U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

March 28, 2023

The Honorable Bill Cassidy
Ranking Member
Committee on Health, Education, Labor and Pensions
United States Senate

The Honorable Virginia Foxx
Chairwoman
Committee on Education and the Workforce
House of Representatives

NATIONAL LABOR RELATIONS BOARD: New Protocols Aim to Prevent Errors When Swearing in Board Members

Accessible Version

The National Labor Relations Board (NLRB) is a federal agency in the executive branch, created to administer and enforce the National Labor Relations Act of 1935.[1] NLRB is headed by a five-member Board and General Counsel. Each Board member is to be appointed in accordance with the Appointments Clause of the U.S. Constitution,[2] which mandates that "Officers of the United States" whose appointments are established by law be nominated by the President and confirmed by the Senate. After the President nominates an individual to be a member of the Board, the Senate determines whether to confirm the nomination. If the Senate confirms the nomination, the President can then appoint the confirmed nominee to the position. The appointment is typically memorialized by a signed presidential commission. The President may sign the commission at any time after confirmation, at which time the appointment becomes official.[3] The appointee then takes the oath of office to be sworn in as a Board member, with full authority to carry out the responsibilities of the office, for a term of five years.

On July 28, 2021, a nominee to the Board was confirmed by the Senate, and on August 28, 2021, the Chairman of the NLRB administered the oath of office to swear in the nominee. On September 22, 2021, twenty-five days after the confirmed nominee was sworn in and began serving as a member of the Board, the White House informed NLRB that the President had signed the nominee's presidential commission, effectuating his appointment as a Board member. After the confirmed nominee received his signed presidential commission on

[1]The National Labor Relations Act of 1935, as amended, encourages the practice of collective bargaining, protects the rights of employees in this area, and seeks to eliminate unfair labor practices. Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151–169).

[2]29 U.S.C. § 153(a) ("[The Board shall consist of five... members, appointed by the President by and with the advance and consent of the Senate.").

[3]Congressional Research Service, Appointment and Confirmation of Executive Branch Leadership: An Overview, Report R44083 (Washington, D.C.: Mar. 17, 2021).

September 22, 2021, the Board Chairman re-administered the oath of office to him. Therefore, the member's term began on September 22, 2021.

Between August 28, 2021, and September 22, 2021, prior to his presidential appointment, the Board member conducted some NLRB work. This has raised questions about NLRB's protocols for administering the oath of office.

You asked us to review what led to NLRB administering the oath of office prior to receiving a signed presidential commission, as well as any procedures NLRB has implemented to prevent a similar error from occurring in the future.

This report examines why an NLRB member was sworn in prior to receiving a signed presidential commission, and what actions NLRB has taken to ensure that such an error will not happen in the future.

To address our objective, we interviewed NLRB officials and collected documentary evidence regarding: (1) NLRB's protocols for swearing in members as of August 2021; (2) the steps that resulted in the nominee being sworn in prior to receiving a signed presidential commission; and (3) actions NLRB has taken to prevent this error from occurring again, such as revising its protocols to swear in new members. Additionally, we reviewed relevant federal laws, regulations, and guidance, along with prior GAO work.[4]

In a separate product, we examined the legal implications of the member's service prior to his presidential appointment (reprinted in enclosure I).[5]

We conducted the work as a performance audit from March 2022 to March 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

NLRB's two primary functions are to: (1) investigate and resolve allegations of unfair labor practices by employers and unions (about 90 percent of NLRB's workload), and (2) conduct secret-ballot elections among employees to determine whether employees wish to be represented by a union (about 10 percent of NLRB's workload).

The Board primarily acts as a quasi-judicial body to decide unfair labor practice and representation cases that have been appealed after a decision by an NLRB Administrative Law Judge or a Regional Director.[6] The General Counsel is independent from the Board and is

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[4]GAO, *National Labor Relations Board: Meaningful Performance Measures Could Help Improve Case Quality, Organizational Excellence, and Resource Management.* GAO-21-242, (Washington, D.C.: Mar. 29, 2021).

[5]See B-334179, Mar. 28, 2023.

[6]A Board decision may be appealed to an appropriate U.S. Court of Appeals. If a party refuses to comply with a Board decision, the Board may petition for court enforcement of the order.

responsible for investigating and prosecuting unfair labor practice cases. The General Counsel also provides general legal and administrative supervision of NLRB regional and headquarters offices in the processing of unfair labor practice cases, as well as representing NLRB in court.

NLRB Failed to Fully Follow Its Protocols for Administering Its Oath of Office, but Has Since Added Internal Controls to Avoid Future Mistakes

NLRB did not fully follow the protocols it had in place to confirm that the presidential commission had been signed prior to administering the oath of office to its new member in August 2021. In May 2021, NLRB established its original protocols outlining steps for the agency to take upon the President nominating a new member to the Board. Among other steps, those protocols instructed NLRB's Director of the Office of Congressional and Public Affairs (OCPA) to coordinate with the White House to ensure that, once the Senate confirmed the Board nominee, the presidential commission would be signed as soon as possible.[7] The protocols said that once the commission is signed, the nominee can be sworn in, adding that it is not necessary to have the physical document in the agency's possession, assuming that the signature is confirmed. However, the Director of OCPA did not confirm that the commission had been signed. The original protocols did not include a specific check by anyone else at NLRB to confirm that the commission had been signed.

NLRB officials said that, upon learning on September 22, 2021, that the presidential commission had not previously been signed, the NLRB Chairman took several actions to address the situation. For example, the Chairman alerted all other Board members and the NLRB Inspector General of the error. Officials said the Chairman also halted cases pending before the Board, and all votes by the Board, while the Chairman investigated the situation. Additionally, the Chairman alerted the Senate Committee on Health, Education, Labor and Pensions and the House Committee on Education and Labor about the unsigned presidential commission in a letter dated October 8, 2021.[8]

Further, the Chairman initiated two internal reviews to determine the cause of the error. First, NLRB's Office of Special Counsel and Labor Relations conducted a personnel investigation to uncover the cause of the error. As noted above, the investigation found that the Director of OCPA failed to verify that the presidential commission had been signed prior to the administration of the oath of office to the new member, mistakenly believing it had been signed previously. Second, the Chairman instructed the Chief of Staff and the Deputy General Counsel to undertake a review of then-current procedures to identify internal controls needed to prevent a similar mistake in the future.[9]

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[7]The protocols also noted that ensuring the Presidential Commission is signed might entail reaching out to the State Department Office of Presidential Appointments.

[8]The Chairman also responded to additional inquiry from Senators Burr and Braun and Representatives Foxx and Allen through a letter dated December 6, 2021. That letter provided further details on the circumstances surrounding the error in administering the oath of office and the member's service between August 28 and September 22, 2021.

[9]GAO defines internal control as "a process used by management to help an entity achieve its objectives." GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G (Washington, D.C.: September 2014). That report also says that internal control helps an entity comply with applicable laws and regulations.

Based on that review of procedures, in December 2021, NLRB created new protocols for nominations to the Board. Among other steps, the new protocols established a committee for handling Presidential appointments requiring Senate confirmation, which NLRB refers to as the Presidential Appointment with Senate (PAS) Confirmation committee.[10] The PAS committee consists of NLRB's Director of OCPA, Chief of Staff, Solicitor, Deputy General Counsel, Associate General Counsel in the Division of Legal Counsel, and the Director of Administration. NLRB officials said that NLRB chose those positions specifically to include a combination of non-career and career leadership on the PAS committee.

