

**UNITED STATES GOVERNMENT**  
**National Labor Relations Board**  
**Office of Inspector General**



**Memorandum**

September 13, 2012

From: David P. Berry  
Inspector General

A handwritten signature in black ink, appearing to read "D. Berry", is written over the printed name and title.

Subject: Report of Investigation – OIG-I-475

This memorandum addresses an investigation conducted by the Office of Inspector General (OIG) involving allegations of improper conduct by Lafe Solomon, Acting General Counsel. The investigation was initiated after we received a Hotline complaint alleging that Mr. Solomon acted in a matter in which he had a financial interest. The facts that we discovered during our investigation substantiated the allegation.

**FACTS**

1. Mr. Solomon was appointed Acting General Counsel on June 20, 2010. (IE 1 page 8)
2. On April 12, 2011, as the Acting General Counsel, Mr. Solomon issued a memorandum to the field offices stating that certain categories of charges in unfair labor practice cases must be submitted to the Division of Advice. (IE 2)
3. The purpose of requiring the submission of a case to the Division of Advice is to ensure that the decision regarding the issuance of a complaint involving certain categories of charges are consistent with the policy priorities of the Office of the General Counsel. (IE 1 pages 10-11 and IE 3 pages 6-8)
4. One category of cases that was required to be submitted to the Division of Advice was “cases involving employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter.” (IE 2 (see paragraph A(9)))
5. On December 30, 2011, Region 11 submitted case 11-CA-067171 to the Division of Advice for consideration of two issues: (1) did Wal-Mart violate Section 8(a)(1) of the act by discharging an employee because of the employee’s postings on Facebook; and (2) is Wal-Mart’s social media policy overly broad. (IE 4)
6. The Division of Advice uses a “screening” procedure for cases that do not involve significant legal review and can therefore be assigned to supervisors to make a presentation to a group of

Advice's managers and supervisors who are able to make a quick decision about whether to proceed with a complaint or dismiss the charge. (IE 3 pages 4-5 and IE 5 page 13)

7. Within the Division of Advice, Region 11's submission was assigned to a supervisory attorney to be "screened." (IE 3 page 5 and IE 5 page 10)

8. For the Wal-Mart case, a Division of Advice supervisory attorney reviewed Region 11's submission and agreed with the Region's analysis that the discharge of the employee did not violate the NLRA, but that Wal-Mart's social media policy was overly broad and that several provisions of that policy violated section 7 of the NLRA. (IE 5 page 13-15 and IE 6)

9. Around January 5, 2012, Mr. Solomon provided a list of his investments, the value of which exceeded \$15,000, to the Deputy General Counsel so she could perform her "gatekeeper" duties to ensure that he did not participate in matters in which he had a conflicting financial interest. (IE 1 pages 46-48, IE 7 page 7, and IE 8)

10. The list provided to the Deputy General Counsel by Mr. Solomon included Wal-Mart in the list of financial holdings. (IE 8)

11. On January 13, 2012, the supervisory attorney presented the case at a meeting with the Division of Advice's Associate General Counsel, managers and supervisors; all of whom agreed with the supervisor's assessment of Wal-Mart's social media policy. (IE 5 pages 13-17 and IE 6)

12. After the meeting, the supervisory attorney prepared an "Advice Memorandum" to send to Region 11 informing the Region of the action to take. (IE 5 page 17)

13. The Advice Memorandum contained a summary of the facts of the case, and an analysis of whether Wal-Mart violated the NLRA by terminating the employee for his Facebook posting and whether the provisions of Wal-Mart's social media policy violated the NLRA. (IE 9)

14. The Advice Memorandum directed the Region to issue a Section 8(a)(1) complaint, absent settlement, alleging that Wal-Mart's social media rules are unlawful by prohibiting employees from presenting persons or the employer in a bad light; posting photographs and video of customers, associates, etc; and using the employer's logo, trademarks, or proprietary graphics. (IE 9)

15. The Advice Memorandum also directed the Region to dismiss all other allegations absent a withdrawal. (IE 9)

16. Because Mr. Solomon had also previously directed that all social media cases be forwarded to him for review, it was necessary to forward the Wal-Mart Advice Memorandum to him for review before sending it to the Region. (IE 3 pages 8-9)

17. When the Advice Memorandum was sent to Mr. Solomon, it was not a draft document in that the Division of Advice considered it to be in final form. (IE 5 page 26)

