



U.S. Office of Government Ethics
Program Review Division

Ethics Program Review

National Mediation Board

Report No. 12-48
April 2012

Results in Brief

The United States Office of Government Ethics (OGE) conducted a review of the National Mediation Board (NMB) ethics program in February 2012. OGE continues to find NMB's ethics program in compliance with applicable statutes and regulations. NMB ethics officials promptly corrected matters addressed during our examination in the areas of financial disclosure and 1353 travel acceptances. Therefore, OGE is making no formal recommendation for improvement.

Highlights

- NMB has established a formal policy for identifying, investigating, and resolving instances of employee misconduct that could constitute violations of the Standards of Ethical Conduct for Employees of the Executive Branch and/or criminal conflict of interest statutes.

Contents

Objectives, Scope, and Methodology.....	3
Program Administration.....	3
Financial Disclosure Systems	3
Special Government Employees.....	4
Education and Training.....	5
Advice and Counsel	6
Enforcement.....	6
1353 Travel Acceptance.....	6
Agency Comments.....	7

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 NMB's ethics program, OGE examined a variety of documents provided by ethics officials; other documents that NMB forwarded to OGE, including the annual questionnaire; prior program review reports, a review of NMB's public and confidential financial disclosure reports and the advice and counseling rendered to NMB employees. In addition, members of OGE's Program Review Division met with the DAEO and the ADAEO to obtain additional information about the strengths and weaknesses of NMB's ethics program, seek clarification on issues that arose through the documentation analysis, and verify data collected.

Program Administration

NMB is a small, independent agency, led by three Presidentially-appointed, Senate confirmed appointees (PAS), whose mission is to facilitate labor-management relations within two of the Nation's key transportation sectors: the railroads and the airlines. Headquartered in Washington, DC, NMB handles mediation and employee representation disputes and provides administrative and financial support in adjusting grievances in the railroad industry. NMB has approximately 50 employees.

The ethics program at NMB is organizationally located within the Office of Legal Affairs, hereafter referred to as the Ethics Office. The General Counsel serves as the agency's DAEO and a Counsel serves as Alternate DAEO. Assisting ethics officials in the day-to-day operation of the program is a paralegal specialist. Each ethics official administers the program as a collateral duty.

Financial Disclosure Systems

NMB has four public financial disclosure filers, which include the agency's three PAS officials and the DAEO. All four public reports are forwarded to OGE for final review and certification. OGE confirmed that each public report had been timely forwarded to OGE in accordance with 5 CFR § 2634.602.

To evaluate the effectiveness of NMB's confidential system, OGE examined all 26 confidential financial disclosure reports that were required to be filed in 2011. Overall, OGE found each report it examined to comply with statutory and regulatory requirements in terms of timeliness of filing, review, and certification. However, a few technical reporting issues were identified and brought to the attention of ethics officials.

- **Use of Agency Date Stamp.** OGE noticed that the majority of confidential reports did not have a date stamp, as required by 5 CFR § 2634.605(a). Therefore, OGE based filing timeliness on the filers' signature dates. Using this method, OGE confirmed that all reports were filed timely. Since compliance with the filing due date had been met, OGE reminds the Ethics Office that a financial disclosure report is considered filed when the agency receives it. Therefore, the agency date of receipt stamp is critical in determining timeliness of filing and review. OGE was assured that the practice of date-stamping reports would become routine during future filing cycles.
- **Use of the OGE Form 450-A.** OGE reminds the Ethics Office that the use of the OGE Form 450-A may be used by incumbent filers in lieu of the OGE Form 450 if the filers can certify that neither they nor their spouses or dependent children have acquired new reportable interests and that the filers have not had a significant change in duties or change of position description assignment in accordance with 5 CFR § 2634.905(b). This form may be used for a maximum of 3 consecutive years. The following year, all employees in designated positions must file the OGE Form 450.

During the examination, OGE notes that of the 26 confidential reports examined, 12 were OGE Form 450-As. Ethics officials indicated that they expected some filers to use the OGE Form 450-A in 2012. OGE clarified the filing restrictions at § 2634.905(b)(5) on when the OGE Form 450-A can be used. Because our examination occurred prior to the February 15th reporting deadline for annual confidential reports, the Ethics Office indicated that they would amend their notification to filers and require all NMB confidential filers to file using the OGE Form 450 for 2012.

OGE notes that after 2012, an OGE Form 450-A can be filed by applicable filers in 2013, 2014, and 2015, but an OGE Form 450 must be filed again in 2016. Since employees may not understand when the form can and cannot be used, the Ethics Office has agreed to ensure that employees understand the limitations on using the Optional Form 450-A.

Special Government Employees

NMB assists the White House in administering ethics services for Presidential Emergency Board (PEB) members. The members of PEBs are appointed by the President and report to the President and are considered special Government employees who are responsible for filing a confidential financial disclosure report upon nomination. Though each board's role is defined by the executive order creating it, PEBs usually only last for 30 days. Each board is charged with investigating and reporting to the President about a specific labor dispute. Board reports often include a recommendation for settlement. Typically, members of the board are professional arbitrators with experience in labor disputes. In recent years, most members of emergency boards have been members of the National Academy of Arbitrators. According to NMB's PEB log, only one board was created in 2011, PEB 243. The last two previous boards were established in 2007.