Additionally, NLRB's new protocols establish several internal controls to ensure the presidential commission has been signed prior to swearing in a new Board member.[11] Under these protocols, for example:

- The Director of OCPA will notify Board nominees that they may not be sworn in until the President has signed the nominee's presidential commission.
- The Director of OCPA will reach out personally to the White House point of contact about the signing of the commission.
- The Director of OCPA will request that the White House email the Director of OCPA when the commission has been signed, and, if possible, provide an electronic copy of any documentation related to the signed commission.
- Upon receiving email confirmation that the President has signed the nominee's presidential commission, the Director of OCPA will share the email and any related documentation with the PAS committee and the NLRB Chairman.
- NLRB's Director of Administration will contact the State Department to confirm their understanding that the commission has been signed and begin the process of obtaining the formal commission.
- After all of the above steps have been completed, the PAS committee will convene, in person or virtually, to ensure that all members agree that the nominee has been appointed by the President and may be sworn in by NLRB. If all members agree, then they shall email the NLRB Chairman that the nominee may be sworn in.
- After the NLRB Chairman has been notified by the PAS committee that the nominee may be sworn in, the Director of OCPA then will consult with the nominee about scheduling the swearing-in ceremony. The Director of Administration subsequently will maintain records related to the appointment, including the presidential commission.

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[10]Presidential appointments requiring Senate advice and consent are often referred to as "PAS" positions. NLRB refers to this committee as the PAS committee in its internal protocols as well as in its 2021 Performance and Accountability Report.

[11]While our focus in this report is on NLRB Board member nominations, the protocols apply to nominees for NLRB General Counsel, as well. NLRB's General Counsel is independent from the Board and is responsible for investigating and prosecuting unfair labor practice cases and for providing general supervision of NLRB field offices in the processing of cases. The General Counsel serves a 4-year term.

Following each confirmation process, the new protocols state that the PAS committee will meet with the Chairman and the General Counsel to review the process with the goal of identifying and addressing areas of potential improvement. There has not been a Board nominee since the agency adopted the new protocols. As planned, the agency should follow through on its new protocols when a new nominee is put in place to ensure they work as intended.

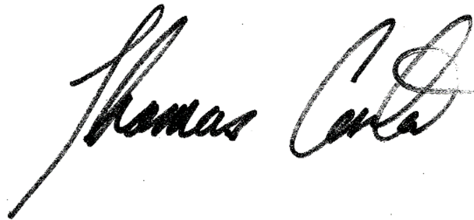
Agency Comments

We provided NLRB with an opportunity to provide comments on facts and analyses contained in this report. NLRB provided technical comments, which we incorporated as appropriate.

GAO Contact and Staff Acknowledgments

We are sending copies of this report to the appropriate congressional committees, the Chairman of the NLRB, and other interested parties. In addition, the report is available at no charge on the GAO website at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-7215 or costat@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report were Mary Crenshaw (Assistant Director), Andrew Nelson (Analyst-In-Charge), Elizabeth Calderon, and Adam Wendel. Also contributing to this report were Jean McSween, Lisa Motley, Jessica Orr, and Jessica Rider.



Thomas Costa, Director

Education, Workforce, and Income Security Issues

Enclosure I: National Labor Relations Board—Member Service Prior to Presidential Appointment, B-334179, March 28, 2023

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Decision

Matter of: National Labor Relations Board—Member Service Prior to Presidential Appointment

File: B-334179

Date: March 28, 2023

DIGEST

The President of the United States appoints members of the National Labor Relations Board (NLRB) by and with the advice and consent of the U.S. Senate. After the Senate confirms a nomination to NLRB, presidential appointment is typically memorialized through a signed presidential commission. Member David Prouty (Mr. Prouty) served as a member of NLRB for a period of twenty-five days prior to the President signing his presidential commission and, therefore, prior to receiving his presidential appointment. We address the legal implications of Mr. Prouty's service during this period prior to his presidential appointment.

We conclude that Mr. Prouty is entitled to retain the salary he received for the period he served prior to his presidential appointment because he should be considered a de facto employee during this period. We also conclude that there was a violation of section 4(a) of the National Labor Relations Act (NLRA) because, prior to his presidential appointment, Mr. Prouty and his legal assistants engaged in certain actions that section 4(a) reserves for members of NLRB and their legal assistants.[1] Specifically, the violation occurred because, prior to his presidential appointment, Mr. Prouty and his legal assistants reviewed administrative law judge reports and his legal assistants reviewed transcripts and prepared draft opinions for him. However, we conclude that there are no applicable penalties for this violation, there is no current violation of NLRA, and no additional action by NLRB or Mr. Prouty is required. In addition, we conclude that Mr. Prouty's service prior to his presidential appointment did not compromise or invalidate matters before NLRB because, after

[1] Pub. L. No. 74-198, 49 Stat. 449 (July 5, 1935) (codified at 29 U.S.C. §§ 151–169). Section 4(a) is codified at 29 U.S.C. § 154(a).

receiving his presidential appointment, Mr. Prouty took steps sufficient to validate the formal actions he took prior to his presidential appointment.

DECISION

On August 28, 2021, one month after the U.S. Senate voted to confirm his nomination to serve as a member of the National Labor Relations Board (NLRB or Board), the Chairman of NLRB administered the oath of office to David Prouty (Mr. Prouty), and he began serving as a Board member. NLRB and Mr. Prouty subsequently learned that the President of the United States signed the presidential commission memorializing Mr. Prouty's presidential appointment on September 22, 2021, and that Mr. Prouty had been serving as a Board member for twenty-five days prior to his presidential appointment. We received a request to analyze the legal implications of Mr. Prouty serving as a Board member prior to being appointed by the President of the United States.[2]

Specifically, this decision addresses three questions. First, we address whether Mr. Prouty should be considered a de facto employee for the period in which he served as a Board member prior to his presidential appointment. Second, we address whether Mr. Prouty's service on the Board prior to his presidential appointment violated the National Labor Relations Act (NLRA), as amended, particularly section 4(a), which addresses permissible activities of the Board, individual Board members, the Board's General Counsel, and certain other NLRB employees.[3] Third, we address whether Mr. Prouty's service on the Board prior to his presidential appointment compromised or invalidated matters before the Board in which he took formal actions.

For the reasons discussed below, we conclude that Mr. Prouty should be considered a de facto employee for the period in which he served as a Board member prior to his presidential appointment and is entitled to retain the compensation he received for this period. We also conclude that there was a violation of section 4(a) of NLRA because Mr. Prouty and his legal assistants engaged in certain actions prior to Mr. Prouty's presidential appointment that section 4(a) reserves for Board members and their legal assistants; however, there is no current violation, and the offenses and penalties provision of NLRA does not apply in this instance. Finally, we conclude that Mr. Prouty's service on the Board prior to his presidential appointment did not compromise or invalidate matters before the Board in which he took formal actions because he sufficiently ratified the formal actions he took prior to his presidential appointment.

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[2] Letter from Ranking Member Virginia Foxx, House Committee on Education and Labor, and Ranking Member Richard Burr, Senate Committee on Health, Education, Labor and Pensions, to the Comptroller General (Feb. 8, 2022); Letter from Ranking Member Bill Cassidy, Senate Committee on Health, Education, Labor and Pensions, to the Comptroller General (Jan. 18, 2023).

[3] Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151–169). Section 4(a) is codified at 29 U.S.C. § 154(a).

In accordance with our regular practice, we contacted NLRB to obtain factual information and its legal views on this matter.[4] NLRB provided us with information and its legal views.[5]

BACKGROUND

NLRB is a federal agency in the executive branch, created to administer and enforce NLRA. NLRB is headed by a five-member Board and General Counsel. Each Board member is to be appointed in accordance with the Appointments Clause of the U.S. Constitution,[6] which mandates that "Officers of the United States" whose appointments are established by law be nominated by the President and confirmed by the Senate. After the President nominates an individual to be a member of the Board, the Senate determines whether to confirm the nomination. If the Senate confirms the nomination, the President can then appoint the confirmed nominee to the position. The appointment is typically memorialized by a signed presidential commission. The President may sign the commission at any time after confirmation, at which time the appointment becomes official.[7] The appointee then takes the oath of office to be sworn in as a Board member, with full authority to carry out the responsibilities of the office, for a term of five years.