18. On January 20, 2012, the Associate General Counsel forwarded the Advice Memorandum to Mr. Solomon, the Deputy General Counsel, and the Executive Assistant to the General Counsel. (IE 9)

19. On January 21, 2012, Mr. Solomon sent the following e-mail message to the Associate General Counsel, the Deputy General Counsel, and his Executive Assistant: (IE 10)

**From:** Solomon, Lafe E.  
**Sent:** Saturday, January 21, 2012 1:37 PM  
**To:** Kearney, Barry J.; Mattina, Celeste J.; Abruzzo, Jennifer  
**Subject:** Re: Facebook case

I think we need to discuss this case. I don't necessarily disagree, but as the Employer is Walmart, I want to know if the charge specifically alleged that the social media policy was over broad, whether Walmart filed a response, and whether this policy is nationwide. The reaction to this complaint will be huge (and especially the negative reaction), and I want to make sure that we are prepared. Lafe

20. A meeting with the Division of Advice and Mr. Solomon regarding the Wal-Mart case was scheduled for January 23, 2012, at 3:00 p.m., in Mr. Solomon's office. (IE 11)

21. The Associate General Counsel recalled that, on the morning of January 23, 2012, he was speaking with Mr. Solomon and that Mr. Solomon stated that he did not know whether or not he could participate in the Wal-Mart case because he owned Wal-Mart stock and that he was going to need to check with the Designated Agency Ethics Official (DAEO). (IE 3 pages 36-39)

22. Prior to the meeting on January 23, 2012, Mr. Solomon stated to the Deputy General Counsel that he had a financial interest in Wal-Mart and that he needed a waiver to participate in the case. (IE 1 page 18 and IE 7 page 9)

23. When interviewed, Mr. Solomon stated that he told the Associate General Counsel and Deputy General Counsel about his Wal-Mart stock because he wanted to be open and transparent and he was aware of his obligations under 18 U.S.C. § 208. (IE 1 page 18)

24. According to the Associate General Counsel and the supervisory attorney, during the meeting Mr. Solomon: (IE 3 pages 10-12 and IE 5 pages 20-23)

a. Did not disagree with the Division of Advice's assessment that Wal-Mart's social media policy violated the NLRA in that it was overly broad, but he was concerned that there would be a negative reaction;

b. Stated that he did not want to issue a complaint without Wal-Mart knowing about it in advance;

c. Stated that he wanted to resolve the matter without a decision to issue a complaint being made public; and

d. Directed the Division of Advice to settle the Wal-Mart case by contacting Wal-Mart's counsel and getting Wal-Mart to amend the social media policy to comply with the law.

25. In addition to the statement of the Associate General Counsel and the supervisory attorney, the notes of the supervisory attorney indicated that Mr. Solomon directed the Division of Advice to contact Wal-Mart; let them know that there are a number of concerns; expressed concerns and may be resolutions; and invite them to meet with the Associate General Counsel to see how to resolve the case. (IE 5 at pages 20-21 and IE 12)

26. When asked about the meeting with the Division of Advice, the Deputy General Counsel stated: (IE 7 pages 8-9)

a. The meeting was very brief, but that Mr. Solomon repeated his questions that he made in the e-mail message;

b. Mr. Solomon asked if Wal-Mart expressed an interest in settlement; and

c. Mr. Solomon instructed the Associate General Counsel to contact Wal-Mart to find out whether or not they were interested in a settlement and what their position was with respect to a settlement agreement.

27. When asked about the meeting with the staff from the Division of Advice, Mr. Solomon stated: (IE 1 pages 21-23, 27-28, 42-45 and 58-60)

a. The meeting was short, lasting about 10 minutes;

b. He was aware that he owned Wal-Mart stock and that he needed a waiver of the conflict of interest to participate in the Wal-Mart case;

c. Because he knew that someday he might need to decide the case, he intended to apply for a waiver, and if he didn't get the waiver he would sell the Wal-Mart stock;

d. He acknowledged that the Advice Memorandum was forwarded to him for a decision;

e. He did not believe that the case was ready for his consideration when the Advice Memorandum was presented to him by the e-mail message of January 20, 2012, because there were a number of issues that had not been addressed including whether the policy affected one store or was nationwide;

f. His intent was to have the Division of Advice go and complete their work while he requested a waiver;

g. He told the Division of Advice staff to contact Wal-Mart's representatives to attempt to resolve the case without requiring him to make a decision on whether to issue a complaint; and

h. He did not believe that his participation was substantial within the meaning of 18 U.S.C. § 208.

