

Congress of the United States
Washington, DC 20510

September 24, 2020

The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half St., S.E.
Washington, D.C. 20570

Dear Chairman Ring:

Thank you for your recent response to our letter regarding the National Labor Relations Board's (NLRB or the Board) Ethics Recusal Report, which formed the basis for and contained new ethics guidance that is now in place for you and other Board members.¹ We wrote you on March 11, 2020 expressing concern that this guidance "is based on a twisted legal analysis that ignores basic tenets of ethics law and public integrity" and effectively allows NLRB Members to unilaterally decide to ignore an ethics officer's recusal recommendation and take part in cases in which they have a conflict of interest; and we requested that the Board rescind the guidance and establish new guidance consistent with the law.² You have not done so – leaving a fundamentally flawed set of ethics rules in place. The NLRB has been plagued with ethics problems since you became Chairman,³ and your response raises new questions about your commitment to an open and transparent ethics process that will let the NLRB make decisions that are not clouded by questions about the Board's ethics and integrity.

In our March 11 letter, we explained that your new report and guidance suggest "that it is not only permissible, but preferable for a potentially-conflicted board member, rather than a third party, to make the final determination of whether they should recuse [which] belies common sense and decades of relevant legal precedent."⁴ We noted that the guidance "allows a Member

¹ National Labor Relations Board, "NLRB Board Member Recusal Process: E.S. Memo 19-1," Memorandum, November 18, 2019,

<https://www.warren.senate.gov/imo/media/doc/NLRB%20Ethics%20Recusal%20Report%20Nov%202019.pdf>.

² Letter from Senator Elizabeth Warren and Representatives Rosa DeLauro, Mark Pocan, and Barbara Lee to NLRB Chairman John Ring, March 11, 2020, <https://www.warren.senate.gov/download/20200311-letter-from-senator-warren-reps-de-lauro-pocan-lee-to-nlrb-on-ethics-recusal-report>.

³ Letter from Senators Elizabeth Warren, Kirsten Gillibrand, Mazie Hirono, Tammy Baldwin, and Cory A. Booker to NLRB Chairman John Ring, September 17, 2018, <https://www.warren.senate.gov/imo/media/doc/2018.09.17%20Letter%20to%20NLRB%20on%20Purple%20Communications%20COI.pdf>.

⁴ Letter from Senator Elizabeth Warren and Representatives Rosa DeLauro, Mark Pocan, and Barbara Lee to NLRB Chairman John Ring, March 11, 2020, <https://www.warren.senate.gov/download/20200311-letter-from-senator-warren-reps-de-lauro-pocan-lee-to-nlrb-on-ethics-recusal-report>.

to simply ‘[reach] his or her own decision’ on recusal and puts NLRB members and staff at risk of discipline for violating ethics rules or criminal conflicts of interest laws.”⁵

You responded to our letter on April 7, 2020.⁶ This response was wholly inadequate, exacerbating our concerns about the process by which you developed this guidance, your commitment to comply with the federal ethics program, and your capacity to uphold the integrity of the NLRB. We have also learned your response to our offices contained citations to portions of the report that the Office of Government Ethics (OGE) flagged as incorrect and requested you “clarify the text of”⁷ – leading us to question whether you are taking this critical matter seriously, or if your intent was to mislead the public and Congress regarding your new ethics protocols and your discussions with ethics experts. We are requesting your agency provide clarity to our offices and to the public regarding the ethics protocols you are now implementing at the NLRB.

NLRB’s Lack of Transparency about Ethics Guidelines

Public documents indicate that OGE sent the NLRB a letter on December 19, 2019 raising concerns that “portions of the [NLRB ethics] Report characterize ethics requirements and processes in ways that could be misconstrued.”⁸ In particular, OGE requested that the NLRB “clarify various portions of the Report that could be misconstrued to suggest that the U.S. Office of Government Ethics (OGE) will adjudicate disagreements between Board members and the NLRB Designated Agency Ethics Official.”⁹ On January 9, 2020, the NLRB replied to OGE stating your agency was “willing to amend our report,” and included edits you described as “our attempt to amend the provisions of the report as [OGE] request[ed].”¹⁰ In the NLRB’s April 7 response letter to our offices, you state that the NLRB, “confirmed every one of our conclusions with OGE, through the Board’s Designated Agency Ethics Officer.”¹¹

In our own conversations with OGE, we learned that OGE has come to an understanding with the NLRB that the edits to the report that you sent to OGE in your January 9, 2020 letter addressed their concerns – but those edits and a final version of the report and guidance appear to not be available to the public in any form.¹²

⁵ Letter from Senator Elizabeth Warren and Representatives Rosa DeLauro, Mark Pocan, and Barbara Lee to NLRB Chairman John Ring, March 11, 2020, <https://www.warren.senate.gov/download/20200311-letter-from-senator-warren-reps-de-lauro-pocan-lee-to-nlrb-on-ethics-recusal-report>.