Mr. Prouty's Appointment

The Senate confirmed Mr. Prouty to be a member of the Board on July 28, 2021, and the Board Chairman administered the oath of office to swear in Mr. Prouty on August 28, 2021. On September 22, 2021, twenty-five days after Mr. Prouty was sworn in and began serving as a member of the Board, the White House informed NLRB that the President had signed Mr. Prouty's presidential commission, effectuating his appointment as a Board member. After receiving the signed presidential commission on September 22, 2021, the Board Chairman re-administered the oath of office to Mr. Prouty. Therefore, Mr. Prouty's term began on September 22, 2021.[8]

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[4] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* https://www.gao.gov/products/gao-06-1064sp.

[5] Letter from Solicitor, NLRB, to Senior Staff Attorney, GAO (Aug. 24, 2022) (hereinafter, Response or NLRB Response).

[6] 29 U.S.C. § 153(a) ("[T]he Board shall consist of five . . . members, appointed by the President by and with the advice and consent of the Senate.").

[7] Congressional Research Service, Appointment and Confirmation of Executive Branch Leadership: An Overview, Report R44083 (Washington, D.C.: Mar. 17, 2021).

[8] In a related audit, GAO examined the circumstances that contributed to Mr. Prouty entering into service as a Board member prior to his presidential appointment and the actions NLRB has taken to ensure such an error does not occur again. See GAO, National Labor Relations Board: New Protocols Aim to Prevent Errors When Swearing in Board Members, GAO-23-105889 (Washington, D.C.: Mar. 28, 2023).

Mr. Prouty's Compensation

The period in which Mr. Prouty served on the Board prior to his presidential appointment and received compensation spanned two federal employee pay periods, Pay Period 19 and Pay Period 20, and Mr. Prouty received full payment for both pay periods on September 21, 2021, and October 5, 2021, respectively. In a letter dated December 23, 2021, NLRB's financial service provider sent Mr. Prouty a bill of collection that required him to repay all of the compensation for the period prior to his presidential appointment, which included all of Pay Period 19 (August 29 – September 11, 2021) and the first 10 days of Pay Period 20 (September 12 – September 21, 2021). The bill of collection made adjustments for federal and state taxes and federal retirement programs and benefits. Mr. Prouty repaid the amount on December 28, 2021.

NLRB determined that Mr. Prouty was entitled to compensation that had already been paid and received by Mr. Prouty as of the discovery of the issue on September 22, 2021, which consisted only of salary for Pay Period 19. Mr. Prouty was subsequently paid this amount in his compensation for Pay Period 2 of Calendar Year 2022, which had an official pay date of January 25, 2022. Additionally, NLRB adjusted Mr. Prouty's service computation date to September 22, 2021.

Section 4(a) of NLRA

Section 4(a) of NLRA, which addresses permissible activities of the Board, individual Board members, the Board's General Counsel, and certain other NLRB employees, provides,

> Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. *The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No administrative law judge's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no administrative law judge shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations.* The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court.

> Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.[9]

(emphasis added). Originally enacted in 1935, section 4(a) was amended in 1947 to add what are currently the third and fourth sentences of section 4(a).[10] The third sentence restricts the Board from employing attorneys to review hearing transcripts or prepare drafts of opinions, unless the attorneys are assigned as legal assistants to perform such work for individual Board members. The fourth sentence restricts persons other than Board members and their legal assistants from reviewing administrative law judge (ALJ) reports and prohibits ALJs from advising or consulting with the Board with respect to exceptions taken to an ALJ's findings, rulings, or recommendations.[11]

Mr. Prouty's Formal Actions

Prior to being appointed by the President, Mr. Prouty engaged in official work responsibilities consistent with those of a member of the Board. However, the number of matters in which he acted prior to September 22, 2021, was limited due to the fact that his recusal obligations were not finalized until September 14, 2021. After September 14, Mr. Prouty began acting in a full range of matters, with the assistance of his assigned staff. This included reviewing ALJ decisions, as well as entering actions in the Board's case management system for a total of eight matters. Three of those matters were no longer pending before the Board as of September 22, 2021. In two of the matters that were no longer pending, both involving decisions to issue orders resolving motions to dismiss, Mr. Prouty "noted off" (i.e., recorded in the Board's case management system his decision not to participate in the cases). For both matters, the Board's action denied motions to dismiss so that a hearing could proceed before an NLRB administrative law judge. In the third matter, Mr. Prouty voted to authorize NLRB's General Counsel to file a contempt petition; however, the petition was never filed due to settlement.[12] The five other matters in which Mr. Prouty entered actions in the Board's case management system were still pending before the Board as of September 22, 2021, when Mr. Prouty's official term began. In addition to these eight matters, Mr. Prouty participated in one internal personnel matter in which he cast a vote via email to the Board Chairman.

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[9] 29 U.S.C. § 154(a).

[10] Labor Management Relations Act, 1947, Pub. L. No. 80-101, § 101, 61 Stat. 136, 139–40 (June 23, 1947).

[11] The effect of the 1947 amendments was to facilitate individualized and independent decision-making by each Board member, along with the support of legal assistants and ALJs. See S. Rep. No. 80-105 (1947), *reprinted in Legislative History of the Labor Management Relations Act, 1947* at 415 (1948) ("[T]he Board, instead of acting like an appellate court, where the divergent views of the different justices may be reflected in each decision, tends to dispose of cases in an institutional fashion. To that extent, the congressional purpose in having the act administered by a Board of several members rather than a single administrator has been frustrated."). ALJs were previously referred to in NLRA as trial examiners until 1978, when section 4(a) was amended to replace "trial examiner's" and "trial examiner" with "administrative law judge's" and "administrative law judge," respectively. Pub. L. No. 95-251, § 3, 92 Stat. 183, 184 (Mar. 27, 1978).

[12] NLRB and the respondent in the case subsequently filed a joint motion to settle the case in October 2021.

Mr. Prouty's Measures to Ratify His Formal Actions

After being appointed by the President and being re-administered the oath of office, Mr. Prouty took measures to ratify the formal actions he took prior to his presidential appointment. On September 27, 2021, for three of the eight matters in which he had entered actions prior to his presidential appointment, Mr. Prouty signed three separate documents entitled "Notice of Ratification," and he also documented his decision to ratify his email vote in the internal personnel matter. On September 29, 2021, for the remaining five matters, Mr. Prouty signed five separate documents entitled "Notice of Ratification." Each of the eight signed documents entitled "Notice of Ratification" included language stating that Mr. Prouty "confirm[ed], adopted[ed], and ratif[ied]" the respective decision or vote "[a]fter proper review and consultation with staff." With respect to Mr. Prouty's email vote in the internal personnel matter, he sent a subsequent email on September 27, 2021, entitled "Ratification for the Proposed Settlement Terms . . . " that stated, "[a]fter proper review and consultation with staff, I confirm, adopt, and ratify my vote on September 20, 2021 to approve the Chairman's intention to enter into the proposed settlement."

DISCUSSION

To examine the legal implications of Mr. Prouty serving on the Board prior to his presidential appointment, we address three questions. First, we address whether Mr. Prouty should be considered a de facto employee for the period in which he served as a Board member prior to his presidential appointment. Second, we address whether Mr. Prouty's service on the Board prior to his presidential appointment violated NLRA, particularly section 4(a). Third, we address whether Mr. Prouty's service on the Board prior to his presidential appointment compromised or invalidated matters before the Board in which he took formal actions.

