



**United States Office  
Of Government Ethics**

Report Number 06-013

## Ethics Program Review

# **National Labor Relations Board**

September 2006 Report

## **Introduction**

### OGE MISSION

The Office of Government Ethics (OGE) provides leadership for the purpose of promoting an ethical workforce, preventing conflicts of interest, and supporting good governance initiatives.

### PURPOSE OF A REVIEW

The purpose of a review is to identify and report on the strengths and weaknesses of the program by: (1) measuring agency compliance with ethics requirements found in the relevant laws, regulations, and policies; and (2) evaluating ethics-related systems, processes, and procedures in place for administering the program. 5 C.F.R. § 2600.103(e)(1)(iii). A review does not investigate any particular case of employee misconduct.

### REVIEW AUTHORITY AND SCOPE

OGE has the authority to evaluate the effectiveness of executive branch agency ethics programs. Our review at the NLRB focused on the financial disclosure systems, ethics education and training, ethics agreements, advice and counseling, outside employment, the enforcement of ethics laws and regulations, and travel payments from non-Federal sources. Title IV of the Ethics in Government Act of 1978, as amended, and 5 C.F.R. part 2638.

While the National Labor Relations Board (NLRB) has several offices in the field with ethics officials, our review focused on the program at the headquarters. The ethics officials at the headquarters are responsible for overseeing the ethics program at the NLRB, including the financial disclosure systems. Ethics officials in the field offices—32 Regional Offices, 3 Subregional Offices, and 16 Resident Offices—generally consult with the headquarters ethics staff in regard to ethics matters. The on-site portion of this review was conducted in April 2006.

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# **Findings**

### **PROGRAM STRUCTURE**

At the NLRB, no one person serves as the head of the agency. Both the five-member National Labor Relations Board (Board) and the General Counsel are the equal heads of the agency. Some offices and divisions are under either the Board or the General Counsel, while others are under both. The ethics program is located in the Division of Administration, which is under the General Counsel.

The Director of the Division of Administration serves as the Designated Agency Ethics Official (DAEO). The Deputy Director serves as the Alternate DAEO. While the DAEO is responsible for the administration of the ethics program, much of the day-to-day duties are carried out by a program analyst who serves as the Ethics Program Officer (EPO). In addition, each Regional Office is headed by a Regional Director (RD) who is designated as a part-time ethics official.

### **OGE's LAST REVIEW OF THE NLRB**

OGE last conducted a review of the NLRB's ethics program in October and November 1999. The report on this review indicated that the ethics program was well managed and in compliance with applicable laws and regulations.

### **FINANCIAL DISCLOSURE SYSTEMS**

Ethics officials at the NLRB do not review financial disclosure reports for conflicts of interest. They do, however, perform a thorough review of the reports for completeness and compliance with the technical filing requirements. While the technical review is important, the conflict of interest analysis is a vital means of accomplishing the goals of promoting good governance and preventing conflicts of interest. OGE is concerned that the lack of a conflict of interest analysis works against advancing these goals.

During our fieldwork, ethics officials explained that they do not conduct a financial conflict of interest analysis and their reason for not doing so. The NLRB, through its various field offices and the Board, processes approximately 30,000 labor-related cases a year. In 2005, the NLRB processed 24,736 unfair labor practice cases and 5,151 representation cases for a total of 29,887 cases. According to ethics officials, most of these cases involve companies in the private sector; moreover, any publicly owned company is a potential party to a case. Hence, they do not believe it is feasible to compile and maintain a list of companies that are currently or potentially parties to unfair labor practice cases or representation cases, nor have they utilized a contractor list in reviewing the reports. Additionally, ethics officials especially noted the difficulty of conducting a timely conflict of interest analysis of the annual public reports, whether using a list or not, because of the potentially

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protracted period of time from the end of the covered period to the filing and review of the report. The reports do not have to be filed until four and a half months after the end of the calendar year covered and may be reviewed as much as 60 days after being filed.

