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May 2, 2012

VIA E-MAIL AND FIRST-CLASS MAIL

David P. Berry, Esq.
Inspector General
National Labor Relations Board
Washington, DC

Re: Terence Flynn

Dear Mr. Berry:

This letter responds to the supplemental report of investigation relating to Terence Flynn, a copy of which you provided to us on April 30, 2012 (the “Supplemental Report”), allowing us less than two days to analyze and respond to it prior to its release to a congressional oversight committee. As discussed more fully below, we strenuously object to the “renewed” investigation of Mr. Flynn and to the purported findings set forth in the supplemental report. Indeed, the entire course and conduct of this investigation, much of which is unprecedented, raises serious questions as to its objectivity, impartiality, independence, and intended purpose. Mr. Flynn is a dedicated public servant with an outstanding record of performance at the National Labor Relations Board over nearly eight years prior to his recess appointment by President Obama. He has cooperated voluntarily with both of your interviews. No allegation raised by your office relates to his actions as a Board Member. Nonetheless, he has been subjected to a series of investigations and dubious referrals apparently intended to distract, intimidate, and to deter him from fulfilling his responsibilities as a Board Member, and ultimately to pressure him to resign.

I Procedural Objections and Concerns

We object to your practice of refusing to share, in advance of interviews, copies of the documents that form the predicate for your investigation. If there were a genuine interest in exploring the facts and circumstances surrounding these documents, they would not be revealed to Mr. Flynn for the first time during the interview, or worse, disclosed to us for the first time in the report itself, as was the case with a number of the exhibits to the initial and Supplemental Reports. Second, we continue to object to the extremely limited period of time

provided for submitting written responses to your draft reports. Mr. Flynn does not have available to him the same array of taxpayer-funded resources at the disposal of the Office of Inspector General. Nor can my counsel access to the Board's electronic case management system or computer and e-mail records to verify factual representations, *e.g.*, as to timing of case actions and issuance. Nor can my counsel access records to establish whether, in fact, alleged disclosures of the type at issue have been commonplace at the Board in the past.

Further, we object to the troubling disclosures and leaks occurring during the course of this investigation. In fact, we were contacted by reporters seeking comment on the OIG supplemental report before we were ever provided a copy of it. Finally, we object to what apparently was a supplemental investigation triggered not by any report of fraud, waste or other misconduct, but rather Mr. Flynn's public statement issued at the advice of counsel and the Board's Public Affairs Office in response to numerous press inquiries. These press inquiries inundated the Board after the initial OIG report was posted, without Mr. Flynn's response, on the website of a Democratic congressman. The suggestion that the release of a public statement in defense of oneself in connection with an investigation involving alleged criminal conduct could provoke yet another investigation (with attendant expense) is without any legitimate predicate, and is antithetical to the American system of justice.

This matter has become highly politicized, and we are concerned about your role in the dissemination of information regarding Mr. Flynn. With respect to your initial report, it evidently was disseminated to members of a congressional oversight committee *immediately* upon its release by your office, and then immediately posted on a Hill website and disseminated to the press. Our understanding was that our response to the report was to be made part of the report, but we find no reference to our response in the report, and our response did not find its way onto the website in question.

Further, our understanding is that an inspector general is authorized to disseminate a report to an oversight committee only if there has been a formal request from the oversight committee. We have not seen any such formal request. Disseminating a report without such a request, particularly when the report contains what is characterized by the inspector general as pejorative information which could adversely affect a citizen's reputation, raises significant concerns under the Privacy Act.

Similarly, several days ago, a Democratic congressman called publicly for an investigation of Mr. Flynn concerning possible violation of the Hatch Act, resulting in additional press attention and causing further damage to Mr. Flynn's reputation, and despite the fact that your initial report never mentions the Hatch Act. We question how information relating to an alleged Hatch Act criminal referral came into the possession of this congressman.

