

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General



Memorandum

April 30, 2012

To: The Board

From: David P. Berry
Inspector General

A handwritten signature in black ink, appearing to read "D-P. Berry", written over the printed name.

Subject: Supplemental Report of Investigation – OIG-I-468

This memorandum addresses an investigation conducted by the Office of Inspector General (OIG) involving allegations of improper conduct by Terence Flynn during the time that he was serving as a Chief Counsel. In a prior report, dated March 19, 2012, we found that Mr. Flynn, while serving as a Chief Counsel, violated the Standards of Ethical Conduct for Employees of the Executive Branch and that he lacked candor during the investigatory interview.

Following the issuance of that report, Mr. Flynn made certain public statements that caused us concern and we determined that it was necessary to continue our investigative efforts. Our initial investigative efforts involved reviewing e-mail messages between about May 5, 2011 and December 5, 2011. To continue our investigation, we requested that the Office of the Chief Information Officer restore Mr. Flynn's e-mail account as of the following dates: September 26, 2010; November 11, 2010; January 31, 2011; and May 5, 2011. Through this process, we compiled a group of e-mail messages that spans from approximately the time that former Member Peter Schaumber's term as a Board Member ended until the date that Mr. Flynn was notified that he was the subject of an OIG investigation.

Through our additional investigative efforts, we determined that Mr. Flynn released deliberative nonpublic information that included, among other things, a draft of a Board majority decision and four dissents that had not yet been issued, as well as other deliberative nonpublic information involving the processing of cases and issues by the Board.

FACTS

Release of Draft Board Decisions

1. At 8:51 a.m., on October 1, 2010, former Member Schaumber sent Mr. Flynn an e-mail message that read: (IE 1)

Can you keep me posted on what Board decisions I should be reading?

2. In a reply e-mail message at 9:45 a.m. on October 1, 2010, Mr. Flynn responded “sure” and mentioned publicly available information that had appeared in the Daily Labor Report. (IE 1)
3. At 9:47 a.m., on October 1, 2010, Mr. Flynn forwarded an e-mail message, dated September 30, 2010, to former Member Schaumber that had as an attachment a dissent by Member Brian Hayes in the case *Richie’s Installations, Inc.*, 21-CC-3337. (IE 2)
4. Member Hayes’ dissent was first circulated to the panel on September 30, 2010. (IE 3)
5. The final panel Board Member voted on *Richie’s Installations, Inc.*, on September 30, 2010. (IE 3)
6. The Board decision in *Richie’s Installations, Inc.* was issued on October 7, 2010. (IE 4)
7. In his dissent, Member Hayes noted that the reasons for his dissent are fully set forth in the joint dissent in *Eliason & Knuth*, 355 NLRB No. 159 (2010). (IE 2 & 4)
8. Member Hayes was joined in the joint dissent in *Eliason & Knuth* by then-Member Schaumber. (IE 5)
9. At 2:23 p.m., on October 6, 2010, Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a dissent by Member Brian Hayes in the Request for Review in *New York University*, 2-RC-23481. (IE 6)
10. On October 6, 2010, former Member Schaumber responded by reply e-mail message to Mr. Flynn that stated “[g]reat dissent.” (IE 7)
11. Member Hayes’ dissent was circulated to the panel on October 6, 2010, at 12:40 p.m. (IE 8)
12. The final panel Board Member voted on *New York University* on October 20, 2010. (IE 9)
13. The Board’s decision on the Request for Review in *New York University* was issued on October 25, 2010. (IE 10)
14. On January 20, 2011, Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a dissent by Member Hayes in the decision in *Mastec Direct TV*, 10-RC-15707. (IE 11)

15. On January 20, 2011, former Member Schaumber responded by reply e-mail message to Mr. Flynn that stated: (IE 12)

Thanks, only skimmed, but quite good. It would have been nice if he cited me ☺

16. Member Hayes' dissent in *Mastec Direct TV* was circulated to the other panel members on January 5, 2011 and revised dissent was circulated on February 17, 2011. (IE 13)

