



U.S. Office of Government Ethics
Program Review Division

Ethics Program Review

National Labor Relations Board

Report No. 11-008
February 2011

Results in Brief

The United States Office of Government Ethics (OGE) conducted a review of the National Labor Relations Board's (NLRB) ethics program between November and December 2010. The results of the review indicated that NLRB's ethics program generally appears to be in compliance with applicable laws, regulations, and policies.

Highlights

- All departing employees are provided a package of post-employment materials.

Concerns

- Fundamental vulnerabilities in the financial disclosure element compromise the integrity of the overall ethics program.
- Annual in-person ethics training required additional information to be provided in order to meet regulatory requirements.

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Objectives, Scope, and Methodology

OGE provides leadership for the purpose of promoting an ethical workforce, preventing conflicts of interest, and supporting good governance. The purpose of a review is to identify and report on the strengths and weaknesses of an ethics program by evaluating (1) agency compliance with ethics requirements as set forth in relevant laws, regulations, and policies and (2) ethics-related systems, processes, and procedures for administering the program. OGE has the authority to

evaluate the effectiveness of executive agency ethics programs. See Title IV of the Ethics in Government Act and 5 CFR part 2638.

To assess the NLRB's ethics program, OGE examined a variety of documents provided by ethics officials; other documents that NLRB forwarded to OGE, including the annual questionnaire; a sample of NLRB's public and confidential financial disclosure reports and a sample of the advice and counsel provided to NLRB's employees. In addition, members of OGE's Program Review Division met with the ethics staff to discuss the strengths and weaknesses of NLRB's ethics program, seek clarification on issues that arose through the documentation analysis, and verify data collected.

Program Administration

NLRB's ethics program is administered from within NLRB's Office of the Director of Administration. The Director of Administration serves as the Designated Agency Ethics Official (DAEO). The Deputy Director of Administration serves as the Alternate DAEO (ADAEO). The Administrative Officer of Administration serves as the Ethics Program Officer (EPO) and is the primary day-to-day administrator of the ethics program. In addition, there are 38 regional ethics officials who serve as liaisons to the EPO. Regional ethics officials are authorized to provide advice and counsel to employees. However, the majority of regional ethics officials will contact the DAEO's office prior to providing advice and counsel to employees.

Financial Disclosure

NLRB has comprehensive written procedures for the administration of the financial disclosure program. The review team examined a sample of public and confidential financial disclosure reports. Public financial disclosure reports were generally filed, reviewed, and certified timely. However, 65 percent of confidential financial disclosure reports were filed late. OGE is not making a formal recommendation because the majority of the confidential financial disclosure reports were less than 30 days late. However, OGE encourages NLRB to evaluate its current process for collecting confidential financial disclosure reports to determine if improvements can be made to help ensure reports are submitted timely. OGE also encourages NLRB to remind its employees that they may request a filing extension when appropriate.

When reviewing financial disclosure reports, the EPO prepares a cautionary memorandum for each filer that lists financial interests in excess of the \$15,000 regulatory exemption. See 5 CFR § 2640.202(a)(2). The memorandum cautions the filer to not participate in any cases involving the financial interests unless they receive a waiver from the DAEO. The cautionary memorandum is sent to the filer and a copy is kept in the filer's financial disclosure folder. OGE believes that while sending filers cautionary memoranda is a good practice, it should be expanded to further assist in the prevention of conflicts of interest. Providing the cautionary memoranda to designated employees who are best-positioned to serve as screeners for the assignment of cases and duties for filers would help to ensure filers do not participate in cases

that may affect their financial interests or raise concerns about impartiality. *See* 18 U.S.C. § 208 and 5 CFR § 2635.502.