Regarding the review of financial disclosure reports, the Ethics Office is responsible for assisting the White House in its initial ethics clearance of potential PEB members. OGE was advised that after initial review and clearance by the White House, the White House forwards the financial disclosure report filed by potential board members to the Ethics Office for review. The review of these reports take place in an expedited timeframe and written clearance by the Ethics Office is generally done by email. Once the President creates a PEB, the White House appoints the DAEO as the PEB's ethics officer. The DAEO is then responsible for contacting these members.

OGE did not examine the financial disclosure reports filed by members of PEB 243 since we were advised that the White House maintains these reports. However, OGE did examine the written notes associated with the Ethics Office's conflict of interest analysis for these members. OGE found the Ethics Office's analysis to address and provide conflict of interest remedies for all relevant ethics concerns.

Education & Training

OGE found NMB's education and training program to be in full compliance, including documenting annually its ethics training plan and satisfying both OGE's initial and annual training requirements.

Initial Ethics Orientation and Annual Ethics Training for Regular Employees

Within two weeks of beginning work at NMB, the DAEO provides new employees with an initial ethics orientation (IEO) briefing. Written material is also provided to new employees that satisfy the content requirements for IEO training found at 5 CFR § 2638.703. As required, new employees are given a minimum of one hour of official duty time to study the material. Because the number of new employees is relatively small from year to year, the DAEO and/or ADAEO will also periodically confer with the new employee following their initial briefing to determine whether any ethics questions have developed. In 2011, NMB provided IEO to one new employee.

To satisfy the annual training requirement in 2011, the Ethics Office presented in-person training to all public and confidential financial disclosure filers. The training consisted of an overview of OGE's web-based training module on Misuse of Position. For filers unable to attend, the Ethics Office required them to take the web-based training module and upon completion were required to send an email confirming training completion. OGE confirmed that all financial disclosure filers received annual training in 2011.

Initial Ethics Orientation for SGEs

OGE found that the Ethics Office provided all PEB 243 members with written ethics training in accordance with the exception at 5 CFR § 2638.705(d)(2) on the conflict-of-interest laws and ethics regulations that apply to them when they first come on board. Written material included OGE's "Conflict of Interest and the Special Government Employee – A Summary of Ethical Requirements Applicable to SGEs" document and the Standards of Ethical Conduct for

Employees of the Executive Branch. PEB members were asked to review these materials carefully and to contact the Ethics Office with any questions.

Advice & Counsel

Pursuant to 5 CFR § 2638.203(b)(7) and (8), both the DAEO and ADAEO are responsible for providing NMB employees with advice and counseling on all ethics-related matters, including post-employment. Employees are encouraged to contact the Ethics Office via all forms of communication, including e-mail, telephone, and in-person. While telephone inquiries of a basic nature are addressed immediately, most inquiries are made and advice rendered via e-mail or through formal ethics opinions.

OGE examined three formal ethics opinions rendered to NMB's senior leadership in 2011 on matters pertaining to widely attended gatherings and board membership in a personal capacity. In all three instances we found the advice rendered to incorporate the following: (1) an indication of when the advice was given; (2) a summary of the relevant facts as described by the employee; (3) a citation to the applicable legal authority; (4) an analysis of the application of the law to the facts; and (5) a conclusion. The advice was consistent, timely, and given in a practical, easy-to-comprehend format. Despite the limited sample size, OGE is satisfied that the advice the Ethics Office renders is adequate in preventing ethics violations from occurring.

Enforcement

NMB does not have its own Inspector General or utilize the services of an outside investigative organization to help ensure that certain program elements described at 5 CFR § 2638.203(b)(11) and (12) are carried out. According to the DAEO, no referrals of alleged violations of the conflict of interest laws have been made to the Department of Justice since 2003. In the event a referral had been made, the DAEO would be responsible for concurrently notifying OGE. In addition, there were also no reported disciplinary actions taken for violations of the standards of conduct in 2011.

Model Practice Identified

- NMB maintains a policy document entitled, Policy #2050 Misconduct and Discipline, which establishes the agency's policy for identifying, investigating, and resolving instances of employee misconduct that could constitute violations of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) and/or criminal conflict of interest statutes.

1353 Travel Acceptances

NMB permits its employees to accept payments from non-Federal sources for travel, subsistence, and related expenses incurred on official travel under the authority of the General Services Administration (GSA) regulation at 41 CFR chapter 304, implementing 31 U.S.C. § 1353. To meet the semiannual reporting requirement, the Ethics Office is responsible for collecting the

information to be reported, drafting the agency's semiannual report of payments of more than \$250 per event, and forwarding the semiannual report to OGE.

At the time of fieldwork, the semiannual report on payments covering the period from April 1, 2011 – September 30, 2011 had not been reported to OGE.¹ Prior to the issuance of this report, the DAEO submitted the aforementioned report using the appropriate GSA Standard Form 326. OGE reminds the Ethics Office that NBM's semiannual travel reports, even when there is no reportable activity, are now posted on our website in accordance with federal efforts to make information available to the public. *See*, OGE's March 30, 2011, "Program Management Advisory: Procedural Update For Reporting Payments Accepted Under 31 U.S.C. § 1353". OGE encourages the Ethics Office to take care to submit these reports timely and ensure that semiannual reports contain required personal information only.

Agency Comments

A draft of this report was provided to the DAEO for review and comment. The DAEO offered one technical correction on the frequency of when initial ethics orientations are provided to new NMB employees which OGE incorporated within the final report.

¹ OGE did receive NMB's semiannual report on payments covering October 1, 2010 – March 31, 2011.