17. The final panel Board Member voted on *Mastec Direct TV* on March 1, 2011. (IE 13)

18. On March 11, 2011, the Board's decision in *Mastec Direct TV* was issued. (IE 14)

19. On January 25, 2011, Mr. Flynn sent an e-mail message to former Member Schaumber that had as an attachment a draft of a decision by Member Becker in the case of *Albertson's LLC*, 28-CA-22546. (IE 15)

20. The panel considering Member Craig Becker's draft decision also included Chairman Wilma Liebman and Member Mark Pearce. (IE 16)

21. Member Becker's draft decision was circulated to the panel on January 24, 2011. (IE 16)

22. When released by Mr. Flynn to former Member Schaumber, Member Becker's draft had not been voted on by the panel. (IE 15)

23. On February 10, 2011, Albertson's LLC made a request to the Board to withdraw its exceptions to the Administrative Law Judge's decision, citing the concurrence of the charging party. (IE 17)

24. On February 25, 2011, the request for withdrawal of the exceptions was approved by an Associate Executive Secretary acting at the direction of the Board. (IE 18)

Release of Other Deliberative Information and Assistance

25. In the earlier report, we stated that an examination of the hard drive from Mr. Flynn's Government computer disclosed that, on September 3, 2010, 6 days after former Member Schaumber's term ended, a document identified as "Schaumber SuppBusPlan.doc" was edited. (Fact 27 of the prior report)

26. On August 31, 2010, former Member Schaumber sent Mr. Flynn an e-mail message that had as an attachment a document titled "SuppBusPlan.doc" and asked that Mr. Flynn take a look at it. (IE 19)

27. On September 3, 2010, at 11:40 a.m., Mr. Flynn sent a reply e-mail message to former Member Schaumber with an attachment titled "SuppBusPlan.doc." (IE 20)

28. On September 3, 2010, at 12:26 p.m., Mr. Flynn sent a second e-mail message with an attachment titled “SCHAUMBER SuppBusPlan.doc” and a message that read: (IE 21)

Peter: This is a recreation of what I sent before. Please confirm receipt of this one.

29. On September 10, 2010, Mr. Flynn forwarded to former Member Schaumber an e-mail message that had as an attachment a memorandum from Member Hayes to the Board stating Member Hayes’ position on the issue of the General Counsel’s request for electronic posting of remedy notices. Mr. Flynn added a comment that read “[s]howing some backbone ...” (IE 22)

30. On September 20, 2010, Mr. Flynn forwarded to former Member Schaumber an e-mail message that contained a proposal regarding 10(j) processing from Chairman Liebman that she wished to discuss at a meeting with the Board and senior Board managers. (IE 23)

31. In the earlier report, we stated that a file identified as “sCHAUMBER wsj ARTICLE.doc” was found on the Government computer that is assigned to Mr. Flynn in the file directory path “Documents and Settings\flynn\My Documents” with a file creation date of September 21, 2010. (Fact 30 of the earlier report)

32. On September 21, 2010, former Member Schaumber sent an e-mail message to Mr. Flynn with an attachment identified as “wsj ARTICLE.doc.” (IE 24)

33. On September 21, 2010, Mr. Flynn responded to former Member Schaumber by a reply e-mail message that included as an attachment an edited article identified as “sCHAUMBER wsj ARTICLE.doc” and stating: (IE 25)

Peter: I have attached proposed mods, though I confess to having some misgivings; I’m not sure that having an angry glare focused on the Board (and you by Union-side people) advances the prospect of my nomination, even though it does not appear imminent.

34. On September 22, 2010, former Member Schaumber responded: (IE 26)

Spoke with Schneider today. He sees no problems with your nomination. It is being held up because they are not ready to nominate a GC. They are holding up other nominations pending yours, such as the head of the GPO. The unions want the Obama nominee for GPO to be confirmed.