After the NLRB ethics officials review a report for technical compliance and certify it, the filer is sent a memorandum stating that the report reveals no apparent conflicts of interest. The memorandum also reminds the filer of the need to recuse him- or herself should a matter arise in which he or she has a financial interest. It is beneficial to send a memorandum to a filer notifying him or her of the status of the report and reminding him or her to recuse if necessary; however, the NLRB memorandum claims there are “no apparent conflicts of interest” when no such review for conflicts was conducted.

During our fieldwork, we suggested that some kind of conflict of interest analysis could be performed on the reports using a database of the cases assigned for the previous year. However, ethics officials expressed to us that this would create an undue burden with little or no value, given that the NLRB processes cases in real time. They contended that the employees in the agency are very cautious and the real ethics matters that arise are in relation to impartiality, not conflicting financial interests. They put more emphasis on education and training and count on the employees to police themselves. The EPO suggested that the topic of conflicting financial interests should be stressed during initial ethics orientation and annual ethics training.

These other approaches for promoting an ethical culture in the agency are beneficial; however, not doing a conflict of interest analysis precludes the reports from being properly certified and places the program in noncompliance with regulatory requirements. Ethics officials who are reviewing officials have a responsibility with regard to the certification of public and confidential reports, as provided by 5 C.F.R. §§ 2634.605 and 2634.909(a):

...[A] report which is signed by a reviewing official certifies that the filer’s agency has reviewed the report, and that the reviewing official has concluded that each required item has been completed and that on the basis of information contained in such report the filer is in compliance with [the criminal conflict of interest statutes, the Ethics in Government Act, Executive Order 12731, the Standards of Ethical Conduct for Employees of the Executive Branch, and any other agency-specific statute or regulation governing the filer].

The basis for financial disclosure is rooted in two major laws, the Ethics in Government Act of 1978 and the Ethics Reform Act of 1979, which aim to promote public confidence in the integrity of Government officials. To do this, OGE’s regulations and the financial disclosure format reflect the laws’ mandates and dual purpose of avoiding conflicts of interest through reviewer analysis of disclosure, and ensuring public confidence in Government through disclosure as an end in itself. Thus, the purpose of a conflict of interest analysis is not to prevent conflicts only within the limited time period of when a report is required to be filed. Rather, it provides an opportunity for reviewers to begin any necessary conflict of interest counseling whenever disclosures are made.

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There is no general requirement that a filer's supervisor or any intermediate official examine or review the report. However, in determining the appropriate chain of review, each agency must ensure that all reviewers are familiar with the technical reporting requirements as well as the Federal conflict of interest laws, and can evaluate available conflict of interest remedies in light of the filer's duties.

At the exit conference, we suggested having an intermediate review of the reports by someone familiar with the filer's caseload. However, ethics officials stated that an intermediate review was not feasible as the cases are not assigned by a supervisor but instead come from the bottom up. For example, in the majority of cases, an individual may walk into a field office to file a petition [with a Board agent] which is docketed and investigated. The petition may work its way up to the RD who determines whether or not a charge has merit. The RDs are the only officials who are required to file a public financial disclosure report in a Regional Office, and because they are the highest level officials in that office, there is no one at the Regional Office level who can review their financial disclosure reports for conflicts of interest. We then suggested that whomever the RDs report to should perform the intermediate review. However, NLRB ethics officials advised that this too was not feasible because the RDs work autonomously.

Based on this information, we reviewed the statutory structure of the agency to determine who has supervisory authority over the RDs' work. We learned that while RDs have been delegated authority to render initial decisions in representation matters, the Regional Offices are under the day-to-day supervision of the General Counsel. [The General Counsel exercises general supervision over attorneys employed by the Board (other than Administrative Law Judges, legal counsel to Board members, the Executive Secretary, and the Solicitor), and over the officers and employees in the Regional Offices.] In addition, the Division of Operations-Management (DOM), which is within the General Counsel's Office, assists in the coordination and integration of all operations in Washington DC, and of Washington operations with the field offices. DOM is also responsible for continuing liaison with field offices and for supervising and coordinating both substantive and administrative phases of their operations. Therefore, it seems plausible that an official in either the General Counsel's Office or DOM could perform an intermediate review of the financial disclosure reports filed by RDs.

