to Chairman Kline, you make a number of false or misleading allegations. First, you assert that a decision has already been made to issue a final rule before the end of Member Becker's service on the Board. That is untrue. No decision has been made and no vote has been taken. As announced publicly last week, a decision on whether, how and when to proceed with any parts of the proposal will be made at the public meeting on November 30. The planned dates for circulation of a final rule and publication in the Federal Register were, when the Board's Solicitor wrote to Chairman Kline on November 10, and remain today, "unknown." Furthermore, the Solicitor accurately stated in that letter: "Discussions between Board Members on how to complete the R-Case Rulemaking are ongoing and no specific timetable has been established at this time." The fact that individual Members may have stated their views on these matters to you does not constitute a decision of the Board. Rather, it constitutes the normal deliberative process of a multi-member agency.

You have been fully informed about and invited to participate in the rulemaking process

You assert in your letter that your colleagues have proceeded to consider the proposed rules "without my participation." That is also untrue. Since the Board first began consideration of amendments to the representation case procedures, you have been kept fully informed and have been invited to participate fully in the deliberations. After you were sworn in as a Member, you were briefed on proposals to amend the rules. At each stage of the preparation of the proposed rule, you were advised of the other Members' thinking and invited to ask questions and provide comments. You were provided with a draft of the proposed rule as early as April of this year and offered a personal briefing concerning the draft. While you did not avail yourself of the briefing, detailed questions from your staff were answered by members of the drafting team, who offered continued assistance with any future questions that might arise. Although the Administrative Procedures Act does not require or provide for the publication of dissents from notices of proposed rulemaking, you were afforded an opportunity to write a dissent, which was published as part of the NPRM in the Federal Register.

The proposed rule, along with your dissent, was published in the Federal Register on June 22, 2011. On June 24, 2011, Board staff held a bipartisan, bicameral briefing for congressional staff. Your staff was invited to attend the briefing and did so. On July 18 and 19, 2011, the Board held a public hearing on the proposed rule. Prior to the hearing, you were briefed on the preparations for the hearing. You were provided a list of witnesses in advance of the hearing and you attended the hearing and participated in asking questions of the witnesses. Initial public comments on the proposals were due on August 22, and reply comments were due on September 6. You and all members of your staff had access to all public comments filed with the Board as soon as they were

filed. At no time did you request assistance in accessing those comments, although it was offered to you, or for additional staff help in reviewing those comments. Nothing in your letter to Chairman Kline suggests that you or any member of your staff has made any effort to review public comments concerning the proposals despite the statutory duty of the Agency, and, thus, of *each* of its Members, to review and consider all public comments. See 5 U.S.C. § 553(c); *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F. 2d 1516, 1520 (D.C. Cir. 1988), cert. denied 489 U.S. 1078 (1989) (agency has a "statutory obligation to consider fully significant comments"). While decrying a lack of public participation in the process, you have apparently chosen to simply ignore the extraordinary wealth of public comments concerning the proposal, many of which are highly sophisticated and contain valuable insights.[2]

Before the public comment period for the proposed rule closed on September 6, 2011, at my direction, agency staff began reviewing and coding the tens of thousands of comments that were submitted. You were invited to have your staff participate in the coding and review of comments. One member of your staff received training in coding, but, according to your Chief Counsel, never had time to participate because of other duties. On September 1, you were provided with a list of all the Board-side staff who had been trained to or were actually working on the comment review and coding[3] as part of my written request to you that the single member of your staff who had been trained to help be permitted to assist with the final review all the comments. After advising me that you would respond to the request after checking with your Chief Counsel, you never responded. In sum, the record is clear that you chose not to make any member of your staff available to assist with the large and complex task of reviewing and coding the comments. Every other Board Member contributed several staff attorneys. If you had honored my request to contribute members of your staff to this necessary work of the agency, they would, of course, have been able to keep you fully informed about the process.[4] Until Monday, November 14, 2011, neither you nor any member of your staff even inquired about the progress or status of the staff-level review of comments, although you were well aware that it was ongoing.