He sees no problem with the wsj op ed for you – the WH is not looking for reasons to hold your nomination up – but for me.

Has anyone done any research on what, if any requirements, the APA places on agency rule-making?

35. On October 12, 2010, Mr. Flynn sent former Member Schaumber an e-mail message stating that the Board “will be voting Kroger this Friday” and stating his opinion on the likely outcome of the vote. (IE 27)

36. The Board met in an Agenda on October 13, 2010, during which it deliberated on *Kroger Limited Partnership*, 25-CB-08896. (IE 28)

37. The Board has not issued its decision in *Kroger Limited Partnership*. (IE 28)

38. On November 1, 2010, Mr. Flynn sent an e-mail message to former Member Schaumber stating that certain decisions had been issued by the Board, including the grant of review in the *New York University* Request for Review. The e-mail message included the following in reference to the grant of review: (IE 29)

[T]he case Wilma [redacted] Deliberative
[redacted] m
[redacted]

39. On November 30, 2010, former Member Schaumber sent Mr. Flynn an e-mail message asking if Mr. Flynn was aware of any recent handbook or insignia wearing cases other than *Stabilus, Inc.* and added a reference to the status of Mr. Flynn’s nomination. (IE 30)

40. On November, 30, 2010, Mr. Flynn stated “[n]ot that I can think of” in a reply e-mail message to former Member Schaumber. (IE 30)

41. On January 6, 2011, Mr. Flynn sent former Member Schaumber an e-mail message stating “Thank you, my friend” followed by the White House press release announcing Mr. Flynn’s nomination as a Board Member. (IE 31)

42. On January 6, 2011, former Member Schaumber responded to Mr. Flynn’s e-mail message with the following: (IE 31)

You’re welcome. Schneider has been keeping me informed. He was surprised I wanted to remain engaged on these issues and told me this week that he hopes I knew that a renomination would have been mine for the asking. I told him that I knew that but that I had had eight great years, that you were available to take my spot and I wanted you to have the opportunity. So do a good job, as I am sure you will.

43. On January 14, 2011, Chairman Liebman sent an e-mail message to the Board, Chief and Deputy Chief Counsels, the Solicitor, and the Executive Secretary detailing the matters that were her top priorities for final issuance by the end of her term. (IE 32)

44. On February 3, 2011, Mr. Flynn forwarded the e-mail message with Chairman Liebman's priorities to former Member Schaumber. (IE 32)

45. On March 2, 2011, Mr. Flynn sent former Member Schaumber an e-mail message that included the following question: (IE 33)

Peter: Can you think of any ethical restraints on a Board member discussing a proposed change to election procedures that has not yet been made public – raising concerns both about the substance of the proposal and the manner in which it is being moved through the Agency (i.e. without open and public discussion, etc.)? That seems different to me than discussing an actual case while it is pending.

46. At 9:49 a.m., on March 30, 2011, former Member Schaumber sent Mr. Flynn an e-mail message that had as an attachment a document titled "NewSpecialtyHealthCareOpED.doc" with a message that read in part "Here it is. Thanks. ..." (IE 34)

47. At 11:13 a.m., on March 30, 2011, Mr. Flynn responded to former Member Schaumber: (IE 35)

I've reviewed this and am happy to suggest revisions, but they will be extensive and I can't guarantee I can get through them today. This week, for sure.

