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# United States Senate

COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

DAVID P. CLEARY, STAFF DIRECTOR  
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<http://help.senate.gov>

October 24, 2019

The Honorable Marvin E. Kaplan  
Member  
National Labor Relations Board  
1015 Half Street S.E.  
Washington, D.C. 20570

Dear Member Kaplan:

I am writing to express my concern regarding your participation in the recent decision by the National Labor Relations Board (NLRB) to engage in rulemaking regarding the statutory employee status of students performing services at private colleges or universities (“Jurisdiction NPRM”).<sup>1</sup> At the time of your confirmation hearing, you submitted to the Senate Committee on Health, Education, Labor, and Pensions, as a supplement to your ethics agreement, a letter dated July 17, 2017 to Lori Ketcham, Designated Agency Ethics Official for the NLRB, in which you stated:

I originally reported my spouse’s employer as Columbia University Hospital. However, my spouse’s employer is the Trustees of Columbia University. Accordingly, I will not participate personally and substantially in any particular matter involving specific parties in which I know the Trustees of Columbia University is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. §2635.502(d).

Under the proposed rule set forth in the Jurisdiction NPRM, the Board seeks to reverse the holding in *Trustees of Columbia University in the City of New York*, 364 NLRB No. 90 (2016), and return to the holding in *Brown University*, 342 NLRB 483 (2004). The effect of this reversal would be to remove students who perform services at a private college or university related to their studies from the definition of employee under the National Labor Relations Act, thereby removing them from statutory protection. The proposed rule would codify the position that the Trustees of Columbia University requested from the NLRB.

By virtue of your wife’s employment, you are deemed to have a financial interest in matters which have a direct and predictable effect on that financial interest.<sup>2</sup> Your participation in this rulemaking, which would adopt the legal position that the Trustees of Columbia University have long sought from the NLRB, benefits your financial interest as defined in federal ethics regulations and thus appears to raise serious and problematic ethics issues.

In 1980, the Administrative Conference of the United States issued a recommendation stating:

<sup>1</sup> Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. 40691 (proposed Sept. 23, 2019) (to be codified at 29 C.F.R. pt.103).

<sup>2</sup> 5 C.F.R. § 2635.402.

A decisional official whose financial interests or those of whose immediate family may be distinctively favored by choices to be made in a particular rulemaking proceeding should voluntarily abstain (or be required by the agency to abstain) from participation in that proceeding, subject to publicly stated and applied agency exceptions for *de minimus* holdings.<sup>3</sup>

Under these guidelines, your participation in this rulemaking appears to be a potential ethics violation unless you obtained a waiver from ethics officials. Moreover, at a minimum, your participation creates the *appearance* of a violation of the applicable ethical standards, which should have resulted in your recusal from the rulemaking if you did not have a waiver to participate.<sup>4</sup>

Accordingly, I request the following information no later than November 7, 2019:

1. Is your wife currently employed by the Trustees of Columbia University?
2. Did you seek a waiver from the NLRB Designated Agency Ethics Official or the Office of Government Ethics to participate in this rulemaking? If so, please produce the document(s).
3. If not, please explain why you did not seek such a waiver and why you believed that such a waiver was unnecessary.

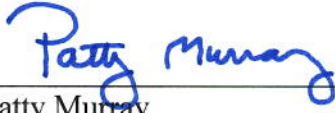
Please contact my staff at [Joseph\\_Shantz@help.senate.gov](mailto:Joseph_Shantz@help.senate.gov) if you have any questions about this request. Thank you for your attention to this matter, and I look forward to your response.

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<sup>3</sup> Administrative Conference of the United States, Recommendations, 45 Fed. Reg. 46771, 46776 (1980) (to be codified in 1 C.F.R. § 305.80-4). See also, Peter L. Strauss, Disqualifications of Decisional Officials in Rulemaking, 80 Columbia L. Rev. 990, 1048 (1980) (disqualification in rulemaking is plainly appropriate in those circumstances, largely defined by federal statute, that involve present significant risks of present financial self-dealing).

<sup>4</sup> 5 C.F.R. § 2635.101 (b)(14).

Sincerely,



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Patty Murray  
Ranking Member

Cc: The Honorable John F. Ring, Chairman  
The Honorable Lauren McFerran, Member  
The Honorable William J. Emmanuel, Member  
Lori Ketcham, Designated Agency Ethics Official  
David P. Berry, Inspector General  
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