NLRB performs a conflict of interest analysis on a 10 percent random sampling of financial disclosure reports required to be filed by reviewing them against a case or contractor list. In addition, NLRB requires filers to sign the NLRB Certification of Conflicts Check/Non-Participation form during the annual filing cycle which certifies that the filer did not participate in any particular matters involving a personal financial interest for the past calendar year. This system was proposed by NLRB in response to OGE's recommendation in the program review report issued in 2006. Specifically, the recommendation directed NLRB to develop a written proposal for identifying conflicts of interests on the part of its public and confidential financial disclosure filers and certifying their reports. OGE closed its recommendation during a follow-up review conducted in 2007.

OGE has reconsidered its position concerning NLRB's current process for prevention of conflicts of interests and the review of financial disclosure reports. OGE continues to be concerned that NLRB certifies reports that have not been reviewed for conflicts of interest. A report which is signed by a reviewing official certifies that the agency has reviewed the report and that the reviewing official has concluded that each required item has been completed and no interest or position disclosed on the form violates or appears to violate applicable laws. *See* 5 CFR § 2634.605 (b). NLRB's current system does not allow for proper certification of financial disclosure reports and puts the reviewing official, the filer, and, ultimately, the agency at risk.

While the Certification of Conflicts Check/Non-Participation form allows employees to self-certify that there were no conflicts of interest during the previous year, the reviewing official cannot rely on this form alone to certify reports. The use of the current form is redundant to the reporting period of the OGE Forms 278 and 450 and does not disclose filers' caseloads. A more beneficial way to ensure the prevention of conflicts of interest would be to employ the use of an OGE-approved alternative form that would require filers to certify that they have no conflicts of interest before accepting a case.

Recommendation

- Perform a conflict of interest analysis on all financial disclosure reports.¹

Suggestions

- Provide cautionary memoranda to designated screeners for each filer.
- Employ the use of an OGE-approved alternative form that would require filers to certify they have no conflicts of interest before accepting a case.

¹ See NLRB comments in appendix.

Education & Training

NLRB reported that all new employees received initial ethics orientation (IEO) within 90 days of their date of entry in 2010. The EPO receives a monthly report from the Human Resources Branch (HR) identifying new employees who must receive IEO. HR provides IEO to headquarters' employees while regional office managers provide IEO to employees in the regional offices. The OGE review team reviewed NLRB's IEO materials and found them to be in compliance with 5 CFR § 2638.703.

The OGE review team examined NLRB's annual training plan and found that it met the requirements of 5 CFR § 2638.706. Annual ethics training is tracked using emails from employees indicating they completed the training. Annual ethics training for 2010 was presented via an emailed PowerPoint presentation. During the review of the training materials used in 2010, the OGE review team found that the training materials did not meet all of the requirements set forth in 5 CFR §§ 2638.704 and 2638.705. Specifically, the annual ethics training did not include a complete review of the 14 Principles of Ethical Conduct or the Federal conflict of interest statutes as required. NLRB's ethics office responded by immediately providing supplemental training to all employees via email to ensure requirements were fully met for 2010. OGE reminds NLRB to continue to ensure that all requirements are met for annual ethics training.

Model Practice

- All departing employees are provided a package of post-employment materials.

Advice & Counsel

Advice and counsel is primarily provided by the EPO with support from the DAEO. The DAEO maintains copies of written advice and counsel provided to employees as well as a log of advice and counsel provided over the phone. The review team examined eight pieces of written advice and found them to be accurate and timely.

Enforcement

NLRB reported four disciplinary actions based wholly or in part upon violations of the standards of conduct provisions (5 CFR part 2635) or the criminal conflict of interest statutes (18 U.S.C §§ 203, 205, 207, 208, and 209). NLRB made no referrals to the Department of Justice of potential violations of the criminal conflict of interest statutes.

NLRB ethics officials appear to have a good working relationship with the Office of Inspector General (OIG). Each office is aware of its responsibilities and works together effectively. The Ethics Office is responsible for notifying OGE of referrals made to the Department of Justice.