48. At 11:31 a.m., on March 30, 2011, former Member Schaumber sent Mr. Flynn an e-mail message that had as an attachment a document titled "SpecialityHeathcareBackgroundPaper2.doc." (IE 36)

49. At 8:47 a.m., on March 31, 2011, former Member Schaumber sent Mr. Flynn an e-mail message with the subject "Additional thoughts" and stated "[o]n re-reading what I wrote its approach may be too narrow. What do you think of the approach below?" and appears to provide additional or replacement paragraphs for the document provided the day before. (IE 37)

50. At 10:25 a.m., on March 31, 2011, former Member Schaumber sent Mr. Flynn additional editorial thoughts for the document provided the day before. (IE 38)

51. At 10:58 a.m., on March 31, 2011, Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a document titled "NewSpecialtyHealthCareOpEd.doc." (IE 39)

52. On April 1, 2011, Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a document titled "NewSpecialtyHealthCareOpEd.doc" with a message that read "[n]oticed two typos." (IE 40)

53. At 11:19 a.m., on April 18, 2011, former Member Schaumber sent Mr. Flynn a link to the Specialty Healthcare document as it appeared as an editorial on The Hill's Congress Blog. (IE 41)

54. At 11:30 a.m., on April 18, 2011, Mr. Flynn responded to former Member Schaumber "[m]aybe it will be picked up by others." (IE 41)

55. The editorial at the link appears to be the document edited by Mr. Flynn. (IE 42)

56. At 12:43 p.m., on April 18, 2011, Chairman Liebman sent Mr. Flynn an e-mail message that read: (IE 43)

Trust you saw this. <http://thehill.com/blogs/congress-blog/labor/156577-nlrbskirts-formal-rulemaking-requirements>
Perhaps even wrote it.

57. At 2:15 p.m., on April 18, 2011, Mr. Flynn responded to Chairman Liebman "I'm not familiar with that blog, but thank you." (IE 43)

58. On April 19, 2011, former Member Schaumber sent Mr. Flynn an e-mail message with "talking points" for a video that he was doing that afternoon and asking "[s]ee any dangers," to which Mr. Flynn responded "not really." (IE 44)

59. When asked during an interview, in late April 2011, with staff from the U.S. Senate's Committee on Health, Education, Labor and Pensions, Mr. Flynn deferred on some questions on the grounds that the issue could come before him as a Board Member. (IE 45)

60. On October 13, 2011, former Member Schaumber asked Mr. Flynn for his personal e-mail address. Mr. Flynn responded by providing the e-mail address [REDACTED]. (IE 46)

61. When interviewed, Member Hayes stated that he has no memory of ever authorizing Mr. Flynn to release a draft dissent to former Member Schaumber. (IE 47)

62. Former Member Schaumber did not respond to our request for an interview. (IE 48)

63. The following facts relate to issues raised by Mr. Flynn when he was interviewed:

a. The Deputy Chief Counsel on the former Member Schaumber staff stated that it was his practice to provide the staff with electronic copies of Member Hayes' dissents that contain substantive analysis once the draft dissent was posted for circulation to the panel. The Deputy Chief Counsel stated that he believed that the staff understood that the decision had not yet been issued. (IE 49)

b. The Board's Solicitor described the Board's deliberative process as follows: (IE 50)

He has observed that a dissent, once circulated, can cause the majority to make substantive changes in the draft majority opinion. A change in the draft majority opinion may then result in a change in the draft dissent. He has also observed that this back and forth may continue for a period of time with the dissenting and majority Members making additional changes to their respective draft opinions in response to their colleague's arguments. As a result of this deliberative process, there have been situations where a dissenting view became the majority opinion, and other situations where a majority opinion has changed sufficiently for the dissenting Member to join the majority.

Another element of the Board's deliberative process is what is referred to as "noting off." Most decisions are issued by a panel of three Members, rather than by the full Board. When that occurs, the non-participating Board Members must "note off" on the decision before it is issued. A Member may decline to "note off" and elect to participate in the deliberations in any particular decision. When that occurs, the decision approved by the previous panel will not issue, and the deliberative process will resume with the new Member participating. This "noting off" process is not required in a small subset of cases that are considered by the "Panel of the Month."