⁶ Letter from NLRB Chairman John Ring to Senator Elizabeth Warren and Representatives Rosa DeLauro, Mark Pocan, and Barbara Lee, April 7, 2020, <https://www.nlr.gov/sites/default/files/attachments/pages/node-6353/ring-to-warren-de-lauro-pocan-lee-final2.pdf>.

⁷ Letter from OGE Director Emory A. Rounds, III to NLRB Chairman John Ring, December 19, 2019, [https://oge.gov/web/OGE.nsf/0/46A7F0E553CB5A20852585B9006C48F7/\\$FILE/Letter%20to%20NLRB%20Chair.pdf](https://oge.gov/web/OGE.nsf/0/46A7F0E553CB5A20852585B9006C48F7/$FILE/Letter%20to%20NLRB%20Chair.pdf).

⁸ *Id.*

⁹ *Id.*

¹⁰ Letter from NLRB Chairman John Ring to OGE Director Emory A. Rounds, III, January 9, 2020, <https://www.nlr.gov/sites/default/files/attachments/pages/node-6353/letter-chairman-ring-oge-director-rounds-1-9-2020-errata-sheet.pdf>.

¹¹ Letter from NLRB Chair John Ring to Senator Elizabeth Warren, April 7, 2020, available at <https://www.nlr.gov/sites/default/files/attachments/pages/node-6353/ring-to-warren-de-lauro-pocan-lee-final2.pdf>.

¹² Call between the Office of Senator Elizabeth Warren and the U.S. Office of Government Ethics, June 18, 2020.

This is troubling. The public has a right to know about the ethics rules under which NLRB officials are operating, and the process that was followed to put them in place – but even the most interested, diligent member of the public who scrutinizes the documents you have made available online would be left to guess what your new policy is.

This sequence of events also raises questions about the fact that you appear to be providing misleading information to the public and to Congress. Currently, your agency’s “NLRB’s Ethics Recusal Report” webpage lists six separate documents as links, including the original November 19, 2019 report, OGE’s letter to your agency, and your response to OGE.¹³ But there is no final version of the report and guidance, with the corrections you shared with OGE, available anywhere – nor an explanation that the text edits at the end of your letter to OGE constitute final corrections of the report, nor documentation that OGE has told the NLRB that those edits address their concerns.

This failure to provide clarity means that several changes that you appear to have made to the ethics policy are not presented clearly or in final form. In particular, OGE informed the NLRB that the original report language could be interpreted to state that “there is a right to review or appeal recusal disagreements to OGE.”¹⁴

Misleading or Incomplete Information Provided to Congress and the Public

These concerns are exacerbated by the fact that you reiterated uncorrected information – with no clarity about what was or was not final – in your April 7, 2020 response to our offices. In that response, you wrote, “after significant work, and in consultation with OGE through our DAEO, we confirmed what we state in the report,” followed by a passage from the report indicating that a Board member can “invoke statutory process to” challenge the DAEO’s recusal determination.¹⁵ But that quoted phrase is part of the language you told OGE you would strike from the report in January,¹⁶ months before your response to us, because OGE told you, “portions of the Report characterize ethics requirements and processes in ways that could be misconstrued.”¹⁷

It is our understanding from discussions with OGE that your agency is aware you sent our offices a formal response with incorrect information.¹⁸ But you have not corrected this error

¹³ National Labor Relations Board, “NLRB’s Ethics Recusal Report,” <https://www.nlr.gov/reports/regulatory-reports-and-notice/ethics-recusal-report>.

¹⁴ Letter from OGE Director Emory A. Rounds, III to NLRB Chairman John Ring, December 19, 2019, [https://www.oge.gov/web/oge.nsf/0/43485A2A24C0CCDB852584D60062B3A5/\\$FILE/Letter%20to%20NLRB%20Chair.pdf](https://www.oge.gov/web/oge.nsf/0/43485A2A24C0CCDB852584D60062B3A5/$FILE/Letter%20to%20NLRB%20Chair.pdf).

¹⁵ Letter from NLRB Chair John Ring to Senator Elizabeth Warren and Representatives Rosa DeLauro, Mark Pocan, and Barbara Lee, April 7, 2020, available at <https://www.nlr.gov/sites/default/files/attachments/pages/node-6353/ring-to-warren-delauro-pocan-lee-final2.pdf>.