Prior to the issuance of your initial report, our client had an impeccable reputation in his professional community. He sacrificed income and economic security in order to become a government employee, and, based on his performance, was nominated by the President to become a Member of the NLRB. He engaged in informal communications about issues of mutual interest with a person who formerly occupied that very position. There is no shred of evidence indicating that any attempt was made to improperly influence any Board decision. Rather, the evidence shows that Mr. Flynn was simply discussing issues of mutual interest with a former close colleague. We want our government employees to interact with persons outside the cloistered confines of government agencies. It improves decision making. And, based on these circumstances, with no shred of evidentiary support, you have alleged some sort of illicit *quid pro quo* between Mr. Flynn and Mr. Schaumber. In our view, this assertion is improper and exceeds your authority as Inspector General.

All of this is not to say that all of Mr. Flynn's interactions with his former colleague reflected perfect judgment in every instance. Mr. Flynn has never made that claim, despite the spin put on his comments by others. These interactions were not, however, illegal, and there is not a shred of evidence that they were undertaken for any improper purpose. You appear to have made not the slightest attempt to examine the e-mail of other similarly situated persons to see what they disseminated to others for discussion outside the agency. Your allegation of a *quid pro quo* is analogous to your earlier allegation of conversion – theft – based on Mr. Flynn's *de minimis* use of his government computer to look over a draft op-ed piece. That allegation completely ignored the well-established fact that government employees are *allowed* to use their government computers for *de minimis* personal business.

You go so far in your supplemental report as to assert, without citing one shred of authority for this proposition, that it was an “ethical violation to publicly discuss a pending case.” Page 12. In point of fact, the Obama administration is committed to expanding transparency and openness in government. That is not to say that agencies such as the NLRB can, and do, hold certain items confidential. This, however, does not mean that an agency employee communicating informally with a former employee about issues they worked on together, which are of mutual interest, is a criminal offense requiring interdiction by an inspector general.

For all of these reasons, we strenuously object to your supplemental report, and to your evident intention to, once again, immediately release it to an oversight committee, which will be expected to promptly post it on a website.

II. Objections to the Findings and Analysis In the Supplemental Report

The Supplemental Report revisits certain communications that were described in the Initial Report, and purports to address “new” communications between Mr. Flynn and former Board Chairman and Member Peter C. Schaumber, Mr. Flynn’s client and close colleague of many years. Specifically, the Supplemental Report addresses instances in which Mr. Flynn sent emails to former Member Schaumber that included as attachments what appear to be draft dissenting opinions in cases decided by the Board. There is no allegation that Member Schaumber disseminated or disclosed any documents received from Mr. Flynn or that the outcome of any Board decision was impacted by the release of any information. Nor does the report cite any statute, precedential authority or controlling regulation establishing that an administrative agency’s draft decisional actions constitute non-public “deliberative” information that may not be shared in private communications with a long-serving former Board Member and Chairman. That is particularly so given that Mr. Schaumber had personally participated in many of the matters in question, and was no longer, so far as Mr. Flynn knew or knows, engaged in the practice of law, much less representation of clients before the Board.

Mr. Flynn recognizes that any agency is in possession of certain information that is non-public. There is no basis for your conclusion in the Supplemental Report that Mr. Flynn has implied, “through his counsel’s objections, that he has inherent authority to release deliberative information.” Mr. Flynn has never made such a statement, either directly or through counsel.

As noted above, we do not have access to Agency computer systems to verify or challenge factual representations concerning case processing information contained in the Supplemental Report. Nor, despite our requests, were we provided with electronic copies of the documents you cite, which we could use to precisely compare the identified drafts with the actually issued Board decisions. However, a manual cross-reading of the documents suggests that the final versions of the dissents at issue were virtually identical, in each instance, with the draft versions shared with Mr. Schaumber. Further, it should be noted that the disclosures at issue in the Supplemental Report were (a) made to a single person – a former Board Member, close colleague and friend who had a personal interest in the Board, based on his years of service and relationships with other Board Members; and (b) did not in any way affect the deliberative process. Member Hayes drafted the dissents in question, and their content reflected his views, not those of Mr. Flynn or member Schaumber. In fact, there is no evidence that Member Schaumber responded with any substantive comments, edits or revisions to the dissenting opinions. Accordingly, there is no evidence that Mr. Flynn's dissemination of these draft dissents could have affected, or did affect, the Board's deliberative process in any way. Similarly, while the supplemental report is drafted to

