UNITED STATES GOVERNMENT

OFFICE OF INSPECTOR GENERAL

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

April 26, 2018

The Honorable Lamar Alexander
Chairman
Committee on Health, Education, Labor, and Pensions
U.S. Senate
428 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor, and Pensions
U.S. Senate
428 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Virginia Foxx
Chairwoman
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

Dear Members of Congress:

On April 24, 2018, we provided the Board with a summary of our investigative efforts regarding an allegation that Member Mark Gaston Pearce improperly released deliberative information.

As explained in the summary, we provided a summary of investigative efforts to the Board rather than a Report of Investigation because we did not make a determination that Member Pearce or any other employee engaged in misconduct. We would normally close a case with this type of determination with an internal memorandum and report it to Congress in our next Semiannual Report. Given the widespread knowledge of the allegation in the labor law community, however, we determined that transparency regarding our investigative efforts and determinations outweighed the risks that our determinations would be misused or misinterpreted. We are now providing the summary to your committees.

Sincerely,

David Berry
Inspector General

Enclosure

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General

Memorandum

April 24, 2018

To: Chairman John Ring
Member Lauren McFerran
Member Marvin Kaplan

From: David Berry
Inspector General

Subject: Summary of Investigative Efforts – OIG-I-543

This memorandum provides a summary of our investigative efforts regarding an allegation that Member Mark Gaston Pearce made statements that included deliberative information from the *Hy-Brand Industrial Contractors, Ltd.*, 25-CA-163189 (*Hy-Brand*) case, to one or more individuals at a reception that was held as part of an American Bar Association (ABA) meeting on the evening of February 25, 2018.

We are providing a summary of investigative efforts rather than a Report of Investigation because we did not make a determination that Member Pearce or any other employee engaged in misconduct. We would normally close a case with this type of determination with an internal memorandum and report it to Congress in our next Semiannual Report. Given the widespread knowledge of the allegation in the labor law community, however, we determined that transparency regarding our investigative efforts and determinations outweighed the risks that our determinations would be misused or misinterpreted.

As explained below, our investigative efforts involved attempting to determine if Member Pearce made any statements regarding a motion for reconsideration in the *Hy-Brand* case and, if so, whether those statements violated a prohibition in a statute or improperly disclosed deliberative information in violation of a rule or regulation. We interviewed Member Pearce and individuals to whom he recalled making statements. We then interviewed individuals that were further identified. Based upon the lack of information that would tend to support the allegation, we determined that further investigative efforts were not warranted.

On February 26, 2018, the Board issued an *Order Vacating Decision and Order and Granting Motion for Reconsideration in Part* in *Hy-Brand*. After the order was issued, the Charged Party filed a Motion for Reconsideration that included an allegation that Member Pearce:

> [I]mproperly revealed on February 25, 2018, the imminent issuance of the vacatur Decision before the opening of the ABA section on Employment and Labor's Mid-Winter meeting in Puerto Rico. The Wall Street Journal reported on March 1, 2018:
>
> > Democratic board member Mark Pearce let slip at an American Bar Association meeting Sunday night [February 25, 2018] that an important decision on the *Hy-Brand* case would be issued the next day.

The motion then alleges that such statement violated 18 § U.S.C. 1905 and the Board's rules and regulations regarding the release of documents and records.

The *Wall Street Journal* did not attribute the information regarding Member Pearce to any particular source. After the motion was filed, additional news organizations reported the allegation made in the *Wall Street Journal* editorial. We are aware of only one article that identified an individual who heard what Member Pearce may have stated. That article was posted on-line by *Politico* and was titled *Update on the NLRB Wars*, dated March 30, 2018. That article restates the *Wall Street Journal* allegation and appears to question whether Member Pearce "actually leaked private information?" and included the following:

> Jack Toner, a labor attorney at Seyfarth Shaw who was at the conference, said Pearce did say a major decision was on the way but didn't elaborate. "I heard Mark say that something big is coming from the board, but nothing specific at all," Toner said. "I had no idea what he might have been talking about. … if he said something specific it wasn't in earshot of me." [Deletions in the original.]

To initiate our investigative efforts, we conducted an interview with Member Pearce. In response to questions regarding what comments he may have made at the ABA meeting, Member Pearce provided the following information:

a. He did not make any speeches at the ABA meeting on Sunday;

b. He did attend a cocktail reception, and at the reception the *Hy-Brand* case was a topic of discussion;

c. He could not recall all the specific individuals that he had conversations with, but he did not believe that he was voluntarily bringing up the *Hy-Brand* case on his own;

d. The only thing that he could recall clearly saying were things like: "stay posted[;] stay tuned[;] [y]ou know, things will, you know, words to the effect that things will be developing;"

e. He never said that the Board would be issuing a decision vacating the *Hy-Brand* decision;

f. The closest thing that he may have said regarding the significance of what might be coming was "stay tuned, you know, watch the news;"

g. When making the comments he did not believe that he was giving an advantage to anyone; and

h. While in hindsight it would have been more prudent to not say anything, that would have been contrary to being social.