Mr. Prouty's Status as a De Facto Employee for the Period He Served as a Board Member Prior to Presidential Appointment

De Facto Employment Doctrine

The de facto employment doctrine is a longstanding doctrine that federal courts and federal agencies have applied to improper or deficient appointments.[13] A de facto employee is one who holds a public office or position with apparent right, but without

[13] *See United States v. Royer*, 268 U.S. 394, 397–98 (1925) (holding that when an officer served at the wrong rank due to miscommunication of his appointment, he should be regarded as an officer de facto because he occupied the office and discharged its duties in good faith and with every appearance of acting with authority, and, in equity and good conscience, he should not be required to refund the money for services actually rendered in an office held de facto because the government presumably benefited from his service); *Badeau v. United States*, 130 U.S. 439, 452 (1889) ("But inasmuch as the claimant, if not an officer *de jure*, acted as an officer *de facto*, we are not inclined to hold that he has received money which, *ex acquo et bono*, he ought to return."). The term de facto means "having effect even though not formally or legally recognized." *De facto*, Black's Law Dictionary (11th ed. 2019). In contrast, the term de jure means "existing by right or according to law." *De jure*, Black's Law Dictionary (11th ed. 2019). The terms de facto doctrine, doctrine of de facto employment, and de facto employment doctrine encompass both federal officers and employees. *See, e.g.*, B-207109, Nov. 29, 1982. For purposes of this decision, we use the term de facto employment doctrine.

actual entitlement because of some defect in his qualifications or in the action placing him in the office or position.[14] Put another way, when there is a position to be filled, and one acting under color of authority fills the position and performs the duties, "his actions are those of a de facto officer or employee."[15] In certain circumstances, a de facto employee may be allowed payment for services performed.[16]

Decisions involving a de facto employment relationship have considered several criteria. When concluding that a de facto employment relationship existed, those decisions found that an individual serving in a de facto status before they were officially appointed may be compensated "for the reasonable value" of the services they rendered "while in de facto status" inasmuch as they "served in good faith during the period in question."[17] Furthermore, "the reasonable value of service[s] rendered" may be established at "the rate of basic compensation" set for the position to which they were officially appointed.[18] For example, in *Matter of James C. Howard III*, an employee who began working two weeks prior to the date his position description was found to be approved, and hence, before he was properly appointed, could be compensated for the reasonable value of the services he performed in good faith prior to the date of his official appointment.[19] Similarly, another case that addressed this issue noted that, "[t]he lack of an appointment presents no obstacle to de facto status and payment of unpaid compensation in cases where an individual has rendered services under color of authority and in good faith with the reasonable expectation of compensation."[20]

Mr. Prouty's Status as a De Facto Employee

To determine whether Mr. Prouty should be considered a de facto employee, we first consider applicable precedent. As explained above, a de facto employee is one who holds a public office or position with apparent right, but without actual entitlement because of some defect in his qualifications or in the action placing him in the office

[14] *See* 64 Comp. Gen. 395, 404 (1985). Although the Comptroller General previously issued decisions related to civilian personnel law issues, the Office of Personnel Management (OPM) currently has the authority to settle federal civilian employees' claims for compensation and leave and to issue advance decisions settling such claims. General Accounting Office Act of 1996, Pub. L. No. 104-316, 110 Stat. 3826 (Oct. 19, 1996); Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (Nov. 19, 1995). *See* 31 U.S.C. §§ 3529(b)(2)(B), 3702(a)(2); Office of Management and Budget, *Determination with Respect to Transfer of Functions Pursuant to Public Law 104-53* (June 28, 1996).

[15] *See* B-189351, Aug. 10, 1977 (determining where employees were sworn in and began working for a federal agency in good faith and agency officials had full knowledge that employees began working prior to the effective date of their appointments, such employees may be considered de facto employees because they performed duties in good faith under color of authority, and the agency may properly compensate such employees for the reasonable value of services performed while in de facto status).

[16] *See Royer*, 268 U.S. at 397–98.

[17] 57 Comp. Gen. 406, 407 (1978).

[18] *Id.*; *see also* B-191397, Sept. 6, 1978.

[19] 57 Comp. Gen. 406. *See also* B-198575, Aug. 11, 1981; B-191397; B-189351.

[20] OPM File Number 06-0057, at 3–4 (June 14, 2007).

or position.[21] Here, consistent with *Matter of James C. Howard III*, Mr. Prouty held a public position with apparent right. Mr. Prouty had been confirmed to the position by the Senate and, according to NLRB, NLRB and Mr. Prouty were acting on the good-faith belief that he was a validly appointed member of the Board from his initial swearing in on August 28, 2021, until September 22, 2021, when NLRB and Mr. Prouty learned that he had not previously been appointed by the President.[22] Moreover, Mr. Prouty engaged in official work responsibilities consistent with those of a member of the Board during the period prior to his presidential appointment. While Mr. Prouty was performing his duties with apparent right, there was a defect in the action placing him in the position—he had not been appointed by the President.

In its Response, NLRB stated that it relied on U.S. Supreme Court precedent and Comptroller General decisions to conclude that Mr. Prouty was a de facto employee under federal law during the time he served prior to his presidential appointment.[23] We agree with NLRB's conclusion.

As explained above, we conclude that Mr. Prouty held a public position with apparent right but without actual entitlement due to a defect in the action placing him in the position. As a result, we conclude that Mr. Prouty should be considered a de facto employee from August 28, 2021, through September 22, 2021.

Mr. Prouty's Compensation for the Period of De Facto Employment

Next, we examine whether the compensation for Pay Period 19 that Mr. Prouty received in January 2022 —the salary that had initially been paid to him prior to his presidential appointment on September 22, 2021—is consistent with the de facto employment doctrine.[24] An individual serving in de facto status before they are officially appointed may be compensated for the reasonable value of the services rendered while in de facto status, established at the rate of basic compensation set for the position to which they were officially appointed, inasmuch as they served in good faith during the period in question.[25] As we note above, the Senate confirmed Mr. Prouty to the position and, according to NLRB, Mr. Prouty rendered services in

[21] *Id.* at 3 (citing to B-188424 and noting that "[a] de facto employee is 'one who performs the duties of an office or position with apparent right and color of an appointment and claim of title to such office or position'"); *see also* B-189351.

[22] NLRB Response, at 11.

[23] *Id.* at 2.

[24] Because Mr. Prouty's service computation date was adjusted to September 22, 2021, and because transactions for federal retirement programs and benefits prior to September 22, 2021, were rescinded, the only compensation Mr. Prouty retained for the pertinent period was his salary for Pay Period 19. Thus, we do not need to address annual leave or other benefits. We also note that NLRB told us that they concluded that, despite his de facto service, Mr. Prouty was ineligible to participate in federal retirement programs prior to September 22, 2021, absent a proper appointment to the civil service. NLRB Response, at 5. *See also Bevins v. OPM*, 900 F.2d 1558, 1561–62 (Fed. Cir. 1990) (holding that an attorney was not "appointed" in civil service and the administration of the oath of office would not, itself, establish that the attorney was appointed in civil service, so he did not qualify for civil service retirement benefits for the relevant period); *Horner v. Acosta*, 803 F.2d 687, 691–92 (Fed. Cir. 1986) (holding that contract employees hired by the Department of the Navy to perform certain intelligence functions were not government employees and that persons who were not government employees were not entitled to service credit).

[25] 57 Comp. Gen. 406; *see also* B-191397.

good faith, was acting on the good-faith belief that he was a validly appointed Board member, and engaged in official work responsibilities consistent with those of a Board member during the period prior to his presidential appointment.[26] Nothing in the record before us indicated otherwise. Accordingly, we find that Mr. Prouty served in good faith during the period of his de facto employment. Mr. Prouty's salary for Pay Period 19 that he received in January 2022 was set at the rate of basic compensation for a Board member, the position to which he was officially appointed on September 22, 2021.