suggest some connection between Mr. Flynn's communications with Member Schaumber and the parties' voluntary, mutual withdrawal of exceptions to the judge's decision in Albertson's LLC – *which withdrawal was independently approved by unanimous Board* – you offer no evidence to support this theory.

The Supplemental Report also re-treads ground covered by the initial report. It notes that Mr. Flynn reviewed, at Member Schaumber's request, a couple of short articles Member Schaumber was drafting. At various stages of this investigation, the OIG has contended that such favors constituted unauthorized outside employment (whether or not compensated), misuse of government property, and conversion (theft). Consistent with other radical shifts in theory and position throughout the investigation (including unexplained revisions to published OIG procedures on its website), your office now contends that these isolated editorial revisions were some type of agreed-upon quid pro quo for Member Schaumber's support of Mr. Flynn's nomination. That such a bald, provocative assertion would be made under these circumstances is stunning, and utterly devoid of evidentiary support. Similarly, there is no basis for your conclusion that Mr. Flynn's expressed opinion that a former Chairman had all but committed to reverse a certain Board case somehow revealed non-public, deliberative information. That former Chairman's prior dissenting opinions and public statements about the case had drawn widespread attention long before participating parties filed a motion to recuse her from further participation in the matter.¹

You conclude that Mr. Flynn's communications with Mr. Schaumber violated the Standards of Ethical Conduct for Employees of the Executive Branch, which provide that an employee shall not "allow the improper use of nonpublic information to further his own interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure." 5 C.F.R. 2635.703(a). However, the Supplemental Report does not detail how the communications at issue furthered Mr. Flynn's own interest or the interest of another. The communications reflect an occasional dialogue between former colleagues about mutual subjects of interest that was informal and that did not in any way affect the operations or business of the Board. There is no evidence to the contrary.

¹ Information concerning then-Chairman Liebman's views on the New York University case was publicly known long before Mr. Flynn sent the November 1, 2010 email to Mr. Schaumber described in paragraph 38 of the Supplemental Report. Although the Motion to recuse Chairman Liebman was not filed until August 11, 2011, in April 2010, then-Chairman Liebman's remarks in a public speech strongly suggested what her position would be with respect to the issue resolved in New York University. See "An Invitation to Unionize" (April 13, 2010) available at http://www.insidehighered.com/news/2010/04/13/nlr#T58_Zkiy-OQ.email. The Supplemental Report does not account for this information, which was publicly available, and which, along with Chairman Liebman's published dissents, served as the basis for Mr. Flynn's comments to former Member Schaumber.

Further, your suggestion that Mr. Flynn's communications with former Member Schaumer were in exchange for former Member Schaumber's lobbying on behalf of Mr. Flynn's nomination is utterly unfounded. The email communications cited in the Supplemental Report do not support this suggestion, nor is there any other information or evidence that would reasonably lead to this conclusion. Mr. Flynn takes this allegation very seriously and would never engage in such conduct. Given the concerns that we raised regarding the renewed and expanded investigation, together with the issues we addressed in our first response, we have serious concerns regarding your findings in this regard.

Finally, we disagree that the standard performance appraisal plan and critical elements that you cite in the Supplemental Report provide any support for the conclusions set forth in the report. During his tenure as an employee of the Board, Mr. Flynn received excellent performance appraisals and was frequently commended for his hard work, dedication and commitment to the Board's mission. These attributes contributed to his nomination to the Board.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry Coburn". The signature is fluid and cursive, with a long horizontal stroke at the end.

Barry Coburn