Member Pearce also identified two individuals with whom he specifically recalled speaking and to whom he made the comments that he described during the interview. We contacted those individuals. One of those individuals is a labor-side attorney. The attorney recalled speaking with Member Pearce and that Member Pearce stated that "something was going to be coming down." The attorney could not recall what prompted Member Pearce to make that statement, but she was aware of several significant decisions and did not associate the comment with any particular case. The attorney did not recall that Member Pearce used any qualifying term like "big." The second individual identified by Member Pearce was an NLRB field agent. The field agent recalled being part of a group of individuals that had a conversation with Member Pearce and recalled hearing him make a statement to "watch the news." At that time, the field agent did not know what Member Pearce was referring to and she did not recall any discussion of *Hy-Brand*.

The field agent identified two individuals that were also part of the conversation with Member Pearce. We contacted both individuals. One of the individuals, a labor-side attorney, explained that she was not at the reception. The second individual was also a labor-side attorney. That individual recalled that there was some discussion of the *Hy-Brand* case, but did not recall any particular statements by Member Pearce.

We also contacted Mr. Toner. In addition to being a management-side attorney with the firm Seyfarth Shaw LLP, Mr. Toner is a former Executive Secretary. In response to questions about the *Politico* article, Mr. Toner stated that the quote was generally correct, but that he did not recall telling the reporter that Member Pearce stated that a "decision" was coming out. Mr. Toner explained that he was in a small group of two or three people that were having a conversation with Member Pearce. During the conversation Member Pearce made a statement that something would be coming from the Board. At that time, Mr. Toner had no reason to believe that it was a decision, and he thought that it was probably a reference to a second Office of Inspector General report regarding Member Emanuel.

Because of Mr. Toner's prior experience at the Board, he was asked questions regarding the appropriateness of the statements that he heard Member Pearce make. Mr. Toner explained that in his experience Board Members often say that something is in the works without getting into the details of the particular matter. Mr. Toner thought that the statement by Member Pearce was consistent with this past practice and that he did not think that Member Pearce "spoke out of school."

We also interviewed a Headquarters attorney who was at the ABA meeting. The Headquarters attorney recalled being at the reception on Sunday night and stated that she did not recall hearing any comments by Member Pearce. The attorney described the reception as very loud and stated that it was difficult to hear conversations. The Headquarters attorney also stated that the following morning there was a conversation between the Headquarters attorney and Member Pearce following a panel discussion. During the conversation the Headquarters attorney stated that morale

was low in the Appellate Court Branch because of the work that was lost as the result of the overturning of several significant Board decisions. The Headquarters attorney recalled that Member Pearce responded that there would be a major development, but that he did not elaborate on what the development was or to which case or cases he was referencing.

As stated above, the motion by the charging party alleges that Member Pearce violated 18 U.S.C. § 1905. That statute prohibits the disclosure of certain information by an agency employee when the employee receives the information in the course of official duties. The statute states that the types of information that is protected from disclosure are:

> Trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditure of any person, firm partnership, corporation, or association; or permits any income return or copy thereof or any such book contained in any abstract or particulars thereof to be seen or examined by any person except as authorized by law.

There is no evidence that Member Pearce had access to the type of information that is protected as a trade secret by 18 U.S.C. § 1905. All of the information in the *Hy-Brand* case that is available to a Board Member was collected through the means of a public hearing and the filing of briefs and motions that are available to the public. Having no access to such information, it would then be impossible for Member Pearce to disclose it. It is also apparent that the pre-issuance status or outcome of a motion in a Board case does not fit with the statutory definition of the information protected from disclosure by the statute.

The Board's regulations prohibit employees from producing Board files, documents, reports, memoranda, or other records of the Board without written consent of the Chairman or the Board. 29 C.F.R. 102.118(a)(1). There is no evidence that Member Pearce produced such documentation or records. However, we have also used this regulation to demonstrate what information is not available to the public and falls within the definition of nonpublic information for purposes of the *Standards of Ethical Conduct for Employee of the Executive Branch* (*Standards*) to establish that an employee engaged in misconduct when information was released without an improper transfer of possession of a document or record.

The *Standards* prohibits the use of nonpublic information to further one's own private interest or that of another, including by knowingly unauthorized disclosure. 5 CFR 2636.703(a). The definition of nonpublic information includes information that has not actually been disseminated to the general public and is not authorized to be made available to the public on request. 5 CFR 2636.703(b)(3). Generally information that is within the Board's documents and records and prohibited from release by an employee under 29 C.F.R. 102.118(a)(1) is nonpublic information.