1353 Travel Acceptances

The required semi-annual reports of payments accepted from non-Federal sources were submitted to OGE in a timely manner. NLRB has comprehensive procedures that outline the process for approving requests for travel payments accepted from non-Federal sources.

Agency Comments

On January 31, 2011 NLRB was provided a copy of OGE's draft report for comment. NLRB's comments are contained in the appendix to this report.



United States Government

NATIONAL LABOR RELATIONS BOARD

1099 14th STREET NW
WASHINGTON DC 20570
www.nlr.gov

TO: Office of Government Ethics
Program Review Division

FROM: Gloria Joseph, Director of Administration
(Designated Agency Ethics Official)

DATE: February 7, 2011

SUBJECT: Response to Draft Review Report – Dated January 31, 2011

This is in response to your e-mail of January 31, 2011, requesting comments on the draft report resulting from your review of the NLRB's Ethics Program conducted in December 2010.

We appreciate the positive comments regarding our Ethics Program, especially OGE's designating our custom of providing all departing employees with a package of post-employment materials as a model practice.

Your report indicated that there were two concerns (which were discussed with NLRB staff by the OGE review team). One of the concerns was that our 2010 annual ethics training materials did not meet regulatory requirements because we did not include a complete review of the 14 Principles of Ethical Conduct and the federal conflict of interest statutes, and that we were required to provide additional information to covered employees to satisfy the regulatory requirements. When the reviewers brought this to our attention, it was my understanding that, if we immediately provided the materials to those covered employees, and informed them that they had one hour of official time in which to review the materials, it would satisfy the regulations and would put the concern to rest. Covered employees were, in fact, provided those additional materials via e-mail on December 9, 2010, and evidence was provided to the reviewers that this took place. Accordingly, we were surprised to see that this was noted as a "concern" in the draft report. Nevertheless, we will ensure that our annual training fully complies with OGE's interpretation of the regulations in the future.

The other concern involved our review and certification of the Public and Confidential Financial Disclosure Reports, specifically, that the NLRB was reviewing and certifying reports without a conflicts of interest review. We would note that since 2007 the NLRB has been performing a conflicts analysis on a random sample of 10 percent of the reports filed and has been having filers certify that they did not participate in an NLRB case, proceeding, or other particular matter that affected a personal financial interest. In addition to this procedure, in 2007 we also started to send ethics advisories to filers who reported stock holdings above the regulatory exemption

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amount of \$15,000. The foregoing was done as part of an agreement reached with OGE in 2007 after its 2006 review, and the NLRB has been in full compliance with this agreement since 2007.

As to the report's recommendation that a conflicts analysis be performed on all financial disclosure reports, at the close-out meeting we agreed that we would perform a conflict analysis on all reports filed. In the draft report OGE made two suggestions regarding its recommendation to perform a conflicts analysis on 100% of the public financial disclosure reports:

- Provide copies of the ethics advisories we send to a filer to the filer's designated screener.
- Employ the use of an OGE-approved form that would require filers to certify that they have no conflicts of interest **before** accepting a case.

Since the close-out meeting in December, we have been working with filers to develop a procedure to implement OGE's recommendation that is as streamlined as possible and in line with the business practices of a small agency with limited resources while still ensuring regulatory compliance. In keeping with that approach, we have asked each public filer to identify a designated individual who will act as a certifier/screener for that filer. We will also explore the feasibility of providing copies of the filers' ethics advisories to their designated certifier/screener. However, while we appreciate OGE's second suggestion regarding using its pre-assignment certifying form, given the manner in which cases are processed in this agency, we do not believe the suggested procedure is feasible.

With regard to the conflict analysis for filers of the Confidential Financial Disclosure Report, inasmuch as the cadre of Confidential Filers at the NLRB is small, the ethics staff most likely will conduct the conflicts analysis of those reports.

Thank you for the opportunity to comment on the draft report. If you have any questions, please do not hesitate to contact me.