UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General

Memorandum

March 20, 2018

To: Board

From: David Berry
Inspector General

Subject: Report of Investigation – OIG-I-541

This memorandum addresses an investigation conducted by the Office of Inspector General (OIG) involving Member William Emanuel (subject). The case was initiated after the OIG received information through its Hotline regarding the subject's participation in the Board's voting on whether to direct the General Counsel to seek remand of *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No 186 (*Browning-Ferris* or *BFI*) from a circuit court. That information supported an allegation that the subject violated the President's ethics pledge found in Executive Order 13770 in that a *Browning-Ferris* party was represented by the subject's former law firm.

During the course of the investigation, we determined that there were additional issues that warranted our investigative efforts. Those issues included whether the subject's participation in *Hy-Brand Industrial Contractors, Ltd.,* 365 NLRB No. 156 (*Hy-Brand*) deliberations was in violation of the President's ethics pledge; whether the subject made false statements in response to a Congressional inquiry and in a memorandum to the OIG; and whether the subject violated certain provisions of the *Standards of Ethical Conduct for Employees of the Executive Branch (Standards)*.

Our investigative efforts substantiated that the subject violated the President's ethics pledge. We did not substantiate the allegations that the subject knowingly provided false information in response to the Congressional inquiry or to the OIG or that he violated certain provisions of the *Standards*.

This report, with the attached investigative exhibits (IE), is provided for your review.

FACTS

Background

Normally, cases are assigned to a Member's staff by the Executive Secretary's office. The staff that is assigned to the case is known as the "originating" staff. The staff for the other Members on the panel are known as the "outside" representatives. Following assignment, the case moves to Stage I. During Stage I, the staff holds a "Presub" with the Member. That term is shorthand phrase for a meeting with the Member and the staff to discuss the case and determine the Member's vote. Once a majority is reached, the case is moved to Stage II. In Stage II, the originating staff drafts a decision. When the draft decision is ready to be circulated, the case moves to Stage III. In Stage III, the outside representatives "screen" the draft. The "screen" is the review process by the outside representatives during which the staff makes recommendations to the Member regarding whether to respond to the draft with modifications or edits. Proposed modifications and any dissent are circulated during this stage. The case moves to the issuance stage once a draft decision, including any dissents or separate opinions, is approved or "noted off" by the Members. During the issuance process, the originating staff prepares a "conformed copy" of the draft. The conformed copy is a clean copy that incorporates any modifications and separate opinions. The conformed copy is then approved by a vote of the Member or "noted off" by any Member who did not participate. For the *Hy-Brand* case, all the Members participated.

Hy-Brand, Pledge, and Statements

1. On July 10, 2014, Littler Mendelson, on behalf of its client Leadpoint Business Services (Leadpoint), submitted a reply brief to the Board in 32-RC-109684, arguing that the Regional Director was correct in his conclusion that Leadpoint was the sole employer rather than a joint-employer and that there was no reason to abandon the Board's longstanding joint-employer standards. (IE 1)

2. On August 27, 2015, the Board issued the *Browning-Ferris* decision finding that Leadpoint and BFI Newby Island Recyclery were joint employers and established a new joint employer standard. (IE 2)

3. On February 17, 2016, the NLRB initiated an enforcement proceeding, Court of Appeals Docket number 16-1063, against Leadpoint in the United States Court of Appeals for the District of Columbia. (IE 3)

4. There is no record that Leadpoint made any effort to defend against the enforcement proceeding. (IE 3)

5. On September 26, 2017, the subject was sworn in as a Member. (IE 4)

6. On October 16, 2017, the subject participated in a "Presub" with his staff assigned to the *Hy-Brand* case. (IE 5)

7. On October 18, 2017, the former Chairman sent an email message with a draft majority opinion for the *Hy-Brand* case to the subject, and other individuals, stating the following: (Appendix)

> The attachment is a "heads-up" majority opinion in *Hy-Brand* – the joint-employer case;
>
> When reviewing the draft keep in mind, without focusing on the wording, what the draft accomplishes – restoring the joint-employer law to what existed prior to *Browning-Ferris* – this is not meant to diminish their role in relation to the draft;
>
> The draft mostly includes the "verbatim" language in the joint dissent in *Browning-Ferris*;
>
> There was great difficulty in producing a consensus draft [dissent], and individual tinkering made it worse;
>
> The attached majority draft – just like the *Browning-Ferris* dissent – is clearly an imperfect compromise;
>
> It may be tempting to suggest a few or massive improvements, but please resist and circulate the draft with very few minor changes; and
>
> If they want to spend more time in the next 30 days considering some adjustments, that could be done after the dissenters respond.