¹⁶ Letter from NLRB Chairman John Ring to OGE Director Emory A. Rounds, III, January 9, 2020, <https://www.nlr.gov/sites/default/files/attachments/pages/node-6353/letter-chairman-ring-oge-director-rounds-1-9-2020-errata-sheet.pdf>.

¹⁷ Letter from OGE Director Emory A. Rounds, III to NLRB Chairman John Ring, December 19, 2019, [https://www.oge.gov/web/oge.nsf/0/43485A2A24C0CCDB852584D60062B3A5/\\$FILE/Letter%20to%20NLRB%20Chair.pdf](https://www.oge.gov/web/oge.nsf/0/43485A2A24C0CCDB852584D60062B3A5/$FILE/Letter%20to%20NLRB%20Chair.pdf).

¹⁸ Call between the Office of Senator Elizabeth Warren and the U.S. Office of Government Ethics, June 18, 2020.

in your letter to our offices, and that letter with uncorrected report language is still posted online along with other documents related to your ethics report.¹⁹

Your response letter also fails to clearly inform our offices of your arrangement with OGE, that you are treating the edits you proposed in your January 9 letter as operative language modifying the November report, and that you are implementing the report based on those changes. Instead, you claim that OGE assured your agency that the report conclusions are correct.²⁰ These assertions are unchallenged, because, as you note, other than OGE Director Rounds' letter to you,²¹ OGE has chosen to only communicate orally with NLRB staff regarding the report.²² We still have no public clarification on whether OGE accepted modified language you proposed as permissible.

We are certain you understand that agencies create agency-specific ethics policies, and agency heads like yourself are “responsible for, and will exercise personal leadership in, establishing and maintaining an effective agency ethics program and fostering an ethical culture in the agency.”²³ While OGE provides technical assistance about what is and is not permissible, your dangerous, precedent-setting recusal policy is yours alone.

Questions

The Standards of Ethical Conduct for Employees of the Executive Branch state that “public service is a public trust.”²⁴ The public belief in the integrity of the government is a critical regulatory goal, which is codified in requirements for government employees to “avoid any actions creating the appearance that they are violating the law or the ethical standards set forth” in federal ethics regulations.²⁵ That means that even the appearance of a conflict of interest must be avoided in order to ensure that “every citizen can have complete confidence in the integrity of the Federal Government.”²⁶

In our previous letter, we noted the problems with your new recusal guidance that harms our federal ethics program and the integrity of the NLRB, and asked that you abandon this policy and start over. Given your failure thus far to provide clarity to Congress and the public about this ethics guidance, we request that you provide the following information no later than October 8, 2020.

¹⁹ National Labor Relations Board, “NLRB’s Ethics Recusal Report,” <https://www.nlr.gov/reports/regulatory-reports-and-notices/ethics-recusal-report>.

²⁰ Letter from NLRB Chair John Ring to Senator Elizabeth Warren and Representatives Rosa DeLauro, Mark Pocan, and Barbara Lee, April 7, 2020, available at <https://www.nlr.gov/sites/default/files/attachments/pages/node-6353/ring-to-warren-delauro-pocan-lee-final2.pdf>.

²¹ Letter from OGE Director Emory A. Rounds, III to NLRB Chairman John Ring, December 19, 2019, [https://www.oge.gov/web/OGE.nsf/0/43485A2A24C0CCDB852584D60062B3A5/\\$FILE/Letter%20to%20NLRB%20Chair.pdf](https://www.oge.gov/web/OGE.nsf/0/43485A2A24C0CCDB852584D60062B3A5/$FILE/Letter%20to%20NLRB%20Chair.pdf).

²² Letter from NLRB Chairman John Ring to OGE Director Emory A. Rounds, III, January 9, 2020, <https://www.nlr.gov/sites/default/files/attachments/pages/node-6353/letter-chairman-ring-oge-director-rounds-1-9-2020-errata-sheet.pdf>.

²³ 5 CFR § 2638.107.

²⁴ 5 CFR § 2635.101.

²⁵ 5 CFR § 2635.101(b)(14).

²⁶ 5 CFR § 2635.101(a).

1. Provide our offices, and make publicly available online, a final version of your report and guidance, and an explanation of the changes that were made in response to OGE's concerns.
2. An explanation of what would happen in the case that an NLRB Member is advised by an agency ethics official to recuse from a case due to a conflict of interest, and the Member decides to ignore that advice.

Sincerely,

Elizabeth Warren
United States Senator

Rosa DeLauro
Chair
Subcommittee on Labor, Health, and Human
Services, Education, and Related Agencies
House Committee on Appropriations

Mark Pocan
Member of Congress

Barbara Lee
Member of Congress