



United States Government

NATIONAL LABOR RELATIONS BOARD

1015 Half Street, SE

Washington, DC 20570

November 8, 2019

The Honorable Patty Murray

Ranking Member

U.S. Senate Committee on Health, Education, Labor & Pensions

154 Russell Senate Office Building

Washington, DC 20510

Dear Senator Murray:

I write in response to your letter dated October 24, 2019, inquiring about my ethical obligations as a Member of the National Labor Relations Board (NLRB).

I share your desire to ensure that all NLRB actions are conducted under the highest possible ethical standards. To that end, given my wife's continued employment as a doctor at Columbia University Medical Center and as an employee of the Trustees of Columbia University, I sought the opinion of the NLRB's Designated Agency Ethics Official (DAEO). Our DAEO has determined that my participation in the Notice of Proposed Rulemaking regarding both undergraduate and graduate students and their classification under the "employee" definition in Section 2(3) of the Act (student rulemaking) raises no regulatory or statutory ethical issues.

To trigger recusal under 18 U.S.C. § 208, there would have to be a showing that the student rulemaking would have a direct and predictable effect on my wife's financial interests as a doctor at Columbia University Medical Center. The DAEO determined the reasoning required to conclude that the disposition of the student rulemaking proceeding would have a direct and predictable effect upon my spouse's financial interests as an employee of the Trustees of Columbia University would require a series of conjectures and is simply too speculative to prohibit my participation under 18 USC § 208. See 5 C.F.R. § 2635.402(b)(2), Ex. 2.

The provision addressing conflicts arising from personal and business relationships, 5 C.F.R. § 2635.502(a), is limited to "particular matters involving specific parties" and does not apply to matters of general applicability, such as the student rulemaking. The DAEO has determined I

would not have to recuse under the “covered relationship” provision even if the Trustees of Columbia University submitted comments in the rulemaking. As such, no waiver is necessary.

Finally, while the determination as to whether to recuse under the “catch-all” provision, 5 C.F.R. § 2635.502(a)(2), initially lies with me, the DAEO has recommended that I not recuse. The DAEO does not believe a reasonable person with knowledge of the relevant facts would question my impartiality in this rulemaking. I agree. However, in an abundance of caution, the DAEO has provided me with advice to ensure that my participation in the student rulemaking does not create any suggestion of impropriety regarding Columbia’s graduate students or the specific facts regarding their employee status. I intend to follow her good advice.

If you or your staff have any further questions or concerns, please do not hesitate to contact me or Edwin Egee in the Office of Congressional and Public Affairs at (202) 273-1991.

Sincerely,

A handwritten signature in black ink, appearing to read "Marvin E. Kaplan", with a stylized flourish at the end.

Marvin E. Kaplan
Board Member