We also suggested the use by confidential filers of an alternative procedure (e.g., a certification of no conflicts of interest form). However, ethics officials did not see how this would help address properly certifying the reports and felt it would require even more work. In the absence of NLRB agreement on these suggested actions, we are recommending that the NLRB develop a written proposal for identifying potential conflicts of interest on the part of its public and confidential financial disclosure filers and certifying their reports in accordance with 5 C.F.R. §§ 2634.605 and 2634.909(a).

Finally, the NLRB has written procedures in place regarding the financial disclosure systems. We found these procedures to generally comply with relevant requirements. Section 402(d)(1) of the Ethics in Government Act. However, we note a lack of implementation of the procedures regarding how a conflict of interest analysis is to be done as none is done at all.

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### Public Financial Disclosure System

The EPO is responsible for conducting an initial review of all the public reports and then forwarding them to the DAEO for final review and certification. To evaluate the administration of the NLRB's public system, we examined 50 of the 117 public reports required to be filed by non-Presidentially-appointed, Senate-confirmed (PAS) employees in 2005. The 50 reports consisted of 44 incumbent, 4 combined incumbent/termination, and 2 new entrant reports. All 50 of the reports were filed, reviewed, and certified in a timely manner.

However, as we noted above, the reports were not reviewed for conflicts of interest. In addition to promoting good governance, reviewing these public reports for conflicts of interest is important because these employees' responsibilities and the decision-making authority inherent in their positions may increase the potential for conflicts. The lack of a conflict of interest analysis also makes filers less accountable. Moreover, as agencies are required to make these reports publicly available within 30 days after receipt, not conducting a thorough initial review of the reports for conflicts of interest could leave the NLRB open to criticism if a conflict were found in a released report.

The NLRB does occasionally receive requests for the release of certain public reports. The EPO informed us that most of these requests are from unions and are for the reports filed by the DAEO and the PAS employees. The PAS employees are the General Counsel and the five Board members, including the Chairman. We reviewed the one recent request made in 2005 for six such public reports. The request was granted, and the reports were released in a timely manner.

We also reviewed the public reports required to be sent to OGE in 2005, filed by the PAS employees and the DAEO. Two of the Board Member positions were vacant, resulting in a total of five reports being filed. The five reports were from the DAEO, the Chairman, two Board members, and the General Counsel. All were filed, reviewed, certified, and forwarded to OGE in a timely manner.

### Confidential Financial Disclosure System

The EPO is responsible for the collection, review, and certification of all confidential reports. To evaluate the confidential system, we examined all 11 of the confidential reports filed by employees in 2005, which consisted of 4 OGE Form 450s and 7 OGE Optional Form 450-As. All forms were filed in a timely manner. Five filers requested and received filing extensions. The OGE Form 450s were reviewed and certified in a timely manner, as well. However, as noted above, the reports were not reviewed for conflicts of interest. The OGE Form 450-As were approved and dated when received by the agency, as determined by our review of the reports and the tracking system. We found only one technical issue and no substantive issues on the reports. Additionally, each filer who used the OGE Optional Form 450-A had an OGE Form 450 on file which, as required, was no more than three years old. 5 C.F.R. § 2634.905(d)(4).

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### **ETHICS EDUCATION AND TRAINING**

The NLRB's education and training program complies with the provisions of 5 C.F.R. part 2638. Indeed, the NLRB exceeds mere compliance by using model practices.

#### Initial Ethics Orientation

All employees at headquarters receive initial ethics orientation during their first day on duty. Employees in the field receive initial ethics orientation within 90 days of beginning employment. New employees are shown two ethics videos. They are also provided with a package of written materials that includes a copy of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards), the NLRB supplemental regulation, ethics officials' contact information, and other ethics materials. They are given an hour of official time to review these materials and are required to certify they have received the training.

#### Annual Ethics Training

An annual ethics training plan was in place for 2005 and 2006 in accordance with 5 C.F.R. § 2638.706. In addition, all covered employees received annual ethics training in 2005. The annual training consisted of videos or PowerPoint presentations. Employees completed certification forms that the EPO used to track completion of annual ethics training. Finally, all PAS employees receive verbal annual ethics training every year.