A Board decision is not "final" until it is issued. The Board considers a decision to be "issued" when it is posted on the NLRB Web site. Until a decision is issued, any Board Member may withdraw his or her vote and cause the deliberations to resume.

c. A standard performance appraisal plan is used for both a Chief Counsel and a Deputy Chief Counsel. Critical Element 2 appears to address the outreach that has been noted by Mr. Flynn: (IE 51)

Demonstrate business acumen, and collaborate with stakeholders. Listen to and engage stakeholders (colleagues, labor organizations, and professional associations, customers and other federal agencies) to identify needs and expectations. Develop processes for two way communications that build strong alliances, involve stakeholders in making decisions and gain cooperation to achieve mutually satisfying solutions. Represent the Agency in a professional and competent manner. Develop and execute plans to achieve organizational goals, leveraging resources (human, financial, technology, etc.) to maximize efficiency and produce high quality results.

d. The organizational measure for Critical Element 2 that relates to outreach states: (IE 51)

Engage in effective outreach with customers and stakeholders *as appropriate*; communicate the Agency's interest, policies, and programs with parties, the labor-management bar, oversight agencies, the public, and other stakeholders, *as appropriate*. In doing so, listen to and consider stakeholders' interests developing processes for two-way communications to identify needs and expectations. [Emphasis added]

e. A Motion for Recusal was filed in the *New York University* case asking that Chairman Liebman not participate in the decision. The motion was based on a claim that Chairman Liebman sought empirical evidence to bolster the view that she expressed in the *Brown* decision. The motion was filed on August 11, 2011. (IE 52)

f. The Board issued *Picini Flooring*, on October 22, 2010. The decision contains a dissent by Member Hayes that incorporates parts of the memorandum from Member Hayes to the Board stating Member Hayes' position on the issue of the General Counsel's request for electronic posting of remedy notices – see fact 29. (IE 53)

g. The Board publishes a monthly Sunshine Act Notice in the Federal Register that reads: (IE 54)

Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto." See also 5 U.S.C. 552b(c)(10).

64. On April 26, 2012, Mr. Flynn was interviewed. A transcript of Mr. Flynn's April 26, 2012, interview is provided at IE 55.

ANALYSIS

As with the first report, we find that the release of deliberative information as outlined in the facts to be a violation of the *Standards of Ethical Conduct for Employees of the Executive Branch*. Those standards state 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). "Nonpublic information is information that the employee gains by reason of Federal employment and that he knows or reasonably should know had not been made available to the general public." 5 C.F.R. 2635.703(b).

As a quasi-judicial body, the Board issues decisions that affect the statutory and property rights of the parties -- employers, employees, and labor organizations. The deliberative process established by the Board, including the protection of deliberative information, is essential in ensuring that the parties receive due process.

In deliberating upon a case, a Board Member must be able to change his or her mind; be open to persuasion by a colleague's arguments; and make, modify, and abandon arguments to his or her colleagues. At the Board, this process occurs through the exchange of drafts of decisions and dissents. Throughout the deliberative process, each Board Member is provided the opportunity to review the drafts of decisions and dissents, propose and accept modifications, and vote. As explained by the Solicitor, this process envisions the exchange of drafts not merely to state the position of a Board Member, but also as a means to persuade his or her colleagues to accept the reasoning stated therein. The dissenting opinion plays a critical role in this process, as was recently stated by Member Hayes in a dissent published in the Federal Register on April 30, 2012, at 25571:

Specific to law, dissents are a useful tool in effecting well-reasoned legal decisions. Indeed, Supreme Court Justice Ruth Bader Ginsburg has stated that dissents are important because they can "lead the author of the majority opinion to refine and clarify her initial circulation" and may be persuasive enough to "attract the votes necessary to become the opinion of the Court." See Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn.L.Rev. 1, 4 (2010). My experience as a Board Member confirms Justice Ginsburg's observation. On numerous occasions, circulated dissents have prompted substantial revision of prior draft majority opinions, and in some instances an initial dissent ultimately became the Board's final decision.