On October 7, you and your staff received copies of the comments Member Becker and I and our senior staff considered the most extensive, detailed, and useful (although all comments had been available to you since they were filed). You were also given computer generated reports identifying the issues addressed in all the comments that had been coded "most significant" and "significant" by the comment review team, along with instructions on how to locate any of the over 65,000 comments on the agency's shared computer system. On November 14, you and your staff were directed to comprehensive lists of issues raised in the most significant and significant comments, which had been prepared by staff who reviewed all such comments a second time. Thus, despite the fact that you refused to provide *any* staff assistance in the Board's review of the

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[2] You may thus not be aware that, despite the strongly held views expressed in your dissent to the NPRM, the Agency received many comments supporting the proposal, not only from labor organizations representing millions of employees, but also from employers supporting many parts of the proposal.

[3] Despite having been given this list, and despite the receipt by your staff of updates identifying all of the other comment reviewers, you state in your letter to Chairman Kline on page 2, n. 5, "I note that my colleagues did not provide you with a requested list of Board staff involved in this process, although that information is available to them, but not to me." Your representation to the Chairman that you did not have access to the list is incorrect.

[4] In fact, your staff received numerous updates concerning the progress of the coding during September and October.

over 65,000 comments, you have been provided full and complete access to the fruits of that undertaking. [5]

In addition to fully sharing with you the results of the review of all public comments on the proposals, your colleagues have repeatedly attempted to engage you in discussion of the proposals in an effort to find some common ground. However, you have chosen not to engage in the ordinary collaborative process of deliberation. As stated above, you were provided with a draft of the proposed rule as early as April of this year and all of your staff's questions concerning the draft were fully and promptly answered. At no time during the consideration of the proposal did you suggest any revisions or attempt to engage your colleagues about the substance of the proposals or the process for their consideration. In your dissent from the NPRM, you stated, "Parts of what my colleagues propose seem reasonable enough," yet neither before nor since publication of the NPRM have you identified the parts of the proposed rules you consider reasonable.[6]

Shortly after the publication of the NPRM in July, Member Becker met with you in your office and asked that you consider which aspects of the proposals could be agreed on and specifically asked that you make proposals in relation to those areas of greatest importance to you. You indicated you would consult your staff and respond, but you never did. Since the end of former Chairman Liebman's term in August, numerous lists of priority matters the Board hoped to dispose of before the end of Member Becker's service have been prepared and circulated among the Members. The rulemaking process was among those matters. I have attempted repeatedly to discuss those priority matters with you in order to reach agreement on a schedule for their disposition and you repeatedly deferred the discussion. In the past two weeks, you declined to attend two regularly scheduled weekly meetings of the Board at which the Members were to have discussed a schedule for the disposition of the priority matters.

In mid-October, I specifically discussed with you a potential schedule for consideration of the rulemaking. You did not offer any alternative schedule. You did not present me with any specific concerns you may have had with the substance of the proposed rules. Instead, you indicated that, if the Board proceeded with consideration of the matter, you would consider resigning your position.[7]

In early November, in response to your suggestion that you would resign, thereby depriving the Board of a quorum and preventing the issuance of *any* form of final rule as well as the adjudication of many cases now pending before the Board, I offered to delay publication of a final

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[5] Here, I must note that since August of 2010, when the term of former Member Schaumber ended, you have enjoyed the use of two full Board Member staffs, currently a total of 27 attorneys. Member Becker, by contrast, has a staff of only 14 attorneys.

[6] Indeed, many parts of the proposed amendments appear indisputably necessary, the elimination of references to the use of "typed carbon copy," to name just one. Yet at no time did you indicate *any* aspect of the proposal you would support.

[7] I note that you, like Member Becker and me, in response to the following written question from the Senate Health, Education, Labor and Pensions Committee -- "Do you intend to serve the full term for which you have been appointed or until the next Presidential election whichever is applicable?" -- provided, under oath, the answer "yes."

rule until after the new year when a quorum of the Board is reestablished (after the end of Member Becker's service), if you would simply agree that, after that time, you would produce a dissenting opinion within a specified time after receiving a draft final rule and notice approved by a majority of Members. I initially proposed a time period of 45 days. You advised me that that offer "did not work for you," and that you would suggest an alternative by the following week. You did not do so. It appears that you believe you are entitled to an unlimited amount of time to consider this matter in order to exercise an effective veto of the will of a majority, whether it be of two, three or four Members and whether it be this year or next.