In 2005, the DAEO made the determination to use the exception at 5 C.F.R. § 2638.704(e)(1), waiving the requirement for a qualified instructor to be available for verbal training of public filers because it would have been impractical. Several of the public filers are Administrative Law Judges who work from home and are dispersed around the nation. Consequently, last year, ethics officials used a CD with a PowerPoint presentation and voice over as a new method to provide annual ethics training to these employees. We examined this new ethics training tool and were favorably impressed with the presentation's format and content.

#### Model Practices

We commend the NLRB for their use of several model practices in the implementation of the ethics education and training program. One of the model practices we found is the monitoring of initial ethics orientation and annual ethics training by having employees complete certification forms. In addition, NLRB employees completed an evaluation of the annual training they received in 2005. Ethics training was also offered to non-filers such as contracting officers and employees holding Visa purchase cards. Moreover, the ethics officials include prudently sanitized information gleaned from advice and counseling and Office of Inspector General (OIG) cases in formulating topics for training. The ethics staff also maintains an ethics page on its intranet site with links to various ethics laws and regulations, question and answer documents, the OGE Web site, and other ethics information. Finally, the DAEO attends senior staff meetings and is given the opportunity to discuss ethics issues.

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### **ETHICS AGREEMENTS**

We were provided with documentation for six ethics agreements made by PAS employees since 2001. All six ethics agreements include recusals in which the PAS employees (members of the Board and the General Counsel) disqualify themselves from matters that pose a potential conflict of interest. The recusals appropriately identified the specific matters from which the PAS employees were recusing themselves.

Ethics officials explained to us the screening arrangements in place. The Executive Secretary serves as gatekeeper for the Board members; screening cases from which the Board members are recused. The Deputy General Counsel serves as gatekeeper for the General Counsel, screening cases that could represent a conflict of interest for the General Counsel. In addition, Deputy Directors receive copies of the General Counsel's recusal.

### **ETHICS ADVICE AND COUNSELING**

Ethics advice and counseling meets the requirements of 5 C.F.R. § 2638.203(b)(7) and (8). We examined a sample of approximately 70 pieces of advice dispensed on varying ethics-related issues, including gifts from outside sources and between employees, conflicts of interest, impartiality, outside employment and activities, and fundraising. We found that ethics officials generally respond to inquiries in a timely manner (often within the same day the inquiry was received) and provide exceptionally thorough advice. In addition, ethics officials keep extensive records of the advice rendered via e-mail and memorandum. Moreover, NLRB ethics officials maintain a phone log where they document any verbal advice given to employees over the phone. Also, we commend the DAEO for providing written advice covering seeking-employment and post-employment restrictions to all PAS employees two to six months prior to the end of their terms.

While the advice and counseling was accurate and consistent with applicable laws and regulations, the practice at the NLRB of allowing supervisors to solicit subordinates for contributions towards gifts for other employees raised concerns among NLRB employees who felt coerced to contribute. The coercion issue came up in the advice we examined responding to inquiries from employees concerned about coercive tactics used by supervisors and management at a field office. Additionally, we found documentation of a complaint regarding coercive tactics that was made on the Inspector General's (IG) Hotline. In accordance with 5 C.F.R. § 2635.302(c), an official superior shall not coerce the offering of a gift from a subordinate. We suggest that the NLRB review its policy of allowing solicitations by anyone who is in the supervisory chain, even where it is made clear that all contributions are voluntary or where the gift is for lower level employees. This issue was discussed at our exit conference, and the ethics staff agreed with our suggestion.

We also suggested expanding the phone log to include the identity of the ethics official who rendered the advice in order to enhance accountability. The ethics staff informed us that the majority of the advice documented in the phone log is rendered by the EPO, but occasionally it is rendered by another ethics official.

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### **OUTSIDE EMPLOYMENT**

According to the NLRB's supplemental standards of conduct regulation (supplemental regulation), an NLRB employee must obtain prior written approval from the Board or General Counsel for outside employment involving the practice of law. For outside employment not involving the practice of law, an NLRB employee must obtain prior written approval from his or her Chief Counsel, RD, Branch Chief, or the equivalent. 5 C.F.R. § 7101.102.