In its Response, NLRB stated that following the precedent of the de facto employment doctrine, de facto employees are permitted, with defective appointment or no appointment at all, to retain compensation already paid, and that Mr. Prouty retained compensation paid on September 21, 2021, for services performed between August 28, 2021, and September 11, 2021.[27] As explained above, we agree that the compensation Mr. Prouty received is consistent with the de facto employment doctrine.

Therefore, we conclude that Mr. Prouty is entitled to retain the compensation he received prior to his presidential appointment.

Mr. Prouty's Service Prior to Presidential Appointment as it Relates to NLRA, Particularly Section 4(a)

NLRA addresses, among other things, the authority and responsibilities of the Board and individual Board members. In particular, section 4(a) of NLRA addresses permissible activities of the Board, individual Board members, the Board's General Counsel, and certain other NLRB employees.[28] We observe that some provisions of section 4(a) pertain to actions the Board must or may take as a whole, while other provisions pertain to actions by Board members individually. Section 4(a) is relevant to Mr. Prouty's service prior to his presidential appointment because Mr. Prouty and his legal assistants engaged in certain actions prior to Mr. Prouty's presidential appointment that section 4(a) specifically reserves for Board members and their legal assistants.[29]

[26] NLRB Response, at 4 and 11.

[27] *Id.* at 4.

[28] 29 U.S.C. § 154.

[29] Although other provisions of NLRA address permissible activities of the Board or individual Board members, such as section 11 (29 U.S.C. § 161), which pertains to investigatory powers of the Board and individual Board members, nothing in the record before us indicated that Mr. Prouty took actions contemplated under other such provisions of NLRA prior to his presidential appointment. Therefore, our analysis focuses on section 4(a) of NLRA.

Plain Language Analysis for Provisions of Section 4(a) of NLRA Regarding Actions by the Board as a Whole

It is well established that statutory analysis "begins with the plain language of the statute."[30] If the statutory language is clear and unambiguous on its face, then the plain meaning of that language controls.[31] The provisions of section 4(a) are contained in seven sentences. The second, fifth, sixth, and seventh sentences of section 4(a) generally pertain to activities by the Board as a whole. These provisions provide,

> . . . The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties . . . The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.[32]

These provisions do not require that all five members be seated, nor do they concern the activities of Board members individually. However, we note that from August 28, 2021, when Mr. Prouty was first administered the oath of office prior to his presidential appointment, until September 22, 2021, the Board operated with four properly appointed members. Furthermore, under section 3(b) of NLRA, a vacancy in the Board does "not impair the right of the remaining members to exercise all of the powers of the Board."[33] In addition, nothing in the record before us indicated that the Board's ability to perform its functions was impaired as a result of Mr. Prouty's service prior to his presidential appointment. Consequently, we find that these provisions are not implicated by Mr. Prouty's service prior to his presidential appointment.

[30] *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *see also Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text.").

[31] *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end."); *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) ("[W]e must first determine whether the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms." (citations omitted)); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

[32] 29 U.S.C. § 154(a).

[33] 29 U.S.C. § 153(b). In addition, 29 U.S.C. § 153(b) defines quorum for the Board as three members (two members in specified circumstances) and authorizes the Board to delegate to any group of three or more members any or all of the powers which it may itself exercise; according to NLRB, a quorum of the Board was seated during the period in which Mr. Prouty served as a Board member prior to his presidential appointment.

Plain Language Analysis for Provisions of Section 4(a) of NLRA Regarding Activities by Individual Board Members

We next turn to the provisions of section 4(a) that pertain to permissible activities of individual Board members. The first sentence of section 4(a) provides,

> Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment.[34]

Prior to his presidential appointment, Mr. Prouty was not a Board member as described under section 3(a) of NLRA,[35] which raises a question as to whether the first sentence of section 4(a) applied to him during this period. For purposes of this analysis, we consider this provision as though it applied to Mr. Prouty because it contains a restriction on Board member activities. NLRB stated that, in preparation to take the oath of office for his service as a Board member on August 28, 2021, and consistent with his ethics commitments, Mr. Prouty severed all prior business relationships, vocations, and employment relationships and did not engage in any outside business, vocation, or employment during the period prior to his presidential appointment.[36] Similarly, nothing in the record before us indicated that Mr. Prouty engaged in any other business, vocation, or employment during this period. As a result, we find that Mr. Prouty did not engage in any other business, vocation, or employment during the period in which he served as a Board member prior to his presidential appointment, and, therefore, this provision is not implicated.

The third and fourth sentences of section 4(a) also pertain to permissible activities of individual Board members. The third sentence of section 4(a) (hereinafter "legal assistants provision") provides,

> The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts.

The fourth sentence of section 4(a) (hereinafter "ALJ provision") provides,

[34] 29 U.S.C. § 154(a).

[35] "[T]he Board shall consist of five . . . members, appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a).

[36] NLRB Response, at 11.

> No administrative law judge's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no administrative law judge shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations.[37]

According to NLRB, the Board currently operates with five independent staffs of career legal assistants.[38] Under this arrangement, legal assistants are assigned to work for individual members, and legal assistants continue to work for individual members even when the Board has fewer than five members.[39] In instances where there is a period of transition between departure and arrival of Board members, the affected legal assistants are temporarily assigned ("detailed") to another sitting member.[40] In all of those circumstances, officials from NLRB noted that the legal assistants' work remains the same: they review and analyze the records in cases, advise their assigned Board member on the issues presented and present the cases to their member, and prepare draft decisions, orders, and separate opinions for review by their member.[41] Under the Board's current arrangement, the Board does not specifically employ attorneys "for the purpose of reviewing transcripts of hearings or preparing drafts of opinions."

Here, legal assistants already employed by NLRB were assigned to work for Mr. Prouty when he began serving as a Board member. However, prior to his presidential appointment, Mr. Prouty was not a Board member as described under section 3(a), which raises a question under the legal assistants provision as to whether the legal assistants assigned to Mr. Prouty could properly review transcripts and prepare drafts for him during this period.

A similar question is raised with respect to the ALJ provision. After Mr. Prouty's recusal obligations were finalized on September 14, 2021, in a limited number of cases, he began considering ALJ decisions with the assistance of his assigned staff.[42] Because Mr. Prouty was not a Board member as described under section 3(a), questions arise as to whether he or his legal assistants could properly review ALJ reports and whether Mr. Prouty could consult with ALJs prior to his presidential appointment. We next consider these questions.

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[37] 29 U.S.C. § 154(a).

[38] NLRB Response, at 9.

[39] *Id.* at 9–10.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 10–11. During the period in which Mr. Prouty served prior to his presidential appointment, he entered actions in three issued matters; however, none of those matters involved reviewing a recommended decision of an ALJ. Therefore, the universe of matters in which Mr. Prouty considered ALJ decisions prior to his presidential appointment was limited to matters still pending before the Board as of September 22, 2021.

Mr. Prouty's Service Prior to Presidential Appointment as it Relates to the Plain Language of the Legal Assistants and ALJ Provisions

It is well established that where the language of a statute is plain and unambiguous, the plain terms of the statute must prevail.[43] The plain terms of the legal assistants provision make clear that (1) the Board may not employ attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions, and (2) only attorneys employed as legal assistants assigned to Board members may review such transcripts and prepare such drafts. Nothing in the record before us indicated that Board attorneys who serve as legal assistants were employed for a purpose prohibited by the legal assistants provision, and we note that the legal assistants assigned to Mr. Prouty could have permissibly reviewed transcripts and prepared drafts of opinions for different Board members. However, on the basis of the plain terms of the legal assistants provision, we find that section 4(a) prohibited the legal assistants assigned to Mr. Prouty from reviewing transcripts and preparing drafts for him prior to his presidential appointment because he was not a properly appointed Board member under section 3(a). Similarly, the plain terms of the ALJ provision make clear that only members of the Board or their legal assistants are able to review ALJ reports. Consequently, we find that section 4(a) prohibited Mr. Prouty and his legal assistants from reviewing ALJ reports prior to Mr. Prouty's presidential appointment because he was not a properly appointed Board member under section 3(a).