28. After the interview with Mr. Solomon, we conducted a follow-up interview with the Associate General Counsel who stated that: (IE 13)

Prior to the meeting the Advice staff found the answers to the questions. Although I do not specifically recall addressing those questions with Mr. Solomon, I believe that we would have answered those questions because he had asked them and the meeting resulted in me being instructed to contact Wal-Mart's representative to resolve the issue in the charge. I do specifically recall that I was not instructed to have the Advice staff engage in additional work to determine the merits of the case.

29. The Associate General Counsel did not question Mr. Solomon's participation in the meeting and did not make any inquiry as to whether Mr. Solomon had obtained a waiver from the DAEO. (IE 3 page 39)

30. The Associate General Counsel stated that he did not ask about the waiver: (IE 3 page 41)

Because I am assuming that the fact that he was there, he got a go-ahead that he could participate. He said he was going to check and he shows up, so I would assume he got the go-ahead.

31. When asked why she allowed Mr. Solomon to participate in the meeting with the Division of Advice, the Deputy General Counsel stated: (IE 7 pages 9 and 15-18)

- a. She was aware that Mr. Solomon owned Wal-Mart stock;
- b. She knew that Mr. Solomon was aware that there was a conflict and she knew that he intended to seek a waiver or sell the stock;
- c. Mr. Solomon had participated in numerous interviews about social media cases and he had been the architect of the social media policy throughout;
- d. Mr. Solomon knew that in this particular case, if a complaint issued, it would be controversial and he felt it was his responsibility as Acting General Counsel to make that decision and that he would take steps to be able to do it;
- e. She understood the meeting to be more general in terms and that no decisions were made in the case; and
- f. She acknowledged that she had spoken with Mr. Solomon and other Office of the General Counsel staff about the OIG investigation prior to the interview.

32. On January 23, 2012, the supervisory attorney contacted Wal-Mart's counsel and arranged for a meeting between Wal-Mart's representatives and the Division of Advice. (IE 14)

33. When contacted by the supervisory attorney, Wal-Mart's counsel expressed concern that the Agency would go to the media and state that it got Wal-Mart to change its social media policy. (IE 5 pages 23-24 and IE 14)

34. On January 24, 2012, the Associate General Counsel forwarded an e-mail message from the supervisory attorney regarding the telephone conversation with Wal-Mart's counsel to Mr. Solomon. (IE 14)

35. The Associate General Counsel stated that he forwarded the e-mail message to Mr. Solomon because he wanted to show Mr. Solomon that he had done what he was told to do. (IE 3 pages 15-16)

36. When interviewed, Mr. Solomon did not recall receiving the January 24, 2012, e-mail message from the Associate General Counsel. (IE 1 page 31)

37. On January 30, 2012, Mr. Solomon requested a waiver from the Director of Administration, who was the DAEO, to participate in the Wal-Mart case; the waiver read: (IE 15)

**My mother died in July, 2011, and my father has recently distributed her stocks to my brothers and me. I inherited, inter alia, 300 shares of stock in Walmart, which as of today, is worth \$18,267. This Walmart stock represents 1.25% of the total stock portfolio owned by my wife and myself.**

**There is a Walmart case pending in Advice on the issue of whether Walmart's social media policy is violative of the NLRA, and, absent settlement or withdrawal, the case would be presented to me to decide whether or not to issue a complaint. I am seeking a waiver to participate in this case.**

**I will be happy to answer any further questions you may have.**

38. Mr. Solomon could not recall the particular reason why he waited until January 30, 2012, to request the waiver other than as the Acting General Counsel he has many issues to deal with. (IE 1 page 37)

39. Mr. Solomon stated that he thought the waiver request was the initiation of the process with the Director of Administration/DAEO and that he would provide basic facts in the request and then there would be a meeting to discuss any additional information that was needed. (IE 1 page 33)

40. A meeting with Wal-Mart's representatives was held on January 31, 2012. (IE 3 page 16)

41. When asked about the meeting with the Wal-Mart representatives, the Associate General Counsel stated: (IE 3 page 19)

a. He told Wal-Mart's representatives that he thought the social media policy interfered with the employees' section 7 rights because of the vagueness of the terms;

b. It was in their interest to have a nationwide policy that "at least this General Counsel would say didn't violate the Act;" and

c. It was in the Agency's interest to have a policy that they could use as guidance to what a lawful social media policy looked like.