On Thursday November 10, I advised you that despite your suggestion that you might resign, the Board majority wished to proceed with deliberations over the rulemaking. I encouraged you not to resign, but to participate in those deliberations. I told you that I was considering recommending significant modifications to the proposed rules and that I would appreciate your input. I told you that I would likely schedule a public meeting unless you preferred that the Board Members vote by electronic means (as we often do) on the questions of whether, how and to what extent the Board would proceed. You indicated that you thought a public meeting would probably be appropriate. I asked for your further views about how to proceed, and you said you would respond by Monday, November 14. I heard nothing from you by or on that date. On Tuesday, November 15, you emailed to advise me that you opposed a public meeting. In addition, you threatened to send an attached letter to Chairman Kline much like the letter you eventually sent at the end of the week.

In a final attempt to resolve our disagreements through the ordinary Board processes, Member Becker asked if you would consider a schedule under which the Board would consider only a very limited number of the proposed amendments and leave the remainder for consideration after the end of Member Becker's service. Member Becker did not ask you to agree to the amendments or to forego dissenting about any aspect of the proposals or the process used to adopt them, but simply that you agree to dissent within 30 days after receiving a draft final rule concerning the very substantially limited set of amendments.

Member Becker's proposal also included agreement of all Members to a temporary, emergency measure intended to permit the Board to issue decisions in cases that had been considered, voted on, and a majority decision written and approved before the end of Member Becker's service, given the possible loss of a quorum at that time. The proposal would have provided that no decision could issue unless a dissenting member had been afforded at least 30 days to write a dissent after receiving an approved majority opinion. Moreover, unlike the Executive Secretary Memorandum cited in your letter, the proposal would have allowed a dissenting member to take *any* amount of time he deemed necessary to write a dissent, which would then be issued and published separately from the majority opinion.[8] The proposal was expressly denominated an

[8] You state in your letter to the Chairman on page 3, "the 'emergency' procedures would deprive me of any meaningful opportunity to consider the majority position, much less prepare a response, in any number of cases." This representation is simply incorrect. Under the written proposal you were given, you would have had *at least* 30 days to prepare a dissent, and the opportunity, if that period was not sufficient, to publish a dissent at any time after issuance of the majority opinion.

"Emergency and Temporary" measure, necessitated by the possibility that the Board might be "without a quorum and unable to fulfill its statutory duty to issue decisions at the end of the current congressional session and, possibly, for an extended period after the end of the session."[9] Last Friday, you informed Member Becker that you would not agree to any aspect of his proposal and made no counterproposal.

In short, you have not in any way been excluded from the process of deliberation concerning the proposed rules. Rather, you have refused to assist with that process in any respect and refused to engage in the normal give-and-take of deliberation of a multi-member board.

A majority of the current Board has authority to adopt a rule

You assert in your letter that the Board cannot proceed to adopt any final rule because of its tradition of not overturning precedent through adjudication without the agreement of at least three Members. Of course, the Board has made no decision to adopt any portion of the proposed rules to date. Moreover, the proposed rules do not purport to overrule any extant precedent. Nevertheless, I must point out that the National Labor Relations Act expressly vests the Board with authority to adopt rules and does not require any form of super-majority vote in order to do so. To the contrary, under the Act, a lawful quorum of the Board consists of three members (out of the five members provided for by the statute). Under Section 3(b) of the Act, so long as the Board has a quorum of three, sitting Members, the Board can "exercise all of the powers of the Board." 29 U.S.C. § 153(b). Rulemaking is one of the "powers of the Board." See 29 U.S.C. § 156. There is no statutory basis to argue that a three-member quorum of the Board must act unanimously—as opposed to acting by majority vote, as the Board ordinarily acts—in order properly to exercise the Board's powers, including rulemaking.