The prohibition on the release of deliberative information allows for the free flow of ideas and the freedom to take, modify, and abandon positions in the Board's deliberative process. This protection has its roots in our jurisprudence. The Supreme Court has stated that "those who expect public dissemination of their remarks may well temper candor with a concern for appearance and their own interest to the detriment of the decision making process." *United States v. Nixon*, 418 U.S. 683, 705 (1974). The release of deliberative information, even for Congressional oversight, raises significant concerns for the rights of parties to an administrative process and an examination as to the reasons for a decision in a case that is pending threatens the appearance of impartiality of the decision maker at the expense of the due process of the parties. See *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966); see also Solicitor's letter to Chairman John Kline, Committee on Education and the Workforce, U.S. House of Representatives, dated May 25, 2011.

Mr. Flynn's public statement that he has engaged in no wrongdoing strikes at the very heart of the Board and all but eviscerates the due process procedures that the Board has established. Members of administrative bodies such as the Board cannot freely discuss

decisions and points of law and fact if they are fearful that the positions that they take during deliberative discussions or in drafts of documents are going to be made public, distributed to pundits, or leaked to parties. If Mr. Flynn has in fact done nothing wrong, then there is nothing stopping any Board employee from discussing deliberative case information with whomever he or she chooses or writing opinion-editorial pieces under his or her own or a pen name.

The release of deliberative information by the NLRB is in fact prohibited by the NLRB's policies and regulations. Information regarding the deliberations of the Board is protected from disclosure by the *Guide for Staff Counsel of the National Labor Relations Board*. The information protected from disclosure includes the identity of the Board Member or staff assigned to a case and the status of a case. Additionally, staff counsels are only authorized to discuss pending cases with personnel on the Board-side of the Agency. Unauthorized disclosure of information either before or after a case is issued is grounds for discharge. In addition to those restrictions, all NLRB employees are prohibited from releasing Agency documents without written consent by the Chairman, the Board, or General Counsel. 29 C.F.R. 102.118. These restrictions do not include provisions that allow for exceptions based upon an individual's subjective determination of the significance of the information. Rather, they provide a clear bright-line rule that once broken can result in serious consequences.

When interviewed, Mr. Flynn has asserted that his release of information was legitimate outreach and implied, through his counsel's objections, that he has inherent authority to release deliberative information. Nothing in Mr. Flynn's performance standards authorize the release of deliberative information. Rather, Mr. Flynn is expected to "engage in effective outreach with customers and stakeholders *as appropriate*; communicate the Agency's interest, policies, and programs with parties, the labor-management bar, oversight agencies, the public, and other stakeholders, *as appropriate*." (Emphasis added) Providing draft decisions in violation of a Federal regulation to an individual, even to a former Board Member, cannot be appropriate outreach. Also, giving information to any individual outside the Board that would be withheld from a Congressional oversight process is not appropriate. We are not aware of any legitimate Federal purpose that is served by giving former Member Schaumber advance notice of how a case is going to be decided, when a vote is going to take place, or the priorities of the Board.

We find that Mr. Flynn violated Federal regulations when he sent former Member Schaumber electronic documents that were draft dissents in the cases *Richie's Installations, Inc.*, *New York University*, and *Mastec Direct TV*. Given Mr. Flynn's years of experience at the Board, he must understand the deliberative process -- particularly in light of the fact that he edited decisions and recorded votes on decisions for former Member Schaumber. In that light, he had to know or should have known that the decision in *Richie's Installations, Inc.* was not issued because the final Board Member had not "noted off" -- information that was available to him in the Board's case processing system. With regard to *New York University*, the e-mail transmitting the draft dissent to the Board was sent at 12:40 p.m. on October 6, 2010, and then sent by Mr. Flynn to former Member Schaumber 1 hour and 43 minutes later. Mr. Flynn had to know that a final decision had not been issued in such a short period of

time. The draft dissent in *Mastec Direct TV* that was sent by Mr. Flynn to former Member Schaumber on January 20, 2011, was circulated in the case processing system on January 5, 2011. Electronic copies of that document were sent to Mr. Flynn, and other staff members, by the Deputy Chief Counsel on January 5 and 19, 2011. On February 14, 2011, a revised Board majority decision was circulated in the case processing system. A revised draft dissent was also circulated on February 17, 2011. Mr. Flynn was also receiving e-mail notifications from the case processing system. As with *Richie's Installations, Inc.*, Mr. Flynn knew or should have known that the *Mastec Direct TV* decision had not issued.