42. The supervisory attorney had difficulty recalling the specifics of the meetings, but acknowledged that, during the meeting with Wal-Mart's representatives, they discussed the issues that they were directed by Mr. Solomon to resolve with Wal-Mart. (IE 5 pages 29-34)

43. The notes that the supervisory attorney took during the meeting with the Wal-Mart representatives state the representatives were told that if they promulgate a new rule and distribute it that "it all goes away." (IE 5 page 34 and IE 16)

44. On February 1, 2012, the Director of Administration/DAEO denied Mr. Solomon's request. (IE 17)

45. The basis for the Director of Administration/DAEO's denial of the waiver request was that Mr. Solomon did not make any compelling reason why the waiver should be granted and that there was a Deputy General Counsel who could act in Mr. Solomon's place. (IE 18)

46. Mr. Solomon stated that, after the waiver request was denied, he did not have any contact with the Director of Administration/DAEO regarding the waiver request. (IE 1 pages 35-36)

47. Mr. Solomon did not communicate information regarding the denial of his request for a waiver to the Division of Advice. (IE 3 pages 39-40)

48. On February 27, 2012, Mr. Solomon sold his Wal-Mart stock for \$17,213.98. (IE 19)

49. Mr. Solomon recalled that he contacted his financial advisor to make arrangements to sell the Wal-Mart stock shortly after the denial of his waiver request, but that there were several financial planning issues that the financial planning advisor wanted to address that resulted in the delay of the sale. (IE 1 page 37)

50. Mr. Solomon obtained 300 shares of Wal-Mart stock, valued at \$16,911.00, on October 21, 2011, as the result of the distribution of his mother's estate. (IE 20 pages 5 and 11)

51. At no time between January 20, 2012 and February 27, 2012, did the value of Mr. Solomon's Wal-Mart stock fall below \$15,000.00. (IE 21)

52. As a career Senior Executive Service employee, Mr. Solomon files public financial disclosure forms. (IE 22 page 10)

53. The process of filing a public financial disclosure form includes a yearly certification by the employee that he or she has not participated personally and substantially in any particular matter that could affect his or her financial interest, unless the filer qualified for a regulatory exemption or received a waiver. (IE 22 page 14-16)

54. A review of Mr. Solomon's DAEO records disclosed that he executed six yearly certifications that he did not participate in a matter that could affect his financial interest. (IE 23)

55. The process of filing financial disclosure forms includes a review by the DAEO and issuance of a memorandum by the DAEO reminding the filers not to participate in a matter in which they have a financial interest. (IE 22 pages 8-11 and IE 23)

56. A review of Mr. Solomon's DAEO records disclosed six memorandums from the DAEO following the review of his financial disclosure forms warning Mr. Solomon to not participate in matters in which he had financial interest of \$15,000 or more. (IE 24)

57. On September 15, 2011, the Director of Administration/DAEO was informed that there would be an assessment of her division because of matters that were brought to Mr. Solomon's attention that, if true, would evidence mismanagement and could create liability for the Agency. (IE 25)

58. On January 20, 2012, the Director of Administration/DAEO received a briefing on the results of the assessment of her division. (IE 25 and IE 26)

59. Before the briefing, the Director of Administration/DAEO sent Mr. Solomon the following e-mail message: (IE 27)

**From:** Joseph, Glona  
**Sent:** Friday, January 20, 2012 10:14 AM  
**To:** Solomon, Lafe E.  
**Subject:** RE: Vacancies Act  
Never mind. I found the answer.

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**From:** Joseph, Gloria  
**Sent:** Friday, January 20, 2012 10:00 AM  
**To:** Solomon, Lafe E.  
**Subject:** Vacancies Act

Lafe:

What is the status of your nomination? Did it expire when Congress went out or is it one of the ones that Reid carried over? No crisis. I was just trying to figure out when a new 210 day period would begin to run.