8. On October 18, 2017, at 3:04 p.m., the subject's Deputy Chief Counsel sent an email message to the staff attorney and supervisory attorney assigned to the *Hy-Brand* case and copied the subject. The message had an attachment titled "Hy-Brand revised majority draft near-final.docx" and text that read: (IE 6)

> Given how short our turnaround time is, there is no need to do a formal (or even informal) screen of this, or to propose any stylistic or "discretionary"-type mods. But please let us know if anything jumps out at you as a problem. Gary, Bill, and I will also be taking a look.

9. On October 18, 2017, at 6:08 p.m., the former Chairman staff circulated an email message to the majority Members, and their staff, with two documents attached. One document was titled "Hy-Brand revised majority draft final to MK and WE (showing changes to near-final draft).docx and the other document "Hy-Brand revised majority draft final to MK and WE (clean).docx." (IE 7)

10. On October 20, 2017, the draft decision was provided to the minority Members with the subject's vote "Approved." (IE 8)

11. On December 1, 2017, the former Chairman's staff circulated a majority response to the dissent. (IE 9)

12. On December 4, 2017, the subject's staff addressed an issue in a footnote. (IE 10)

13. On December 11, 2017, the subject received an email message with a revised dissent and generally stated that he did not need to do anything. The message also stated that, under the former Chairman's timetable, any further response needed to be circulated by 2:00 p.m. the next day and that the voting needed to be completed by 5:00 p.m. (IE 11)

14. On December 12, 2017, at 1:55 p.m., the subject's Deputy Chief Counsel sent him an email message with an attachment titled "Hy-Brand final majority response to dissent.docx." (IE 12)

15. On December 12, 2017, the Board's case management system recorded the subject's vote as "Approved" in the *Hy-Brand* case for the Majority response. (IE 13)

16. On December 14, 2017, the subject voted to approve the text of the proposal to direct the General Counsel to seek, among other things, the remand of the *Browning-Ferris* case from the circuit court. (IE 14)

17. On December 14, 2017, the Board issued the *Hy-Brand* decision. (IE 15)

18. On December 15, 2017, the Chief Counsel voted "approved" for the subject on the remand direction to the General Counsel. (IE 15)

19. On December 19, 2017, the subject voted to rescind the directive to the General Counsel. (IE 16)

20. On December 19, 2017, the General Counsel filed a motion requesting remand of *Browning Ferris*, including the enforcement application against Leadpoint, Court of Appeals Docket number 16-1063. (IE 18)

21. The General Counsel's motion requesting remand was served on Littler Mendelson as the attorney for Leadpoint. (IE 18)

22. The subject received a letter, dated December 21, 2017, from the Ranking Member and others members of the Committee on Health, Education, Labor, and Pensions and the Committee for Education and the Workforce asking questions related to the *Hy-Brand* decision and the remand of the *Browning-Ferris* case. The questions in the letter state that Littler Mendelson represents Leadpoint in the *Browning-Ferris* matter. (IE 19)

23. In an email message, dated December 22, 2017, to his staff after he received the Congressional inquiry, the subject stated that Littler Mendelson did not represent a party in *Browning-Ferris*. In a response, dated December 28, 2017, the subject was told that Littler Mendelson did in fact represent Leadpoint, a *Browning-Ferris* party. (IE 20)

24. In an email message, dated December 30, 2017, the subject questioned whether Leadpoint was on his recusal list and whether the *Hy-Brand* decision referred to Leadpoint or Littler Mendelson. (IE 20)