The Board does have a tradition, as you state, of not overruling its own prior precedents through adjudication with fewer than three votes to do so. See *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154, slip op. at 2 & fn. 1 (2010) (concurring opinion of Chairman Liebman and Member Pearce) (collecting cases dating back to 1985). This tradition, which is not unbroken,[10] is not based on the Act itself, nor has it been codified in a Board rule or statement of procedure. No Board decision has ever articulated a reason for the practice.

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[9] As you know, Member Becker has advocated adoption of such an internal rule since the start of your and my service on the Board, and has informed you directly that he would publicly support its retention *regardless* of any subsequent changes in the composition of the Board. I note further that the proposal parallels rules governing case processing in federal courts of appeals, designed, of course, to prevent a dissenting judge from effectively exercising a pocket veto through delay. See, e.g., U.S. Court of Appeals for the Third Circuit, Internal Operating Procedures, §§ 5.5.3(b), 5.6; U.S. Court of Appeals for the Seventh Circuit, Operating Procedures, § 9(i).

[10] See *Mathews Readymix, Inc.*, 324 NLRB 1005, 1008 fn. 14 (1997), enf. granted in part, denied in part, 165 F.3d 74 (D.C. Cir. 1999) (two-member majority overrules precedent); *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 775 fn. 3 (1997) (same).

The closest approximation to such a rationale comes from a federal appellate court. On review of *Hacienda Resort,* the U.S. Court of Appeals for the Ninth Circuit acknowledged the Board's traditional approach to overruling precedent in adjudication:

> We recognize the Board's interest in protecting the stability of its legal precedent. Unlike other federal agencies, the NLRB promulgates nearly all of its legal rules through adjudication rather than rulemaking.... Under such a scheme, the Board's rules would be of little assistance to employers and unions in following the NLRA if the Board's rules interpreting the Act were subject to routine, frequent change. The Board reasonably has decided that requiring a three-member majority to overturn precedent provides for the necessary stability of its rules, and we defer to that judgment.

Local Joint Executive Board of Las Vegas v. NLRB, 657 F.3d 865, 872 (9th Cir. 2011).

The Ninth Circuit's statement underscores a critical aspect of the Board's practice: It has been followed in the Board's *adjudication* of cases, rather than in rulemaking. The notice-and-comment process of rulemaking does not implicate the same concerns about the stability of legal rules that adjudication does, because it does not permit the "routine, frequent change" of which the court spoke. The greater stability inherent in rulemaking has been cited by the Administrative Conference of the United States in recommending increased use of rulemaking by the Board. See Administrative Conference of the United States, Recommendation 91-5, *Facilitating the Use of Rulemaking by the National Labor Relations Board* (adopted June 14, 1991), 56 Fed Reg. 33851 (July 24, 1991). In sum, the notice and comment procedures of the Administrative Procedures Act, which you have acknowledged have been fully followed by the Board, are an appropriate substitute for the self-restraint the Board has traditionally imposed on itself in the context of adjudication.

You do not possess a veto over all Board action

You assert in your letter that you possess veto power over *any* action of the Board at this time under the Supreme Court's recent decision in *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). You assert that you must agree "to delegate decisional authority on this matter to a group of three Board members." Section 3(b) of the Act provides that "[t]he Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." At present, however, the Board, consisting of only three Members, is exercising its powers as a full Board and not delegating any powers to "any group of three or more members." Until now, you agreed, at least implicitly, with this construction of the Act: since the end of former Chairman Liebman's term, the three remaining Members of the Board have issued numerous decisions without any such delegation, including decisions in which a Member dissented. In fact, since that time, the language used in panel decisions when there are more than three sitting Members, "The National Labor Relations Board has delegated its authority in this proceeding to a three-member

panel," has not generally been used,[11] and you have raised no objection and never made the peculiar suggestion that the three sitting Members must somehow delegate authority to themselves until now.

