

Congress of the United States

Washington, D.C. 20515

October 27, 2021

Delivered via Email

The Honorable Lauren M. McFerran
Chairman
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570-0001

Dear Chairman McFerran:

We write to you about concerning events related to the standing of National Labor Relations Board (NLRB or Board) Member David Prouty, the implications of this situation, and the integrity of the Board. On October 8, you notified Congress that Mr. Prouty, who was confirmed by the Senate on July 28 as a Board member, was improperly administered the oath of office by you on August 28 and erroneously served as a member for 25 days because the President did not officially appoint Member Prouty until September 22.¹ This error, which was not made public for 17 days, is more egregious than your letter implies and could have serious implications regarding Board activities during the period in question. While your letter attempts to minimize the implications of the NLRB's failure, it raises many questions, including one about the Board's ability to administer the law faithfully.

Oaths of office are not casual affairs. The Constitution of the United States prescribes exactly when a new President is sworn in and takes his oath of office. Executive branch employees must be sworn in on their first day. Members of Congress are sworn in before they can vote, speak, or be assigned committees. Congressional staff also must take an oath in order to serve. Without taking an oath of office, an individual cannot be considered "sworn in" or exercise the serious and solemn responsibilities of their office.

Your letter indicates that due to an "internal agency misunderstanding," Mr. Prouty had to be re-administered the oath of office on September 22, and that you "have initiated a thorough review." The tone of your letter suggests that, despite your hope that the review will "prevent such an error from occurring again," there was no harm as result of the "error."

To gain a better understanding of the circumstances that led to this disturbing situation, please provide answers and relevant materials for the following:

¹ Letter from Lauren McFerran, Chairman, NLRB, to Patty Murray, Chairman, S. Comm. on Health, Educ., Lab., & Pensions et al. (Oct. 8, 2021), <https://www.nlr.gov/sites/default/files/attachments/pages/node-166/letter-to-oversight-committees-regarding-appointment-of-member-prouty.pdf>.

- All documents and communications between the NLRB and White House Office of Personnel related to David Prouty, his presidential commission, and his oaths of office, including “any legal or administrative concerns arising from the error.”
- A complete description of the “internal agency misunderstanding” and a list of “all necessary steps” the NLRB has taken and is planning to take to identify and address any resulting legal and administrative concerns stemming from the violation, along with all related documents and communications.
- An explanation of whether the error regarding Mr. Prouty’s oath of office delayed, or did not delay, the official commencement of his service as a Board member.
- All documents and communications regarding guidance given by counsel—including, but not limited to, NLRB counsel—to re-administer the oath to Mr. Prouty.
- Additional details on the “thorough review” the NLRB is conducting and its likely timing.

In addition to the impact of the aforementioned failure in agency operations and controls, your letter also raises significant concerns about the nature of Mr. Prouty’s work during the 25 days he was not a Board member as well as about the legitimacy of the Board’s actions during this period. According to your letter, Mr. Prouty was a *de facto* employee of the Board even though he lacked a presidential commission.

To provide a better understanding of Mr. Prouty’s role and the impact of his actions during the 25 days he lacked a presidential commission, please provide the following:

- A copy of Mr. Prouty’s official calendar.
- All documents and communications regarding the NLRB Inspector General’s (IG) determination related to this situation.
- All documents and communications used by NLRB, the Department of Justice, the Office of Personnel Management, or any other agency to determine that Mr. Prouty was a *de facto* employee for 25 days.
- All documents and communications used by NLRB personnel—including, but not limited to, ethics officials, the IG, and the Chief Information and Privacy Officer—to determine the error’s impact on agency operations and whether there was a violation of federal law.
- All documents and communications, and an explanation, about how Mr. Prouty legally received compensation during the 25 days, how much pay he received, and any documents and communications about whether Mr. Prouty could owe back pay with interest to the federal government for the 25-day period.

- An explanation of whether Mr. Prouty's work or the work of the legal assistants assigned to him in his capacity as a Board member, for the 25 days he lacked a presidential commission, violated Section 4(a) the *National Labor Relations Act*.²

Taken as a whole, your October 8 letter leads us to believe that the Board was severely compromised and unable to conduct its official activities legitimately. It is unclear how Mr. Prouty could have acted in any capacity as a Board member or even as an employee of the federal government. Further, without Mr. Prouty lawfully serving as a Board member, there may have been instances in which the Board did not have a quorum with which to conduct business or a valid majority for official decisions.

To allow us to better understand the effect on the Board's adjudicatory functions, please provide the following:

- A list of all decisions Mr. Prouty participated in from August 28 to September 22, including information on case status and resulting member vote tallies.
- A list of all cases Mr. Prouty or his legal assistants worked on from August 28 to September 22.
- All documents and communications used by the NLRB to determine whether the cases worked on by Mr. Prouty or his legal assistants from August 28 to September 22 are valid.
- All documents and communications used by the NLRB for the purposes of determining whether actions taken by the Board from August 28 to September 22 are valid or required a re-hearing or other further action to make them valid.

Finally, there was a troubling delay in your letter to Congress and the related press release from the time you learned of the error.³ In your letter, you reported that you became aware on September 22 that Mr. Prouty was not a duly sworn member of the Board. Yet, you neglected to report the issue to Congress for more than two weeks.

- Please provide an explanation of why the Board did not immediately inform Congress upon discovering Mr. Prouty's lack of presidential commission on September 22.

² 29 U.S.C. § 154(a) ("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.").

³ See News Release, NLRB, Statement on Administrative Error During Member Prouty's Swearing-In (Oct. 8, 2021), <https://www.nlr.gov/news-outreach/news-story/statement-on-administrative-error-during-member-proutys-swearing-in>.

The Honorable Lauren M. McFerran

October 27, 2021

Page 4

- Please also confirm whether your October 8 letter was the NLRB's first communication of any kind to Congress regarding this matter.

Given the severity of this issue, we expect meaningful and forthright answers to our requests for information not later than November 10. If you have any questions, please contact Joe Wheeler with the House Committee on Education and Labor at (202) 225-4527 and Matt Mimnaugh with the Senate Committee on Health, Education, Labor, and Pensions at [Matt Mimnaugh@help.senate.gov](mailto:Matt_Mimnaugh@help.senate.gov).

Sincerely,



Virginia Foxx
Ranking Member
House Committee on Education and Labor



Richard Burr
Ranking Member
Senate Committee on Health, Education,
Labor, and Pensions



Rick W. Allen
Subcommittee on Health, Employment,
Labor, and Pensions



Mike Braun
Subcommittee on Employment
and Workplace Safety

cc: The Honorable David P. Berry, Inspector General
National Labor Relations Board

Lori Ketchum, Associate General Counsel, Ethics Office
National Labor Relations Board