In a letter to Members of Congress, NLRB asserted that nothing in Mr. Prouty's premature oath of office contravenes Congress's purpose in passing the legal assistants and ALJ provisions of section 4(a).[44] NLRB explained that the legal assistants provision was enacted to eliminate the centralized review section that had previously made case recommendations to all Board members simultaneously and that the ALJ provision was adopted to eliminate a layer of supervisory review between Board members and judges.[45]

In addition, in its Response, NLRB explained that the legal assistants' current role clearly differentiates them from the legal assistants employed under the old review section and that these differences highlight that the work performed by Mr. Prouty's assigned legal assistants prior to Mr. Prouty's presidential appointment did not violate section 4(a).[46] NLRB further explained that absent their assignment to Mr. Prouty prior to his presidential appointment, they would have been detailed to another sitting member and continued to prepare cases for and under the supervision of that member and not for the Board in the manner that prompted

[43] *Bostock*, 140 S. Ct. at 1749; *Salazar*, 555 U.S. at 387; *American Trucking*, 310 U.S. at 543.

[44] Letter from Chairman Lauren McFerran, National Labor Relations Board, to Ranking Member Richard Burr, Senate Committee on Health, Education, Labor and Pensions, Ranking Member Mike Braun, Senate Subcommittee on Employment and Workplace Safety, Ranking Member Virginia Foxx, House Committee on Education and Labor, and Ranking Member Rick Allen, House Subcommittee on Health, Employment, Labor, and Pensions (Dec. 6, 2021).

[45] *Id.* at 4.

[46] NLRB response, at 11.

Congressional concern in 1947. NLRB similarly contended that, even if Mr. Prouty were not considered a Board member prior to his presidential appointment, the work of his legal assistants prior to his appointment does not implicate section 4(a) because their work was performed for Mr. Prouty, and not for the Board on a unitary staff.

We do not disagree with NLRB's description of the legislative history of the legal assistants and ALJ provisions. Nevertheless, as explained above, it is well established that statutory analysis begins with the plain language of the statute, and if statutory language is clear and unambiguous on its face, then the plain meaning of that language controls. Here, the plain language is clear. As explained above, we find that the legal assistants provision prohibited the legal assistants assigned to Mr. Prouty from reviewing transcripts and preparing drafts for him during the period prior to his presidential appointment, and the ALJ provision prohibited Mr. Prouty and his legal assistants from reviewing ALJ reports during the same period. Although Mr. Prouty's legal assistants could have permissibly performed these functions for other Board members during this time period, they performed them for Mr. Prouty. Accordingly, as explained above, we conclude that there was a violation of section 4(a). Because the plain meaning of the statute is clear, we need not consider the legislative history.

NLRB also stated in its Response that when the work was performed, Mr. Prouty and his staff were all acting on the good-faith belief that he was a validly appointed member and, because NLRB concluded that Mr. Prouty was serving in at least a de facto capacity, nothing in section 4(a) would prevent a Board member in those circumstances from carrying out the routine duties for the position with their assigned staff. In addition, NLRB asserted that Mr. Prouty ratified his prior actions in matters where he may have used documents prepared by legal assistants and that it would be illogical to assume ratification would validate his actions in those cases but not his underlying work or the work of his legal assistants.

Although Mr. Prouty's status as a de facto employee is relevant for purposes of compensation, it does not pertain to the plain language of section 4(a). In addition, whether Mr. Prouty ratified his prior actions, a question we analyze later in this decision, does not inform our reading of section 4(a). Ratification is an equitable remedy that can confer validity to actions taken by an improperly appointed official, but Mr. Prouty's ratification, alone, cannot confer presidential appointment. As explained above, NLRA requires Board members to be appointed by the President, and section 4(a) reserves specified functions for Board members and their assigned legal assistants.

In sum, we conclude that there was a violation of section 4(a) because, prior to his presidential appointment, Mr. Prouty and his legal assistants reviewed ALJ reports and his legal assistants reviewed transcripts and prepared draft opinions for him.

Consequences or Remedies for Violations of NLRA, Including the Legal Assistants and ALJ Provisions

In order to ascertain any potential consequences or remedies for a violation of the legal assistants or ALJ provisions of section 4(a), we next turn to the offenses and penalties provision of NLRA, section 12, which provides,

> Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this subchapter shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.[47]

This provision relates to the duties performed under NLRA, including section 4(a). Nothing in the record before us indicated that Mr. Prouty "resist[ed], prevent[ed], impede[d], or interfere[d]" in the performance of duties by any individual. Rather, Mr. Prouty engaged in work responsibilities consistent with those of a Board member. Therefore, we conclude that the offenses and penalties provision of NLRA does not apply in this instance. Furthermore, we note that the provision applies only to willful violations. In examining this provision, the U.S. Court of Appeals for the Ninth Circuit has noted that "evil purpose and knowledge of wrong" are "implicit in the requirement of willfulness."[48] As stated above, according to NLRB, Mr. Prouty and his staff, including his legal assistants, were all acting on the good-faith belief that he was a validly appointed member of the Board from his initial swearing in on August 28, 2021, until September 22, 2021, when NLRB and Mr. Prouty learned that he had not previously been appointed by the president.[49] Nothing in the record before us indicated that Mr. Prouty was acting with an "evil purpose" or had "knowledge of wrong." Moreover, Mr. Prouty has been a properly appointed member of the Board since September 22, 2021, and his five-year term has not expired, so there is no indication that a current violation of section 4(a) exists.

We agree with NLRB, based on the record before us, that Mr. Prouty and his staff were acting on the good-faith belief that he was a validly appointed member, and as explained above, we find that the offenses and penalties provision of NLRA does not apply in this instance.

Based on the foregoing, we conclude that section 4(a) prohibited Mr. Prouty and his legal assistants from engaging in certain actions they took prior to Mr. Prouty's presidential appointment. Specifically, we conclude that there was a violation of section 4(a) because, prior to his presidential appointment, Mr. Prouty and his legal assistants reviewed ALJ reports and his legal assistants reviewed transcripts and

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[47] 29 U.S.C. § 162.

[48] *United States v. Culy*, 790 F.2d 796, 798 (9th Cir. 1986) (affirming a conviction under 29 U.S.C. § 162). The U.S. Supreme Court has cited to the inclusion of the word "willfully" in section 12 of NLRA as an example of where Congress has "seen it fit to prescribe . . . an evil state of mind." *Morissette v. United States*, 342 U.S. 246, 264 (1952).

[49] NLRB Response, at 11.

prepared draft opinions for him. However, we find that there is no current violation of section 4(a), and the offenses and penalties provision of NLRA does not apply in this instance. As such, we conclude that no additional action by the Board or Mr. Prouty is required.