No standing rule of Board procedure provides you with 90 days to dissent before publication of any final rule

You assert in your letter that Executive Secretary Memorandum No. 01-1 entitles you to 90 days to write a dissent to any final rule. That is untrue. Memorandum No. 01-1 applies to "Timely circulation of Dissenting/Concurring Opinions" -- i.e., it expressly applies only to the adjudication of "cases." While you acknowledge that the Memorandum applies only to adjudication, you assert that there is "no rational basis for not applying it to substantive rulemaking as well." There is one, however, and it is embodied in the APA. Significantly, as stated above, the APA makes no provision for publication of a dissent from either a notice of proposed rulemaking or final rule. Moreover, the APA requires a notice of proposed rulemaking. There is no parallel requirement of a published statement of a preliminary view by the majority in adjudication. Here, therefore, you have had a detailed statement of the majority's views since well before the NPRM was published in June. There is thus every reason to expect that "timely circulation" of an opinion dissenting from any final rule could be prepared in less than 90 days.[12] Finally, while you assert that your colleagues intend to "not allow the requisite time for preparing or circulating a dissent," the only proposal that has been made to you provided that if you did not believe you had sufficient time to prepare a dissent you could take as much time as you deem necessary and your dissent would be published in the Federal Register subsequent to the final rule.[13]

The Board's use of staff from its General Counsel's office and regional offices to fulfill its statutory duty to review public comments was entirely proper

You assert in your letter that the Board's use of staff from its General Counsel's office or regional offices to assist with the review of comments or in any other manner in connection with the rulemaking proposal somehow violates Section 4(a) of the Act. This allegation of illegal conduct is made without supporting citation or explanation. As you well know, nothing in that section prevents staff from any part of the agency, including the General Counsel's office or regional offices, from assisting in the review of public comments on a proposed rule or in research or drafting under a Board Member's supervision. Section 4(a), by its terms, applies to the

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[11] Compare *Atlantic Scaffolding*, 356 NLRB No. 113, slip op. at 1 (March 18, 2011) (Liebman, Pearce and Hayes) with *Douglas Autotech Corp.*, 357 NLRB No. 111, slip op. at 1 (Nov. 18, 2011) (Pearce, Becker and Hayes). The absence of any delegation and thus of the delegation language in nearly all decisions since the Board dropped to three Members is consistent with the absence of any delegation (and thus the delegation language) whenever the Board acts through all its sitting members, i.e., when it acts *en banc*. See, e.g., *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 1 (Aug. 26, 2011).

[12] Indeed, Memorandum 01-1 expressly provides that "questions will arise which are not answered by these procedural instructions" and that they will be handled "on an ad hoc basis." Further, the Memorandum provides that "For good cause, the Board has the discretion to allow departure from these procedures on a case-by-case basis."

[13] Memorandum 01-1 creates a 90-day period for circulation of a dissent, but contains no allowance for the subsequent publication of dissents if the dissenting Member requires more time.

adjudication of cases (to which the General Counsel is a party) and has never been construed otherwise. Moreover, you are well aware that staff from the General Counsel side of the agency are detailed from time to time to Board staffs where they perform a variety of duties. It is disturbing, to say the least, that you would raise a charge of illegal behavior in a letter to a Member of Congress without first speaking with me about your concerns or raising them with the Agency's Solicitor or Inspector General, who could easily have allayed your concerns on this score.

Other Board Members have continued to fulfill their duty to decide cases

You assert in your letter that the Board has not properly attended to the adjudication of pending cases while it was fulfilling its duty under the APA to consider all public comments on the proposed rules. This is untrue. As you point out in your letter, action by all sitting Members is traditionally required before a decision is issued. While I do not believe it is appropriate to publicly reveal the status of pending cases in each Member's office, under separate cover I will provide you with a list of all cases we have designated as priority cases in which decisions are ready to be issued pending only your action. For you to suggest that the delay in issuing cases is due to other Members' devotion of their time or their staffs' time to the rulemaking proceedings is disingenuous, particularly when you have refused requests to provide any staff to assist with the statutorily mandated task of reviewing public comments.[14]

The rulemaking process has been the most open and inclusive process in the Board's 75-year history