Glona

60. On February 1, 2012, the Director of Administration/DAEO made a rebuttal presentation to the findings of the assessment. (IE 25)



61. On August 7, 2012, the Deputy Associate General Counsel, Division of Enforcement Litigation, was designated the NLRB DAEO. (IE 28)

62. On September 13, 2012, the DAEO issued a memorandum to all NLRB employees that: (IE 29)

a. States that the Board and Acting General Counsel are committed to fostering high ethical standards for all NLRB employees and strengthening the public's confidence that the NLRB's business is conducted with impartiality and integrity;

b. Explains that the functions of providing advice for Government standards of conduct, statutes and regulations, and legal professional responsibility are consolidated into one office;

c. Establishes a new protocol for the Office of General Counsel that ensures matters are screened for potential conflicts of interest before they are presented to the officials in the Office of the General Counsel; and

d. Explains that the DAEO has instituted and expanded a multi-resource training program for the standards of conduct and legal ethics.

63. We confirmed with Wal-Mart's representative that the Division of Advice's description of the January 31, 2012, meeting was accurate. (IE 30)

## ANALYSIS

### *Conflict of Interest*

An Officer or employee of the NLRB is prohibited from participating personally and substantially in an official capacity in any particular matter, in which, to his knowledge, he has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

As we understand Mr. Solomon's position, he thought his conduct did not violate the prohibition with regard to participating in a matter in which he had a financial interest because he believed that his participation at the meeting on January 23, 2012, did not constitute "personal and substantial" participation. Based upon the following analysis, we disagree with Mr. Solomon. We find that Mr. Solomon did in fact participate personally and substantially, as the Acting General Counsel, in the case involving Wal-Mart's social media policy knowing that he owned Wal-Mart stock valued at \$15,000.00 or more, and that the case involving Wal-Mart's social media policy would have a direct and predictable effect on that financial interest.

Unfair labor practice charges are particular matters in that they involve specific persons or entities in NLRB proceedings to determine whether there has been a violation of the NLRA, and, if there has been, an appropriate remedy. As such, those proceedings are investigatory and result in determinations through a process that involves deliberation and a decision or action that

is focused upon the interests of specific persons, or a discrete and identifiable class of people. *See* 5 C.F.R. 2640.103(a)(1).

Mr. Solomon's participation was "personal" because he participated directly in the matter. *See* 5 C.F.R. 2640.103(a)(2). Mr. Solomon acknowledged that he reviewed the Advice Memorandum; that he met with the Advice staff to discuss the Wal-Mart case; that he made a decision that further work was needed before a decision on the merits of the charge could be made; and that he directed his subordinates to contact the Wal-Mart representatives to attempt to reach a resolution that would negate his need to make a decision on the merits of the charge.

These actions by Mr. Solomon were of substantial significance to the matter in that he made actual decisions regarding how to proceed with the Wal-Mart case that were not perfunctory, administrative, or peripheral. *See Id.* Participation in a matter may be substantial even though it is not outcome determinative and a finding of substantiality is based not only on the effort devoted to the matter, but also on the importance of that effort. *Id.* Under that regulatory analysis, Mr. Solomon's participation in the Wal-Mart case was substantial because he engaged in a decision-making process that involved the question of whether to issue a complaint against Wal-Mart; he stopped the Division of Advice from sending the Advice Memorandum to the Regional Office; he discussed concerns about Wal-Mart's social media policy; and he instructed the Division of Advice to seek a resolution with Wal-Mart's representatives that would result in the dismissing of a charge. Those types of actions are clearly not perfunctory, administrative, or peripheral; they are rather very central to issues of how the Agency was to proceed with the case against Wal-Mart. The participation by Mr. Solomon, while not resulting in a decision to authorize the issuance of a complaint, did result in a determination of how to bring to bear upon Wal-Mart the authority of the Federal Government to effect a change in a policy that affects each of Wal-Mart's employees and was, by its very nature, intended to be determinative of the outcome. Participating in that type of decision-making process of whether, when, and how to engage a charged party to seek a resolution of a case is of such significance so as to render it substantial participation. Given these facts and this analysis, we find Mr. Solomon's assessment of his participation to be incorrect.<sup>1</sup>

A disqualifying financial interest arises from the ownership of publically traded stock in a corporation that is a party if the value of the stock held by the employee is in excess of \$15,000. 5 C.F.R. 2640.103(b) and 2640.202(a). Wal-Mart was a charged party and, between January 21, 2012 and February 27, 2012, Mr. Solomon owned Wal-Mart stock at a value that exceeded \$15,000.