25. On January 23, 2018, the subject was notified that he was the subject of an OIG investigation regarding his participation in the *Browning-Ferris* remand matter. (IE 21)

26. On January 26, 2018, the subject provided the following responses to certain questions: (IE 22 exhibit 5)

> 3. Did you request to participate in *Hy-Brand*?
>
> No. I was automatically assigned to the Hy-Brand case because the case had already been designated as a full Board case prior to my arrival.
>
> 13. Please describe in full, and provide any document, including vote sheets, relating to your participation in the Board's decision to move to remand *BFI* to the Board.
>
> On December 15, I voted to direct the General Counsel to seek a remand of several Board decisions pending before the courts of appeals, including BFI. By unanimous vote of the Board members, that directive was rescinded on December 19. . . . At the same time, the Board recognized that the General Counsel, as an officer of the court, has an independent ethical duty to notify the court of recent Board decisions that bear on the cases pending before the courts, including BFI, and stated its expectation that the General Counsel would continue to perform that ethical duty. . . .
>
> At the time of these events, I was unaware that the Littler Mendelson firm represented Leadpoint Business Services, a party in the BFI case, when that case was previously pending before the Board. Littler Mendelson is a huge law firm of more than 1,000 lawyers, and I was involved in only a small fraction of the firm's practice. In any event, under Section 10(e) of the NLRA, the Board no longer had jurisdiction over the case as of the filing of the record in the related D.C. Circuit cases on March 14, 2015 (D.C. Cir. Case Nos. 16-1028, 16-1063, 16-1064). Leadpoint did not contest the Board's BFI decision in these proceedings before the D.C. Circuit, nor did Littler Mendelson enter an appearance with the court.
>
> [Remainder of answer relates to future actions.]

27. On January 29, 2018, the subject submitted a written statement to the OIG that included, in part, the following: (IE 22 exhibit 6)

> Because the *Browning Ferris* case was not pending at the Board at the time I was sworn in as a Board member, it did not appear on the Board's comprehensive list of parties as to whose cases I am required to recuse myself; and therefore I was

> not informed that my former firm had represented a party in the case several years earlier. Furthermore, I was not independently aware of the historical fact. My former firm is very large with multiple offices and approximately 1,000 lawyers, and I was involved in only a small part of the firm's practice.

28. During the subject's confirmation process, in response to question 18 "Please provide a list of all cases decided by the NLRB and that are currently on appeal in which Littler Mendelson represents a party. . . ." of the Questions for the Record from the Ranking Member, Committee on Health, Education, Labor, and Pensions, the subject provided a list that included on the first of fourteen pages the entry: (IE 22 exhibit 7)

> 9/25/2015 32-CA-160759 Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery and FPR-II, LLC, d/ DC:DC Circuit

29. In response to question 20 "Please confirm that you intend to recuse yourself for two years from all cases that come before the NLRB in which Littler Mendelson represents a party." of the Questions for the Record from the Ranking Member, Committee on Health, Education, Labor, and Pensions, the subject provided the following response: (IE 22 exhibit 7)

> That is my understanding of the requirement. I will do whatever is required by law.

30. In response to question 21 "Leadpoint Services, a party in the Board's *Browning-Ferris* case, is represented by Littler Mendelson. Will you recuse yourself for the required period from any action by the Board that involves Leadpoint Services?" of the Questions for the Record from the Ranking Member, Committee on Health, Education, Labor, and Pensions, the subject provided the following response: (IE 22 exhibit 7)

> If recusal questions arise with regard to any particular matter, I will request the advice of the Board's ethics office.