Finally, your letter asserts that the rulemaking procedure has been rushed and exclusionary. This is untrue. On June 22, the Board published in the Federal Register a 36-page NPRM setting forth the proposed rules along with a detailed explanation of why they were being proposed. The Board sought written comments on the proposals for 60 days and written reply comments (which are not required by the APA) for an additional 14 days thereafter. The Board held an unprecedented two-day public hearing on the proposals attended by all sitting Board members, at which many of the most experienced and skilled members of the labor and management bar as well as employers, employees, and union leaders testified concerning the proposals and were questioned by Board Members. The Board has received over 65,000 public comments on the proposals, and each unique comment has been personally read at least once if not many times by Board staff under my direction. To describe this extraordinarily careful and open process as in any respect rushed and exclusionary simply ignores reality. It appears that in your view due process means interminable process or, at least, process that extends until the Board is either disabled from acting or its

[14] I further reject your suggestion that the Board attempted to "disguise" a "diminution in productivity" in its response to the congressional request. Exhibit 3, which you criticize in your letter, was prepared by the Executive Secretary's office in response to the request for a "monthly breakdown of decisions issued by the Board." When your staff pointed out that the request might refer to a subset of decisions, namely those in contested cases, a table providing that information was prepared as well, and attached as Exhibit 4. Both sets of numbers were provided to the committee at the same time. Neither even remotely supports your assertion that necessary work on the rulemaking proceeding has had an "adverse impact" on the issuance of decisions.

composition changes. But that is not how due process is defined under the Constitution or the APA, and the Board has fully and fairly complied with both the letter and spirit of the law.

In sum, I recognize that you may disagree with my views of proper administrative procedure and Board priorities, and you have every right to do so and every right to express that disagreement in an appropriate forum. That forum is the planned public meeting, a private meeting with me or Member Becker, or a published dissent. At every step of this rulemaking process, the other members of the Board have attempted to include you and your staff in the accomplishment of the tasks necessary to fully and fairly consider the view of the public, to engage in discussions with you, and to seek your views. At every step of the process, however, you have declined to assist, to participate, and to engage in collaborative deliberation. With all due respect, your conduct has been inconsistent with the collegial norms of the Board.

I deeply regret that you continue to decline to participate in a meaningful way in this deliberative body. I urge you to return to your work here on the Board. Many cases, vitally important to the employees, employers, and labor organizations who rely on this Agency as well as to the general public, await your consideration. Every day, Member Becker and I along with all the other employees of our Agency strive to make the National Labor Relations Act work as a mechanism for the peaceful resolution of conflicts that arise in American workplaces. If you disagree with the approach we have taken, state your disagreements face to face across the conference table, where they can be considered and debated, or explain your position in a dissent, as both Member Becker and I have done when we have been in the minority, and as previous Members of this Board have done since the creation of this venerable body. You can come back to the work of the Agency and contribute your views to our important deliberations, or you can continue down a reckless path of unfounded public accusation. I, for one, hope you will return to work, and I invite you to do so. We still have much to do on behalf of the American people.

Very truly yours,

Mark Gaston Pearce
Chairman

cc: The Honorable John Kline, Chairman
House Committee on Education and the Workforce
The Honorable George Miller, Ranking Member
House Committee on Education and the Workforce
The Honorable Tom Harkin, Chairman
Senate Committee on Health, Education, Labor & Pensions
The Honorable Michael B. Enzi, Ranking Member
Senate Committee on Health, Education, Labor & Pensions

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6100

November 23, 2011

The Honorable Brian Hayes
Board Member
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Dear Member Hayes:

I respectfully request that you provide me and the Committee on Education and the Workforce with information regarding any requests, recommendations, or demands that you or your office have received calling upon you to resign from, obstruct, or otherwise incapacitate the National Labor Relations Board ("the Board"), as well as any offers or discussions regarding future employment.