With regard to the draft majority decision in *Albertson's LLC*, the e-mail message that Mr. Flynn received clearly states that the document is a draft decision and that the panel Members had not yet voted. The memorandum stating Member Hayes' position on electronic notice posting was not yet in a draft decision format. That document is clearly a statement of Member Hayes' position on the law and what his vote will be. These documents represent the beginning of the Board's deliberative process in their respective cases, a fact that was apparent in the e-mail messages received by Mr. Flynn with the documents.

We also find that drafting of the editorial on *Specialty Healthcare* was improper. When interviewed, Mr. Flynn acknowledged that he participated in the deliberations. That participation gave him access to the thoughts of the Board Members and their staffs. His assistance in redrafting former Member Schaumber's article was an abuse of his discretion and violated the policy of the Board. Despite Mr. Flynn's assertion during the interview that he was never a staff counsel and he was not aware of the *Guide for Staff Counsel of the National Labor Relations Board*, his e-mail message to former Member Schaumber on March 2, 2011, clearly demonstrates that he knew it was an ethical violation to publicly discuss a pending case. His lack of candor, when responding to then-Chairman Liebman, further demonstrates that he knew his conduct was improper. It is also noteworthy that Mr. Flynn deferred answering questions from the staff of the Senate's Health, Education, Labor, and Pension Committee on the grounds that the issue could come before him as a Board Member.

Mr. Flynn's release of information regarding the position of then-Chairman Liebman to decide *New York University* with a certain outcome, the priority of cases before the Board, and information pertaining to the vote on *Kroger Limited Partnership* was also improper. As explained in the first report, such information is considered deliberative, pre-decisional information that has been protected from disclosure and considered by the NLRB to be the most confidential of Agency information. Although Mr. Flynn raised the motion for recusal of then-Chairman Liebman in *New York University* as evidence that her position in that case was known, it was not filed until 11 months after Mr. Flynn sent the e-mail message to former Member Schaumber. The assertion by Mr. Flynn during the interview that information regarding the votes of the Board is made available in the Federal Register is incorrect. The Federal Register notice does not provide any case-specific information.

We also find that Mr. Flynn's conduct is evidence that he violated the general principle that "[p]ublic service is a public trust, requiring employees to place loyalty to the

Constitution, the laws and ethical principles above private gain” and “[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards . . .” 5 C.F.R. 2535.101(b)(1) and (14). Mr. Flynn’s concern that the Wall Street Journal opinion piece would hurt his nomination is evidence that he was more concerned about being appointed as a Board Member than following the ethical standards. The e-mail messages between Mr. Flynn and former Member Schaumber show that former Member Schaumber was involved in Mr. Flynn’s nomination and that former Member Schaumber clearly claimed credit for Mr. Flynn’s nomination as a Board Member. That situation gives rise to the appearance that Mr. Flynn’s disclosure of deliberative information and assistance to former Member Schaumber was in return for former Member Schaumber’s lobbying on behalf of Mr. Flynn’s nomination. Given his knowledge of former Member Schaumber’s participation in the nomination process, Mr. Flynn had a duty to conform his conduct to avoid the appearance of a quid pro quo situation. This finding is in part the result of Mr. Flynn’s lack of candor during the interview in acknowledging former Member Schaumber’s participation in Mr. Flynn’s nomination.

We conclude that the issues identified in this report, and those of the prior report, evidence a serious threat to the Board’s decisional due process. We recommend that the Board review these facts to determine appropriate action.