31. After being notified of the discrepancy between his response to the Questions for the Record, the Congressional Inquiry, and the statement provided to the OIG, the subject submitted a letter to the Members of Congress to clarify his earlier response. That clarification stated, in part, that when he initially responded, he did not recall that Littler Mendelson represented Leadpoint; he firmly did not believe that he was required to recuse himself from the vote to direct the General Counsel to seek remand of the *Browning-Ferris* case; and the Designated Agency Ethics Official (DAEO) informed him that he was not obligated to recuse himself. (IE 22 exhibit 12)

32. The following is a summary of the information provided by the subject during an interview: (IE 22)

a. When he responded to the Congressional inquiry questions, some 6 or 7 months after submitting the Questions for the Record, he did not have a recollection of the obscure fact that Littler Mendelson represented Leadpoint in the *Browning-Ferris* matter; (page 35)

b. He did not really answer question 21, indicating that he was not sure about the statement made in the question that Littler Mendelson represented Leadpoint and he did not believe that he was familiar with that fact at that time; (page 35)

c. He avoided the question and simply said that if recusal questions arise with regard to any particular matter, he will request the advice of the Board's ethics office; (page 35)

d. He did not want to go through the effort of tracking down whether the assertion in question 21 that Littler Mendelson represented a party in *Browning-Ferris* was correct; (pages 35-36)

e. He was aware that *Browning-Ferris* was a significant case and one of many reversals of precedent by the Obama Board, but he did not have any joint-employer cases after *Browning-Ferris* was issued; (page 36 & 38)

f. In response to the assertion that a reasonably competent attorney would recall that his firm represented a party in *Browning-Ferris* once that fact was made known to the attorney, he responded that in the confirmation process there are reams and reams of documents; huge forms one after another; and the Questions for the Record were just another form, and he did not focus on it or recall it; (pages 36-37)

g. He has no motive to lie to Congress and he would not do so after leaving his law practice and moving to Washington, D.C., to engage in public service; (pages 39)

h. He did not think of recusing himself from the *Hy-Brand* deliberations; (pages 42)

i. The NLRB has a very elaborate recusal system, and if you are recused they do not assign the case to you; (pages 43)

j. He does not look at every case that comes across his desk and wonder if he has to recuse himself; (page 44)

k. The reason why no one told him that he was recused in *Hy-Brand* was because the *Browning-Ferris* case was before the circuit court and the Board did not have jurisdiction over it; (page 44)

l. There was no reason for him to have a concern that *Hy-Brand* was overturning *Browning-Ferris*; (page 45)

m. That he should be recused in *Hy-Brand* never entered his mind or anyone else's mind at the NLRB; (page 45)

n. It is the Board's responsibility to identify recusal questions. (page 46)

o. He did not agree that Littler Mendelson was representing Leadpoint in the *Browning-Ferris* case because Littler Mendelson had not made an appearance in circuit court litigation and Leadpoint had not participated in the *Browning-Ferris* case in the circuit court; (pages 47-49)

p. Prior to the *Hy-Brand* decision, they had gone through a number of other deliberations with the former Chairman and he did not think that he was going to be able to make a lot of writing style changes to the *Hy-Brand* decision; (page 60)

q. There was some pushback from the career staff about using *Hy-Brand* to overrule *Browning-Ferris*, and he wondered about it but concluded that it was appropriate; (page 61)

r. He did not feel any undue pressure to participate in cases, but he did feel pressure from the time constraints; (page 62)

s. He agreed with the outcome of the *Hy-Brand* decision. (page 62)

t. He did not seek any guidance from the DAEO prior to participating in the *Hy-Brand* decision, before voting in *Hy-Brand*, or when he participated in the direction to the General Counsel regarding the remand of *Browning-Ferris* from the circuit court. (pages 75-79)

u. After he received the Congressional inquiry, he met with the DAEO and during that meeting she told him that she thought that he did not violate the pledge. He requested that determination in writing, but the DAEO did not provide a memorandum to him because she stated that the OIG did not want her to issue or put her determination in writing. (pages 79-80)

ANALYSIS

We determined that the subject did not intentionally provide false information in response to the Congressional oversight committees' request for information or to the OIG. While it is apparent that the subject's statements in response to the Congressional inquiry are inconsistent with the information he provided in response to Questions for the Record question 18 and the fact that the Ranking Member, in question 21, stated that Littler Mendelson represented a party in the *Browning-Ferris* matter, inconsistency alone is not sufficient to show that the subject intentionally lied.