To evaluate the NLRB's compliance with the supplemental regulation, we noted any outside employment activities reported on the public and confidential financial disclosure reports we examined. We identified a total of 18 filers who reported outside activities. According to the EPO, 12 of these filers' activities did not involve the type of employment that would require prior written approval. Of the remaining six filers, one reported an activity which had not changed in scope since it was originally approved several years before the period covered by our review and hence did not have a record of the approval on file. Another filer reported an activity for which he did not get approval beforehand. In this case, the EPO followed up with the filer and requested information from him and his supervisor to get the outside activity approved. The remaining four filers had prior written approvals for their outside activities as required. The activities appeared to generally be approved according to the supplemental regulation.

### **ENFORCEMENT**

According to documentation provided to us by the Counsel to the IG, there were eight allegations of NLRB employees violating the Standards in 2005.

The allegations consisted of five misuse of Internet cases, one misuse of resources case, one misuse of e-mail case, and one misuse of time and equipment case. Of the eight allegations, five were found to be substantiated. Actions taken against the employees in these five cases included a 30-day suspension, oral counseling, and a reprimand, while one of the employees retired after the interview with the OIG and another resigned in lieu of removal. The actions to remedy these violations generally seemed to be undertaken in a prompt manner, in accordance with 5 C.F.R. § 2638.203(b)(9).

In addition, the EPO informed us that the ethics officials have a good working relationship with the OIG. The Counsel to the IG also expressed to us that he has a good relationship with the ethics officials. Officials in both offices are aware of the need to notify OGE of a referral to the Department of Justice of a potential violation of the criminal conflict of interest statutes. However, none has been made recently.

### **TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES**

The NLRB accepts travel payments from non-Federal sources for travel, subsistence, and related expenses incurred by agency employees on official travel for attendance at a meeting or similar function. 31 U.S.C. § 1353. The procedures for requesting and receiving authorization for

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acceptance of travel expenses from a non-Federal source are set forth in an NLRB Administrative Policy Circular (APC). Employees are instructed to complete a Form NLRB-5475 prior to the occurrence of the travel. The form and a copy of the invitation letter are then sent to the approving official and the DAEO for concurrence, as delineated in the APC.

The semiannual report required to be sent to OGE is compiled by a Finance Specialist in the Finance Branch of the Division of Administration, and the EPO reviews it and transmits it to OGE. We reviewed the two semiannual reports sent to OGE covering the period from October 1, 2004 through September 30, 2005. Both semiannual reports were sent to OGE in a timely manner using the appropriate SF 326 Form.

In addition, we examined the travel payments from non-Federal sources reported on the NLRB's semiannual report covering the period from April 1, 2005 through September 30, 2005. As part of this review, we examined the supporting documentation for all 43 reported acceptances. We found that while the majority of the Form NLRB-5475s were completed prior to occurrence of the travel, four were not. In one case, the employee was unaware of the prior approval requirement; in two other cases, the travel was originally to be charged to the NLRB, but a decision was later made for the travel to be paid for by a non-Federal source. These three Form NLRB-5475s were completed after the travel. In the fourth case, we could not find a corresponding Form NLRB-5475. The EPO informed us that this was either a result of a copy of the form not being made or an oversight by the employee. Aside from these issues, it appears that travel payments accepted under § 1353 are generally being properly authorized, including conflict of interest analyses being conducted as part of the approval process.

In addition to our review of travel payments accepted from non-Federal sources, the NLRB's OIG will be conducting a review of reimbursable travel. After our fieldwork, the NLRB's OIG contacted us to determine our scope, methodology, and findings relating to travel payments accepted from non-Federal sources under § 1353.

## **RECOMMENDATION**

To bring the NLRB's ethics program into full compliance with applicable laws and regulations, we recommend that the NLRB develop a written proposal for identifying potential conflicts of interest on the part of its public and confidential financial disclosure filers and certifying their reports in accordance with 5 C.F.R. §§ 2634.605 and 2634.909(a).

The NLRB's DAEO is to advise OGE within 60 days of the specific actions the NLRB has taken or plans to take on our recommendation. OGE stands ready to assist the NLRB in implementing our recommendation and suggestions, as well as other program initiatives that the NLRB may choose to undertake. OGE will formally follow-up with the NLRB in six months.