Mr. Prouty's Ratification of His Formal Actions during His Service on the Board Prior to Presidential Appointment

In order to determine whether Mr. Prouty's service on the Board prior to his presidential appointment compromised or invalidated matters before the Board in which he took formal actions, we must analyze whether he sufficiently ratified the formal actions he took during that period of time. Federal courts have repeatedly held that defects arising from the decision of an improperly appointed official can be remedied through ratification.[50] Ratification is "the affirmance of someone's prior act, whereby the act is given the same effect as if it had been done by an agent acting with actual authority."[51] Ratification typically occurs "when a principal sanctions the prior actions of its purported agent,"[52] but ratification can also be effective when the same party is both agent and principal.[53] Federal courts have found that proper or sufficient ratification typically requires the party seeking to ratify an action to have the power to reconsider the action at the time the ratification is made[54]; have knowledge of the material facts pertaining to, and conduct an independent evaluation of the merits of, the act being ratified[55]; and make a detached and considered judgment in evaluating the merits of the act being ratified.[56] The U.S. Court of Appeals for the Third Circuit (Third Circuit) has noted that, "as an equitable remedy, ratification has been applied flexibly and has often been adapted to deal with unique and unusual circumstances."[57]

At the outset, we note that Mr. Prouty served for a 25-day period prior to his presidential appointment, and, subsequently, he took measures to ratify his actions during that period. These prior actions pertained to eight case handling matters before the Board and one internal personnel matter. The measures Mr. Prouty took

[50] *Jooce v. FDA*, 981 F.3d 26, 28 (D.C. Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021); *Advanced Disposal Service East, Inc. v. NLRB*, 820 F.3d 592, 602–06 (3d Cir. 2016) (holding that an NLRB Regional Director properly ratified his earlier actions); *CFPB v. Gordon*, 819 F.3d 1179, 1185–86, 1190–91 (9th Cir. 2016) (deeming proper the CFPB Director's ratification of his own prior invalid actions), *cert. denied*, 137 S. Ct. 2291 (2017).

[51] *Ratification*, Black's Law Dictionary (11th ed. 2019).

[52] *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (quoting *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998)); *see also Advanced Disposal*, 820 F.3d at 602 ("[T]he general rule [is] that the ratification of an act purported to be done for a principal by an agent is treated as effective at the time the act was done. In other words, . . . the ratification 'relates back' in time to the date of the act by the agent.") (brackets in original; citations omitted).

[53] *Wilkes-Barre*, 857 F3d at 372; *Advanced Disposal*, 820 F.3d at 602–03.

[54] *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994).

[55] *Wilkes-Barre*, 857 F.3d at 371; *Advanced Disposal*, 820 F.3d at 603; *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 796 F.3d 111, 117–21, 124 (D.C. Cir. 2015); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708–09 (D.C. Cir. 1996).

[56] *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 602–03; *Doolin*, 139 F.3d at 213; *Legi-Tech*, 75 F.3d at 709.

[57] *Advanced Disposal*, 820 F.3d at 603.

to ratify these actions (hereinafter "ratification measures") included signing a document entitled "Notice of Ratification" for each of the eight matters in which he entered actions in the Board's case management system. Each document stated that he "confirm[ed], adopted[ed], and ratif[ied]" the respective decision or vote "[a]fter proper review and consultation with staff." With respect to the internal personnel matter, Mr. Prouty sent an email entitled "Ratification for the Proposed Settlement Terms . . . " that similarly stated, "[a]fter proper review and consultation with staff, I confirm, adopt, and ratify my vote on September 20, 2021 to approve the Chairman's intention to enter into the proposed settlement." For each of these nine matters, we consider whether Mr. Prouty's ratification measures meet the requirements prescribed by federal courts for ratification.

Power to Reconsider the Action at the Time the Ratification Is Made

To determine whether a ratification is proper or sufficient, federal courts have generally analyzed whether the party seeking to ratify an action had the power to reconsider the action at the time the ratification is made. This analysis often turns on whether the ratification itself is timely. The U.S. Supreme Court's decision in *FEC v. NRA Political Victory Fund* addressed the timeliness of ratification. There, the Federal Election Commission (FEC) filed a petition for a writ of certiorari, which FEC did not have authority to do without the Solicitor General's authorization. After the deadline for filing a petition had passed, the Solicitor General authorized the petition filed by FEC. As to whether the Solicitor General's after-the-fact authorization could relate back to the date of FEC's unauthorized filing so as to make it timely, the U.S. Supreme Court stated that "the question is at least presumptively governed by principles of agency law, and in particular the doctrine of ratification."[58] The Court observed that "it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*."[59] Therefore, the Court held that, because the Solicitor General's authorization occurred after the statutory deadline for filing a petition, the authorization could not relate back to the date of the filing as to make it timely.[60]

Federal courts have since interpreted the timing problem that was addressed in *NRA* as an inquiry into whether the ratifier has the power to reconsider the earlier decision at the time of ratification.[61] In *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, the temporary director of the Office of Thrift Supervision, who was properly appointed, attempted to ratify the previous acting director's decision to

[58] *NRA Political Victory Fund*, 513 U.S. at 98.

[59] *Id.* (citation omitted).

[60] *Id.*

[61] *Doolin*, 139 F.3d at 213–14; *see also Advanced Disposal*, 820 F.3d at 603 (noting that the "timing problem" in *NRA* "has since been read to require that the ratifier have the 'power' to reconsider the earlier decision at the time of ratification") (citing *Doolin*, 139 F.3d at 213–14).

initiate certain enforcement proceedings.[62] In that case, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) found that "[t]he timing problem posed in *NRA*" was "not present" because "[n]o statute of limitations would have barred [the agency official] from . . . starting the administrative proceedings over again."[63]

Within the framework set forth in *NRA* and *Doolin*, we examine whether Mr. Prouty had the power to reconsider his earlier actions at the time he sought to ratify them. We start this analysis by observing section 10(d) of NLRA, which generally provides that the Board may at any time, upon reasonable notice, modify or set aside, in whole or in part, any finding or order until the record is filed with a reviewing court, upon which the court takes exclusive jurisdiction of the case.[64] We next address each of the matters in which Mr. Prouty had entered actions prior to his presidential appointment.

For the two matters involving motions to dismiss in which Mr. Prouty sought to ratify his decision not to participate in the cases, because the two orders denied motions to dismiss, sending the proceedings to an NLRB administrative law judge, the matters remained under the Board's jurisdiction. Thus, under section 10(d), the Board retained authority to "modify or set aside" those orders at the time of Mr. Prouty's ratification measures.

Next, with respect to the matter involving a vote to authorize the filing of a contempt petition, Mr. Prouty sought to ratify his vote prior to the petition being filed. Thus, under section 10(d), the matter remained within the jurisdiction of the Board, and the Board could have directed the General Counsel to take a different action, at the time of Mr. Prouty's ratification measure.

Regarding the internal personnel matter, Mr. Prouty's ratification measure occurred on September 27, 2021, prior to the time the settlement was communicated to the opposing counsel on September 28, 2021. Thus, the Board retained jurisdiction over the matter at the time of Mr. Prouty's ratification measure.

Finally, with respect to each of the five matters still pending before the Board on September 22, 2021, the Board had issued no decision. Thus, the Board retained jurisdiction over all five matters at the time of Mr. Prouty's ratification measures.

Therefore, consistent with *NRA* and *Doolin*, at the time of Mr. Prouty's ratification measures, the Board retained jurisdiction over all eight matters before the Board in which Mr. Prouty entered an action in the Board's case management system and over the internal personnel matter in which Mr. Prouty voted via email to the Board Chairman. As a result, we conclude that Mr. Prouty, as a properly appointed member of the Board as of September 22, 2021, had the authority to reconsider his earlier actions at the time he was seeking to ratify them.

[62] *Doolin*, 139 F.3d at 203.

[63] *Id.* at 213.

[64] 29 U.S.C. § 160(d). Similarly, 29 C.F.R. § 102.48(c)(2) gives parties 28 days to file motions for reconsideration of Board orders.