The subject's initial draft response to the Congressional inquiry and his reaction after being informed of the discrepancy supports a finding that more likely than not the subject did not recall that fact when he submitted his response. The subject's email message that he sent after he received the Congressional inquiry shows what appears to be a genuine lack of recall of the fact that Littler Mendelson represented Leadpoint. Additionally, once the subject learns that fact, his reaction appears to be one of trying to determine if he should have known. Had the subject recalled the information regarding Littler Mendelson that he previously provided in his answers to the Questions for the Record, we would expect different responses in the email messages to his staff.

The President's ethics pledge found in Executive Order 13770, January 28, 2017, *Ethics Commitments by Executive Branch Appointees* states:

> As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law: . . .
>
> 6. I will not for a period for 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contract.

To "participate" means to participate in a manner that is both personal and substantial. EO 13770, section 2 paragraph (t). Those terms are defined in 5 C.F.R. 2641.201(i):

> *Participate* is to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or other such action, or to purposefully forbear in order to affect the outcome of a matter;
>
> *Personally* means to participate directly, either as an individual or in combination with other persons; and
>
> *Substantial* means that the employee's involvement is of significance to the matter.

A Member's participation in the Board's decision making process is participation that is both personal and substantial. As illustrated by the facts outlined above, the subject fully participated in reviewing the draft decision and the drafts of the direction to the General Counsel. The subject then voted "approved" on the decision itself, the direction to the General Counsel to ask that *Browning-Ferris* be remanded, and the Solicitor's direction that rescinded the direction to the General Counsel.

As stated in our report to Congress, we determined that the *Hy-Brand* and *Browning-Ferris* cases are the same particular matter involving specific parties for the purposes of the President's ethics pledge found in Executive Order 13770. In reaching that conclusion, we took into account the position of the subject as stated in a letter provided to the OIG by the subject's attorney. Providing a written position afforded the subject an opportunity to be heard on the issue without having to participate in a voluntary interview that could have been used against the subject in a criminal proceeding. We also considered the position of DAEO. Our report to Congress and the subject's letter are provided as an appendix to this report.

"Directly and substantially related to my former employer or former clients" is defined, in part, as a matter that the appointee's former employer represents a party. EO 13770 sec. 2 (d). We disagree with the subject's argument that the Leadpoint is not a party to the *Browning-Ferris* matter at the circuit court and that Littler Mendelson is not Leadpoint's representative. Leadpoint is in fact a party in the underlying Board litigation that resulted in the circuit court litigation and remained a "Respondent" in the circuit court litigation. That Leadpoint opted to not appear before the circuit court does not change its status as a party for purposes of the NLRB

charge or the circuit court litigation. Additionally, Littler Mendelson itself, in July 2017, provided a list of cases pending before the circuit courts in which it represented a party. *Browning-Ferris* is on page one of that list. The Agency continued to serve Littler Mendelson throughout the circuit court proceedings. The motion for reconsideration filed by the General Counsel includes Court of Appeals Docket number 16-1063 that lists Leadpoint as the respondent – a party.

The subject did in fact have actual knowledge that Littler Mendelson was a representative of a party in the *Browning-Ferris* case. The subject's assertions that he did not directly answer the questions or that he was not sure that the facts asserted in the question were accurate does not negate the fact that the subject was notified in writing that Littler Mendelson represented Leadpoint in the *Browning-Ferris* case. The subject's statements during the interview regarding his thought process in answering the questions lack a level of credibility. Clearly the subject had to read question 21 because the answer he provided is not random. In other words, although his answer may be evasive it is not nonsensical. Additionally, if the subject was simply inserting a generic response to questions regarding his recusal obligations and future actions, we would expect the answers to questions 20 and 21 to identical. Given that they are not, it is apparent that the subject read the questions and made some distinction between the two.

The subject also had actual knowledge that the decision in which he was participating was in fact the dissent from the *Browning-Ferris* case that was being reissued as a majority decision in *Hy-Brand*. The subject was provided that information in writing before he received the draft majority decision. Thereafter, the subject chose to participate in the Board's actions to reissue the *Browning-Ferris* dissent as a majority decision.