When drafting the regulation that provides the exemption for securities below a threshold level, the U.S. Office of Government Ethics (OGE) provided an explanation of how a financial interest arises from the ownership of stock:

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<sup>1</sup> We found the Associate General Counsel's statement that the Division of Advice was not directed to do more work to determine the merits of the case to be credible, particularly given the statements of the Deputy General Counsel, at pages 8-9 of IE 7, and the notes of the supervisory attorney, at IE 12. Had Mr. Solomon given such direction, we would likewise find that to be substantial participation as it was combined with the direction to contact Wal-Mart to resolve the case.

- Ownership of shares in an entity normally represents an ownership interest in the entity itself;
- Government matters that affect the financial interest of the entity have a concomitant effect on the financial interest of the person who owns stock;
- The effect of the matter on the entity need not be reflected in a change in price of the stock; and
- A conflict of interest is implicated if the matter affects the entity's financial interest in any measurable way.

60 FR 47208, 1995 WL 529702 (FR) (Page 14-15).

In any matter involving an unfair labor practice (ULP) charge, the financial interest of a charged party will be affected by the decisions of the Agency. For example, a decision that there is merit to a charge will require a charged party to expend financial resources to defend against the complaint or meet with the NLRB representatives to reach a settlement. If the matter involves the termination of an employee, the outcome will determine if the employee is reinstated and if back pay is owed. As such, ULP charges are matters that have a direct effect on the financial interest of charged parties in that there is a close causal link between any decision or action to be taken by the NLRB in the matter and the expected effect of the matter on the financial interests of the charged party. *See* 5 C.F.R. 2640.103(a)(3). This direct effect on the charge party's financial interest is perhaps why financial disclosure filers, such as Mr. Solomon, are warned each year that they should not participate in any particular NLRB matters involving any entity in which they own stock unless its value is below \$15,000.

### *Aggravating, Extenuating and Mitigating Circumstances*

The legal analysis for determining whether the prohibition on acting in matters involving financial conflicts of interest has been violated is a strict liability standard. United States v. Hedges, 912 F.2d 1397, 1400-03 (11th Cir. 1990). We believe, however, that aggravating, extenuating and mitigating circumstances are relevant in considering how to move forward and/or if corrective action is necessary.

We found no evidence to support a finding that Mr. Solomon acted with the intent to enrich himself or otherwise achieve any financial benefit. That finding is based on the consistent statements of the Division of Advice personnel that support Mr. Solomon's assertions that his motivation was to avoid entangling the Agency in an episode of protracted litigation with a major employer.

We did, however, find a complete failure of the NLRB's ethics program with regard to the operations of the Office of the General Counsel and that the environment at the NLRB in which this violation occurred was dysfunctional and adversarial.

The Office of the General Counsel should have had a system in place to screen matters for the possibility of a financial conflict of interest before the matters were forwarded to the General Counsel. That having failed, Mr. Solomon should have known not to act, absent a waiver, in the matter given his acknowledgment that he was aware of the need for a waiver of the financial conflict of interest. At the very least, Mr. Solomon should have sought advice from the DAEO given the warnings he had received not to participate in matters involving parties in which he owned stock of \$15,000 or more. Mr. Solomon, having made the wrong decision, should have been stopped by the Deputy General Counsel from participating in the Wal-Mart matter until he had a waiver or divested himself of the Wal-Mart stock. That everything failed to stop Mr. Solomon is evidence of a complete failure of the NLRB's standards of conduct program with regard to the Office of the General Counsel.

On the day that the Wal-Mart Advice Memorandum was forwarded to Mr. Solomon, he and the Director of Administration/DAEO sat through a presentation by an outside consultant that detailed the findings of an assessment of the Division of Administration. Mr. Solomon initiated the assessment months earlier after receiving information that caused him concern that the managers in the Division of Administration had created a hostile work environment. Prior to that meeting, the Director of Administration/DAEO sent Mr. Solomon an e-mail message questioning him on when his time as Acting General Counsel might end. It is readily apparent that the adversarial nature of that situation is not conducive to providing an ethics program for the Office of the General Counsel with effective counseling for ethics and standards of conduct issues, as envisioned by 5 C.F.R. 2638.203.

When requesting a waiver of a financial conflict of interest, the employee is to advise the Government official responsible for his appointment of the "nature and circumstances" of the matter and make "full disclosure" of the interest in advance of taking action. 5 C.F.R. 2640.301(a)(1). Requests for waivers are to be made in advance of acting in a matter involving a financial conflict of interest. 5 C.F.R. 2640.301(a)(5). For Presidential appointees, two Executive Orders delegate the authority to approve requests for waivers of financial conflicts of interest to the head of an agency except in matters that involve the head of the agency. In those cases, the approval authority has been delegated to the Office of the White House Counsel.