The outcome of a motion in a Board case would certainly meet the definition of nonpublic information, in that it would be information from a record that is not authorized for release until the decision is issued. So, if there was evidence that Member Pearce provided the outcome of the *Hy-Brand* motion for reconsideration on Sunday night before the decision was issued, that would meet

the definition of releasing nonpublic information. Member Pearce denies that he did so and the statements that he does admit to making are ones related to the status of the motion, in that something would be coming. The individuals we interviewed appear to corroborate that Member Pearce did not disclose the contents of the Board's decision.

The status of a motion or other Board action may or may not be nonpublic information. To determine that issue it is a matter of the context in which the information is provided. For example, the NLRB Web site states that motions in *Hy-Brand* are pending, so obviously something is coming. In this instance, we must look to how the information was received in order to determine the context of what information was actually conveyed.

Based upon our interviews, it is apparent that the individuals we identified as receiving information from Member Pearce did not draw a linkage between Member Pearce's comments and the *Hy-Brand* case. Nevertheless, even if we assume that such linkage exists solely by virtue of a dissenting Member making comments that something would be coming and to watch the news, we are unaware of any evidence to support the element of using the information for private interest. Additionally, there was also some commentary that other individuals were caught completely off guard by the decision. If the context of Member Pearce's statements conveyed the outcome of the motion, we would have expected it to travel rather fast within the confines of a small group of labor lawyers who have gathered to discuss current labor law issues. Given that Member Pearce's comments were received by labor and management-side participants, the fact that it was a surprise to some would seem to support the determination that Member Pearce's statements were simply too vague to be of practical use or benefit to anyone given the overall context of the conversations. This is in stark contrast to the findings in another investigation involving the improper release of deliberative information for the private gain of others. Those misconduct findings involved a course of conduct of releasing draft decisions, pre-decisional votes of Members, and legal advice to the Board.

The Board's regulations prohibit an employee, including a Member participating in any particular proceeding, from making "any prohibited *ex parte* communications about the proceeding to any interested person outside this agency relevant to the merits of the proceeding." 29 C.F.R. 102.126(b). The regulations do not define who an "interested person" is; however, the regulations do state in the section for communications prohibited that prohibited communications include written communications that are not served on all the parties and oral communications when all the parties have not been given advanced notice and an adequate opportunity to be present. 29 C.F.R. 102.129. Therefore, we conclude that the "interested person" includes the parties, any discriminatee that is not a party, and any representatives appearing before the Board. The regulations do not define "relevant to the merits," but they do state in the list of communications that are not prohibited that such not prohibited communications include oral or written requests for information solely with respect to the status of a proceeding. 29 C.F.R. 102.130(b). We also looked to the remedy to determine whether it would be within the confines of "relevant to the merit." The remedy for a party who was not involved in an *ex parte* communication is to be provided with documentation of the *ex parte* communication and then be given an opportunity to submit facts or contentions to rebut the *ex parte* communication. 5 C.F.R. 102.132(b). For purposes of our analysis, we conclude that prohibited *ex parte* statements must somehow be related to facts or legal arguments of the *Hy-Brand* matter, and not solely related to the status of the matter.

The firm Seyfarth Shaw LLP represents a party in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No 186 (*Browning-Ferris*). We previously determined that *Browning-Ferris* and *Hy-Brand* were the same matter for purposes of the President's ethics pledge. It is our understanding that the Designated Agency Ethics Official came to the same determination. So, while the communications with the labor-side attorneys were not prohibited *ex parte* communications because they are not interested parties, Mr. Toner, a management-side attorney, is an interested party by virtue of his employment with Seyfarth Shaw LLP. Likewise, a field agent as a General Counsel prosecutorial-side employee would also be an interested party.

With regard to the communication with Mr. Toner and the field agent, we determined that they were not prohibited *ex parte* communications because the communications were not relevant to the merits of the proceeding, in that Mr. Toner and the field agent were unable to link the comments to the *Browning-Ferris/Hy-Brand* matter. Additionally, the comments by Member Pearce appear to be more within the scope of what would be considered a not prohibited communication regarding the status of a proceeding rather than information that was relevant to the merits of the proceeding. It would appear that the regulation would have allowed an interested party to ask Member Pearce for a status update on the *Hy-Brand* motion and that Member Pearce could have made the comments that something would be coming or to watch the news.

Based upon the foregoing, we determined that there is insufficient evidence to find that more likely than not Member Pearce engaged in misconduct. We also determined that Member Pearce's statement during the interview was generally corroborated by the information provided by Mr. Toner and that further investigative efforts are not warranted at this time. Nevertheless, there may or may not be certain due process issues with a Member discussing a current or live matter at an ABA meeting. It is, however, our long-standing practice not to engage in a due process analysis. Our raising the issue of due process at this point is to ensure that our analysis and determinations are limited solely to whether a rule or a regulation was violated. If there are any due process concerns we recommend that the Board consult with the Designated Agency Ethics Official.