As you are fully aware, the Board is an independent federal agency that administers and enforces the National Labor Relations Act for both employers and employees.[1] A functioning Board is critical to stable labor relations in this country. The U.S. Supreme Court has ruled[2] that the Board must have a three-member quorum in order to execute many of its responsibilities. You took an oath to fulfill those responsibilities. During the Senate confirmation process, you affirmed under oath your intention to serve the full term to which you were appointed. If you resign before the President can appoint, or the Senate can confirm, a Member to the Board to replace you, you will effectively shut down the Board's ultimate decision-making authority.

I have read reports of special interest organizations and individuals calling on you to resign precisely to incapacitate the Board. I am also in receipt of a November 21, 2011, letter from Board Chairman Pearce to you, indicating that you have indeed threatened to resign. The open calls to resign, followed by the threats you allegedly have made, raise the specter of private requests as well. I am concerned that any decision to resign prematurely will be the result of objectionable motives or improper influence.

These open calls for you to cripple the Board began at least as early as August 2011. The website LaborUnionReport.com[3] urged you "to resign your position as a member of the National Labor Relations Board," asserting that "[i]f you resign your position, the NLRB will become incapacitated." LaborUnionReport.com added that "your resignation will help incapacitate the NLRB until after the 2012 elections."[4] It is my understanding that this website is owned by a union avoidance consulting firm called Kulture, LLC. Around the same time, South Carolina Governor Nikki Haley announced that she too

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[1] Pub. L. 74-198, 49 Stat. 452.
[2] On June 17, 2010, the Supreme Court ruled in *New Process Steel vs. the NLRB* (130 S. Ct. 2635), that the two-member Board lacked the authority to decide cases.
[3] http://www.laborunionreport.com/portal/2011/08/an-open-letter-to-gop-nlrb-member-brian-hayes-please-resign-immediately/
[4] Id.

supports your resignation in order to shut-down the Board.[5] According to Chairman Pearce's letter, you made your threat to resign in mid-October 2011.

Short of resignation, there are indicia of other behaviors that appear designed to incapacitate the Board or otherwise obstruct its business. For example, your November 18, 2011, letter to Chairman Kline indicates that you believe you can single-handedly shut down any action of the Board, by merely withholding your consent from the Board to act, though you offer no plausible legal argument for such power. Additionally, your November 18 letter complains that you have been excluded from a rulemaking process. To the contrary, Chairman Pearce's November 21, 2011, letter to you provides numerous examples of your alleged failure to attend briefings, have your staff participate in comment reviews, engage other members of the Board about the substance of proposals or the process, respond to requests from other members of the Board to provide your views, or attend regularly scheduled meetings of the Board.

All of these developments – from the public calls for your resignation to the behaviors described in Chairman Pearce's letter – paint a troubling picture of your activity – or inactivity – at the Board. The integrity and viability of the Board depend upon the good faith execution of its Members' responsibilities. Threatening to shut down the Board itself if fellow Members make policy choices with which you disagree is, to my knowledge, unprecedented behavior from a Member of the Board.

Because I am less aware of the private requests or enticements that you may have received to resign prematurely, threaten to do so, or otherwise obstruct or incapacitate the Board, I have attached a specific list of requested information to shed light on those communications. I have also included specific instructions as to how you should produce that information to me and the Committee no later than Friday, December 2, 2011.

If you have questions regarding this request, please contact me or direct your staff to contact the Committee's Investigative Counsel, Kate Ahlgren, who may be reached at (202) 225-3725. I appreciate your attention to this matter.

Sincerely,

George Miller

GEORGE MILLER
Senior Democrat
Committee on Education and the Workforce

cc: Chairman John Kline
Enclosures

[5] http://dailycaller.com/2011/09/01/s-c-gov-supports-crippling-un-american-nlrb-including-resignation-of-lone-gop-member/

Schedule

1. A list of all communications between the Honorable Brian Hayes and any parties external to the National Labor Relations Board ("the Board) regarding Member Hayes' resignation from the Board or future employment from December 1, 2010, through the date of this request. The list shall include the date and description of each such communication and the identities of the individuals involved.

2. All documents related to such communications from December 1, 2010, through the date of this request.

3. All documents related to the Board's required ethics training completed by the Honorable Brian Hayes from June 29, 2010, through the date of this request.