Knowledge of the Material Facts and Independent Evaluation of the Merits

Federal courts have generally required the party seeking to ratify an action to have knowledge of the material facts pertaining to, and conduct an independent evaluation of the merits of, the act being ratified.[65] In *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, a properly appointed Copyright Royalty Board (CRB) conducted an independent review of a decision by a previous, improperly appointed CRB and reached the same decision. In that case, CRB did not redo the original process or hold new evidentiary proceedings, but instead conducted an independent, de novo review of the entire written record of the proceeding.[66] The D.C. Circuit found that the independent review of the prior record by the properly constituted CRB was sufficient to cure any Appointments Clause violations because CRB had the power to conduct an independent evaluation of the merits and did so.[67]

In *Advanced Disposal Services East, Inc. v. NLRB*, a quorum violation had stripped an NLRB Regional Director of authority to conduct the unionization election challenged by an employer. The Board, after properly constituting, took steps to expressly ratify the appointment of the Regional Director, and, in turn, the Regional Director took steps to ratify all of the actions he had taken during the relevant period. Specifically, the Board stated that it considered relevant supporting materials before reauthorizing the selection of the Regional Director and that it "confirm[ed], adopt[ed], and ratif[ied]" all of its earlier actions. The Regional Director stated that he "affirm[ed] and ratif[ied] any and all actions" taken by him or on his behalf.[68] The Third Circuit focused its analysis on whether "the ratifier [had] 'knowledge of all the material facts' relating to the decision they [were] making" in order to "protect the ratifier from unknowingly ratifying conduct of which he or she was unaware."[69] Relying on the Board's statements, the Third Circuit found that "the Board had full knowledge of, and appropriately reconsidered, its earlier appointment" of the Regional Director.[70] Regarding the Regional Director's ratification, the Third Circuit found it to be effective and noted that, when the ratifier is both the agent and the principal, "the knowledge requirement is easily satisfied" because they, "better than anyone else, had full knowledge" of their earlier actions.[71]

[65] *Wilkes-Barre*, 857 F.3d at 371; *Advanced Disposal*, 820 F.3d at 603; *Intercollegiate Broadcasting System*, 796 F.3d at 117–21, 124; *Legi-Tech*, 75 F.3d at 708–09.

[66] *Intercollegiate Broadcasting System*, 796 F.3d at 116.

[67] *Id.* at 117.

[68] *Advanced Disposal*, 820 F.3d at 602 (brackets in original).

[69] *Id.* at 603 (citation omitted).

[70] *Id.* at 604.

[71] *Id.* at 604–05.

Similarly, in subsequent cases, when the ratifier is both the agent and the principal, courts have not required explicit evidence that the ratifier conducted an independent review of the merits of the act being ratified in order for a ratification to be effective.[72] For example, in *Jooce v. FDA*, which examined whether the Commissioner of Food and Drugs' ratification of an Associate Commissioner's action cured any defects stemming from the Associate Commissioner's appointment, the D.C. Circuit found that the requirement to conduct an independent evaluation of the merits of the act being ratified was satisfied because nothing in the record indicated that the Commissioner failed to conduct an independent evaluation of the merits.[73]

Here, Mr. Prouty is both agent and principal. As a result, consistent with the Third Circuit's holding in *Advanced Disposal*, we conclude that Mr. Prouty had full knowledge of his own actions that he sought to ratify. Additionally, similar to statements by the Board and its Regional Director that the Third Circuit in *Advanced Disposal* found to be an effective ratification, each of Mr. Prouty's ratification measures included language stating that he "confirm[ed], adopted[ed], and ratif[ied]" the respective decision or vote "[a]fter proper review and consultation with staff." Furthermore, similar to the court in *Jooce*, nothing in the record before us indicated that Mr. Prouty failed to conduct an independent evaluation of the merits. Therefore, we conclude that Mr. Prouty satisfied the requirement to conduct an independent evaluation of the merits of the acts being ratified.

Detached and Considered Judgment

Federal courts have generally required the party seeking to ratify an action to make a detached and considered judgment in evaluating the merits of the act being ratified.[74] In *FEC v. Legi-Tech, Inc.*, a reconstituted FEC sought to ratify a prior decision to bring an enforcement action that was made by an improperly constituted FEC. There, the D.C. Circuit found that the reconstituted FEC's review of its prior decision while improperly constituted, even if it was no more than a "rubberstamp" of the original decision, was sufficient to ratify its prior decision absent a contention that one or more of the Commissioners were "actually biased."[75] The court noted that "forcing the [FEC] to start at the beginning of the administrative process, given human nature, promises no more detached and 'pure' consideration of the merits of the case than the [FEC's] ratification decision reflected."[76] In *Wilkes-Barre Hospital Co. v. NLRB*, a quorum violation had stripped an NLRB Regional Director of

[72] *Jooce*, 981 F.3d at 29; *Wilkes-Barre*, 857 F.3d at 371 (holding that "the properly constituted Board expressly ratified its appointment of . . . [the] Regional Director," in part, because there is "no evidence to suggest that the Board failed to 'conduct an independent evaluation of the merits'") (citation omitted).

[73] *Jooce*, 981 F.3d at 29.

[74] *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 602–03 (noting that the purpose of this requirement is "to ensure that the ratifier does not blindly affirm the earlier decision without due consideration"); *Doolin*, 139 F.3d at 213; *Legi-Tech*, 75 F.3d at 709.

[75] *Legi-Tech*, 75 F.3d at 709.

[76] *Id.*

authority to issue complaints. The Board, after properly constituting, took steps to ratify the appointment of the Regional Director, who, in turn, took steps to ratify all of the actions he had taken during the relevant period. There, the D.C. Circuit concluded that it would "take [the Regional Director's] ratification 'at face value and treat it as an adequate remedy'" because there was no evidence to suggest that the Regional Director "failed to make a detached and considered judgment or that he was 'actually biased.'"[77]

Here, Mr. Prouty's ratification measures included language stating that he "confirm[ed], adopted[ed], and ratif[ied]" the respective decision or vote "[a]fter proper review and consultation with staff." Furthermore, similar to the court in *Wilkes-Barre,* nothing in the record before us indicated that Mr. Prouty failed to conduct a detached and considered review. In fact, the language of Mr. Prouty's ratification measures indicates that he did conduct such a review. Therefore, we conclude that Mr. Prouty satisfied the requirement to make a detached and considered judgment in evaluating the merits of the acts being ratified.

In its Response, NLRB stated that Mr. Prouty ratified the formal actions he took during the period in which he served on the Board prior to his presidential appointment and that it is well-settled that ratification is appropriate under these circumstances.[78] As explained above, we agree that Mr. Prouty's ratification measures met the requirements prescribed by federal courts for ratification.

Based on the foregoing, we conclude that Mr. Prouty, after being officially sworn in as a Board member upon being appointed by the President, took sufficient measures to ratify the formal actions he engaged in during the period in which he served on the Board prior to his presidential appointment. Because Mr. Prouty sufficiently ratified his formal actions, Mr. Prouty's service on the Board prior to his presidential appointment did not compromise or invalidate the matters before the Board in which he took formal actions.

CONCLUSION

We find that Mr. Prouty should be considered a de facto employee for the period in which he served as a Board member prior to his presidential appointment and is entitled to retain the compensation he received for this period. We find that there was a violation of section 4(a) of NLRA because Mr. Prouty and his legal assistants engaged in certain actions prior to Mr. Prouty's presidential appointment that section 4(a) reserves for members of the Board and their legal assistants; however, there is no current violation, and the offenses and penalties provision of NLRA does not apply in this instance. Finally, we find that Mr. Prouty's service on the Board prior to his presidential appointment did not compromise or invalidate matters before the

[77] *Wilkes-Barre,* 857 F.3d at 372 (citation omitted).

[78] NLRB Response, at 12.

Board in which he took formal actions because he sufficiently ratified the formal actions he took prior to his presidential appointment.

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