The General Counsel is not the typical Government General Counsel and the position is often considered, or accorded the status of, the "head of the agency." A statutory example is when the General Counsel is performing his or her duties under section 3(d) of the National Labor Relations Act. The Chairman simply has no role in supervising that function of the General Counsel operations. Additionally, the Chairman and the General Counsel have traditionally jointly appointed certain senior Agency officials and jointly performed such acts as submitting the Performance and Accountability Report and the Office of Inspector General Semiannual Report to Congress. The General Counsel also has direct supervision over the person who performs the DAEO function. Because the General Counsel position at the NLRB is considered, for some purposes, the "head of the agency," Mr. Solomon's request for a waiver should have not been acted upon by the Director of Administration/DAEO – particularly because the basis for the waiver request was so that Mr. Solomon could perform his section 3(d) duties.

Mr. Solomon's request for a waiver lacked a complete description of the "nature and circumstances" of the matter. Mr. Solomon did not disclose his participation in the matter prior to requesting a waiver, the correct status of the matter, nor that the matter involved a Wal-Mart employee who was alleging that he was wrongfully discharged. We find that the waiver request was misleading because of the combination of a lack of information provided by Mr. Solomon and his statement that "absent settlement or withdrawal, the case would be presented to me to decide whether or not to issue a complaint" given that the matter had already been presented to him for a decision. We believe that it is reasonable to expect that a person requesting a waiver would include his level of participation up to the point of submitting the request for the waiver and a full description of the status and issues involved in the matter.

We are, however, equally concerned that there was nothing found in DAEO administrative records to indicate any attempt by the Director of Administration/DAEO to seek additional information before acting on the waiver request. Once the Director of Administration/DAEO received the waiver request, she should have taken steps to provide counseling to Mr. Solomon on his ethical duties as they related to his Wal-Mart holdings and social media ULPs. *See* 5 C.F.R. 2638.202(b)(3). Adequate counseling would entail getting a detailed description of the facts and circumstances of the matter, given that the information was not included in the waiver request. Once that information was received, it would have been apparent that administrative action was necessary to cure an actual or potential ethics violation. *See* 5 C.F.R. 2638.203(b)(9)(i).

Mr. Solomon's failure to timely submit a waiver request or seek ethics counseling and the Director of Administration/DAEO's failure to offer to meet with and counsel Mr. Solomon are evidence of a complete lack of communication between the two of them. That lack of communication at such a high level in the Agency further illustrates the dysfunctional and adversarial relationship that then existed.

As explained above, the Director of Administration/DAEO should not have acted to approve or deny the waiver request. Nevertheless, having decided to act, the Director of Administration/DAEO should have, but did not, use the regulatory framework established by OGE to make a determination of whether to grant the request. *See* 5 C.F.R. 2640.301. Under that framework the Director of Administration/DAEO should have determined whether Mr. Solomon's Wal-Mart stock was sufficiently substantial to be deemed likely to affect the integrity of his service. That determination should have been based on factors that included the interest that created the disqualification; the identity of the holder of the interest; the value of the disqualifying financial interest (value of the potential loss or gain); the value of the holding in which the financial interest arises and its relationship to the individual's assets; the importance of the employee's role; and other factors. Rather than following that framework, the Director of Administration/DAEO's analysis appears to have taken into consideration only her views on the need for Mr. Solomon's participation and that he did not make a compelling case. Additionally, she appears to have been looking for a justification to deny the waiver given her comments in the e-mail message to DAEO program officer (IE 23):

**From:** Joseph, Gloria  
**Sent:** Tuesday, January 31, 2012 9:11 AM  
**To:** Heinzmann, Kym  
**Subject:** RE: Lafe seeking waiver Wal-Mart case

Do we have any language in OGE publications or our own or elsewhere that talks about these waivers being an action of last resort? Anyone reading the language, below, would simply assume that all they have to do is ask for a waiver while making full disclosure of their asset. I'd like to be able to point to something that talks about operational needs, etc.

### ***Remedial Action***

The actions of the newly appointed DAEO would appear to set up an appropriate system of controls to prevent future violations. It will remain, however, incumbent upon the individuals to ensure that they follow the standards of conduct.