4. A copy of the Honorable Brian Hayes' executed *Ethics Commitment by Executive Branch Personnel* pursuant to Executive Order 13490 (January 21, 2009).

Instructions & Definitions

In responding to this document request, please apply the instructions and definitions set forth below.

Instructions

1. Produce a copy of all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Also produce documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.

2. If you know that any entity, organization, or individual denoted in this request has been, or is currently, known by any name other than that herein denoted, the request should be read also to include such alternative identification.

3. Produce each document sequentially bates-stamped and in a form that renders the document capable of being copied.

4. Identify each item number in the Schedule to which each document is responsive.

5. Produce responsive documents together with copies of file labels, dividers or identifying markers with which they were associated when this request was issued.

6. Produce every responsive document even if another person or entity also possesses a non-identical or identical copy of the same document.

7. If any of the requested information is stored in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or computer backup tape), you should consult with Committee counsel to determine the appropriate format in which to produce the information.

8. If any document responsive to this request was, but no longer is, in your possession, custody, or control, to the best that you are able, identify the document (stating its date, author, subject

and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.

9. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, voicemails, microfiche, microfilm, videotape, recordings and motion pictures), and electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs memory sticks, and recordings) and other written, printed typed, or other graphic or recorded matter of any kind of nature, however or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft of non-identical copy is a separate document within the meaning of this term.

2. The term "related," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent, to that subject.

3. The terms "you" or "your" refer to the entity to which the request is addressed, to the custodian of documents for the entity, or both, as the context most broadly construed allows or requires.

4. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

5. The term "communication" means each manner or means of disclosure or exchange of information, regardless of the method used, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.

BRIAN E. HAYES
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MEMBER
NATIONAL LABOR RELATIONS BOARD
brian.hayes@nlrb.gov

The Honorable George Miller
Senior Democrat
Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, DC 20515-6100

December 2, 2011

Dear Congressman Miller:

I am in receipt of your letter dated November 23, 2011. Having reviewed your letter I do not understand it to constitute a request from the Committee. With regard to the substance of your letter, as you may now be aware, I have formally announced my decision to remain a Member of the National Labor Relations Board.

Very truly yours,

Brian Hayes
Member, National Labor Relations Board

Cc: John Kline

Berry, David P.

From: Matis, Jennifer A.
Sent: Friday, January 20, 2012 1:38 PM
To: Berry, David P.
Subject: FW: Letter From NLRB Member Hayes
Attachments: Charles Cohen.doc

From: Murphy, James R.
Sent: Wednesday, January 18, 2012 3:58 PM
To: Matis, Jennifer A.
Subject: FW: Letter From NLRB Member Hayes

From: Murphy, James R.
Sent: Thursday, December 22, 2011 11:09 AM
To: 'ccohen@morganlewis.com'
Subject: Letter From NLRB Member Hayes

Chuck,

Brian asked that I transmit the attached letter to you. A hard copy will follow in regular mail.

Hope all is well and that you have an enjoyable holiday season.

Jim Murphy, Chief Counsel

Charles Cohen, Esq.
Morgan, Lewis and Bockius
1111 Pennsylvania Ave., N.W.
Washington DC 20004
Via e-mail and regular mail

December 22, 2011

Dear Chuck:

I hope this letter finds you well.

I am writing to advise you that there has been a claim to the effect that I have been engaged in negotiations with Morgan, Lewis and Bockius regarding future employment; and, that such alleged negotiations should require my recusal in any matters before the Agency involving Morgan, Lewis. The claim is, as you are aware, not correct. Indeed, I made it very clear in a public statement last month that I have no intention at present to leave my position at the NLRB and pursue employment anywhere else. All this notwithstanding, I want to take this opportunity to formally re-affirm the fact that I have no present interest or intent in pursuing employment with Morgan, Lewis; and, to the extent it is alleged that there existed any negotiations to such end to likewise re-affirm that I unequivocally withdraw from same.

Thanks for your attention to this correspondence, and best wishes for the New Year.

Very truly yours,

Brian E. Hayes