The pledge obligates the subject to commit himself to not participate in particular matters involving the parties that are represented by Littler Mendelson. Because of that commitment, the subject is not afforded the privilege to ignore or forget in what cases Littler Mendelson represents parties. If the subject had an honest belief that question 21 contained a misstatement of fact, he should have addressed that issue either at the time he answered the questions or before he participated in a decision that overruled *Browning-Ferris* while it was pending an enforcement action in a circuit court. Having done neither, the subject was obligated to seek ethics advice from the DAEO prior to participating in the deliberations that were simply reissuing the *Browning-Ferris* dissent as a majority decision by a new Board.

At various times, the subject has stated that the DAEO stated to him that his participation in the direction to the General Counsel to request remand of *Browning-Ferris* was not a pledge violation. The DAEO may provide advice to an employee who has questions about the application of the *Standards*. 5 C.F.R. 2635.107(b). An employee who then relies upon the DAEO's advice and acts in conformance with it may not be disciplined provided the employee made full disclosure of all of the relevant circumstances. *Id.* It is our understanding that this regulatory provision is applicable to the DAEO's advice regarding the President's pledge. There is no evidence and the subject is not asserting that he sought DAEO advice prior to any of his actions in *Hy-Brand* or the direction to the General Counsel. As such, the "safe harbor" provision is not applicable to the subject.

In performing her duties, the DAEO is required to seek the services of the OIG when appropriate, including the referral of matters to and the acceptance of matters from the OIG. See 5 U.S.C. 2638.203(12). The DAEO has no independent investigative authority. If an OIG investigation substantiates misconduct, the DAEO then ensures that there is prompt and effective action taken to remedy the violation. See 5 U.S.C. 2638.203(9). It is our longstanding practice to request that the DAEO not engage in investigative activity or issue ethics guidance involving past conduct that the OIG is investigating until after we are able to provide the DAEO with factual information based upon our investigative efforts. This practice ensures that the DAEO does not interfere with our investigative efforts and that the DAEO is not inappropriately used by an employee as an advocate or representative. The DAEO is, however, not bound by any determinations that we make regarding the application of the facts to the *Standards* or the President's ethics pledge. It is our understanding that the DAEO is not in disagreement with our determination that a pledge violation occurred when the subject participated in the *Hy-Brand* deliberation that was then followed by the direction to the General Counsel to seek remand of *Browning-Ferris*.

Extenuating or Mitigating Circumstances

The subject was a Board Member for 20 days when he began his participation in the *Hy-Brand* Presub – the first step of the deliberative process. Within 4 days of that meeting, the majority decision was finalized and circulated to the minority Members. Although the subject stated that he agreed with the outcome of each of the decisions, he explained that he felt significant time related pressures to act on the decisions prior to the end of the former Chairman's term. The subject also stated that by the time the majority Members got to the *Hy-Brand* decision, he did not think that he could make significant editorial changes to the decision. While not exculpatory, the circumstances of the subject's failure to recall an important fact and the pressure to issue the cases may provide context in understanding why he acted in the *Hy-Brand* decision and the remand of the *Browning-Ferris* matter without seeking the DAEO advice when others might do otherwise.

Other Matters Involving the Standards of Conduct

During the investigation of the *Hy-Brand/Browning-Ferris* matter, we received a Hotline complaint alleging that Littler Mendelson provided the subject with a list of prior Board decisions that needed to be overturned and that the subject provided the list of cases to his staff. Our review of that compliant found that the subject assembled a list of issues and cases, but that there is no evidence that subject coordinated that list with Littler Mendelson. To the contrary, we determined that the source material for the list was provided to the subject by an NLRB employee who regularly provides research assistance. As such, we determined that the subject did not act in manner that violated the *Standards*.

We also observed that the subject responded to an invitation to attend a conference in a manner that appeared to be a solicitation of a gift related to the reimbursement of travel and conference expense. Prior to the OIG interview, the subject notified the conference organizer that he would not be attending the conference. In light of the fact that Members routinely have their expense paid by the conference organizers and the subject declined the invitation, we

referred this issue to the DAEO to ensure that the subject receives additional ethics briefings regarding accepting invitations and attending conferences.