



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF BOARD MEMBER MCFERRAN
Washington, D.C. 20570

October 8, 2020

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

The Honorable Rosa DeLauro
United States House of Representatives
2413 Rayburn House Office Building
Washington, DC 20515

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

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

Senator Warren and Representatives DeLauro, Pocan, and Lee:

Thank you for your letter of September 24 expressing concern about the ethics program at the National Labor Relations Board. I share your commitment to ensuring “that the American public can have faith in the integrity” of the Board. Preserving that public trust requires that every Board member comply fully with applicable statutes, regulations, and executive orders, and conform to due process requirements for all of the Board’s decision-making.

My views on the issues raised in your letter are clearly and consistently reflected in: (1) the Board’s decision in *Hy-Brand II*, 366 NLRB No. 26 (2018), in which I was part of a unanimous Board panel that vacated the original decision in that case; (2) the Board’s decision in *Hy-Brand III*, 366 NLRB No. 93 (2018), in which I was part of a unanimous Board panel that denied a motion to reconsider *Hy-Brand II*; (3) my separate concurring opinion, with Member Pearce, in *Hy-Brand III*; and (4) my separate statement accompanying the Board’s Ethics Recusal Report, issued in November 2019.

I did not participate in the drafting of the Report (which was prepared pursuant to a delegation of administrative authority to the Chairman, from which I abstained), though I was kept regularly apprised of the progress of the Chairman's efforts to review and evaluate the Board's ethics and recusal procedures. As I said in my separate statement that was published in conjunction with the Report, while I acknowledge and appreciate the time and the effort that staff put into the preparation of the document, I do not agree with several of the Report's conclusions.

Most fundamentally, I disagree with the Report's overriding premise that Board Members have the absolute right to participate in any matter before the Board. Rather, I adhere to my view, expressed in the *Hy-Brand II* decision, that applicable law gives the Designated Agency Ethics Official ("DAEO") authority to make an independent, binding determination that a Board Member should be disqualified "if a reasonable person with knowledge of the relevant facts would be likely to question the [Member's] impartiality in the matter." See 5 C.F.R. § 2635.502(c). I further adhere to my view, expressed in my concurring opinion *Hy-Brand III*, that the Board as a whole is permitted (and, indeed, compelled) to prevent the participation of a Board member in a matter from which he or she is disqualified, in order to protect the integrity of the Board's decision-making process and the due process rights of litigants.

In light of these views, I voted against several of the Report's "Action Items," including the new requirement "allowing individual Board members to determine their own recusal motions," and allowing Board members to have "sign off of all revisions made to the member's own recusal list." Rather, as I said in my separate statement, I believe that the better approach – consistent with both applicable law and the Board's institutional interests – would be to adopt procedures requiring that individual Board members "should defer to disqualification determinations made by the DAEO," and that "the Board as a body will prohibit a member who has been disqualified by the DAEO from participating in a matter."

Based on these positions, and the oaths that I have taken as a public servant, I can unequivocally commit that I will follow the guidance of the NLRB Designated Agency Ethics Official if I am advised to recuse myself from a case or any other official matter.

Again, I appreciate your interest in preserving the integrity of the Board's decision-making process, and I am happy to answer any additional questions that you might have.

Sincerely,



Lauren McFerran
Board Member,
National Labor Relations Board