

FEDERAL WORKERS ALLIANCE

COLLECTIVELY REPRESENTING OVER 550,000 FEDERAL AND POSTAL WORKERS

March 28, 2022

Hon. Gary Peters
Chairman
Homeland Security and Governmental Affairs Committee
United States Senate
724 Hart Senate Office Building
Washington, D.C., 20510

Re: Request for Senate Homeland Security and Governmental Affairs Committee to Favorably Report Ernest W. DuBester's Nomination for FLRA Member and Kurt Rumsfeld's Nomination for General Counsel of the Federal Labor Relations Authority

Dear Chairman Peters and Democratic Members of the Senate Homeland Security and Governmental Affairs Committee:

We, the undersigned, write as members of the Federal Workers Alliance (FWA), a coalition of national unions that collectively represents more than 550,000 federal workers across the country, to request that you vote to report favorably the nominations of Ernest W. DuBester and Kurt Rumsfeld to the Senate as soon as possible.

We are well over a year into the Biden Administration, yet the President's day-one commitment to resetting labor-management relations in the Executive Branch and pursuing collaborative and productive labor relations in federal government is hampered by a Federal Labor Relations Authority (FLRA) currently controlled by a 2-1 majority of anti-worker, anti-union appointees from the Administration. President Biden also named an Acting General Counsel for the FLRA last March to fill the vacant position, but the federal workforce needs a Senate-confirmed Presidential appointee leading the FLRA Office of the General Counsel to investigate and prosecute complaints under the Federal Service Labor-Management Relations Statute (the Statute) efficiently and fairly.

DuBester, the President's nominee for FLRA Member, is currently the Chair of the FLRA and has been a Member of the FLRA for almost 12 years. Previously, he served as Chair of the National Mediation Board (NMB) for eight years. He has accumulated an invaluable depth of experience and knowledge regarding labor law and the Statute, has been nominated by four Presidents from both political parties and confirmed in the Senate six times with bipartisan support. Considering this extensive record as an experienced federal labor law practitioner and public servant, DuBester is highly qualified and should be reported favorably out of HSGAC at the next available opportunity and confirmed immediately thereafter.

Rumsfeld, the President’s nominee for General Counsel of the FLRA, has served as FLRA Assistant General Counsel from 2013 to 2019 to lead the agency’s investigative and prosecutorial arm. The Office of the General Counsel lacked Senate-confirmed leadership since 2017, which has caused a massive backlog of unfair labor practice cases and resulted in unacceptable delays for federal employees and their unions seeking redress for violations of the Statute. While the appointment of an Acting General Counsel in March 2021 has returned functionality to the Office of the General Counsel, the office requires leadership that is appointed with the advice and consent of the Senate. Rumsfeld is highly qualified and should be reported favorably out of HSGAC at the next available opportunity and confirmed immediately thereafter.

Our urgency for wanting President Biden’s nominees for the FLRA – including Susan T. Grundmann, nominee for FLRA Member, who was favorably reported out of Committee on February 2, 2022 – confirmed by the Senate as soon as possible is borne out of the unpredictable and poorly-reasoned decisions that current FLRA Members Colleen Duffy Kiko and James Abbott have issued over the last four years, as well as the four year vacancy in the FLRA General Counsel’s Office that has created a significant backlog of complaints. Kiko and Abbott have amassed a track record for decisions that disregard decades of Authority precedent, fail to apply legal reasoning, and are inherently biased against labor and the collective bargaining process. Their decision-making has severely restricted federal employees’ statutory right to bargain, scaled back management’s duty to bargain, and limited negotiability over telework and unions’ ability to initiate bargaining over work conditions. During the time that Kiko and Abbott have formed a majority on the FLRA, the dissenting voice on the FLRA board has been Member and now Chair DuBester, whose minority opinions have applied sound reasoning and relied on well-established precedent.

The U.S. Circuit Court for the District of Columbia has vacated five significant decisions in which Kiko and Abbott formed a majority on. Strikingly, in each of these D.C. Circuit Court rulings, the court has admonished Kiko and Abbott for misunderstanding legal concepts and arriving at arbitrary decisions that inappropriately set aside precedent. In a 2020, D.C. Circuit Court decision noted that Abbott and Kiko “engage[d] in a type of circular reasoning that has been criticized by the U.S. Supreme Court” when they misapplied basic precedent in their FLRA decision regarding the difference between the phrases “terms and conditions of employment” and “working conditions” (AFGE Local 1929 v FLRA, 961 F.3d 452, [D.C. Cir. 6/9/2020](#)). More recently, the D.C. Circuit described a 2020 policy statement advanced by Kiko and Abbott that removed union’s right to seek mid-term bargaining based on reasoning that is “a non sequitur” (AFL-CIO v FLRA, No. 20-1398, [D.C. Cir. 1/28/2022](#)). A further example of Kiko and Abbott’s poorly reasoned decisions is the D.C. Circuit vacated another policy statement and explained, “The cursory policy statement that the FLRA issued to justify its choice to abandon thirty-five years of precedent promoting and applying the de minimis standard and to adopt the previously rejected substantial-impact test is arbitrary and capricious” (AFGE v FLRA, No. 20-1396, [D.C. Cir. 2/1/2022](#)).¹

¹ U.S. Circuit Court for D.C. decisions that have remanded or remanded and vacated FLRA decisions supported by Kiko and Abbott include: AFGE Local 1929 v FLRA, 961 F.3d 452, D.C. Cir. 6/9/2020; NWS v FLRA, No. 19-1163, D.C. Cir. 7/31/2020; NTEU v FLRA, No. 20-1148, D.C. Cir. 6/22/2021; AFGE, AFL-CIO v FLRA, No. 20-1398, D.C. Cir. 1/28/2022; and, AFGE v FLRA, No. 20-1396, D.C. Cir. 2/1/2022;

We appreciate that HSGAC leadership, Members, and staff take these nominations seriously and are committed to thoroughly examining the nominees to ensure fair, efficient, and unbiased judgment and administration at the FLRA. The qualifications of these nominees should not be in question and DuBester and Rumsfeld's service at FLRA is not unfamiliar to the Committee. DuBester has been confirmed numerous times by voice vote to serve on the NMB and the FLRA. Rumsfeld possesses a detailed understanding of FLRA operations, knows first-hand how to efficiently administer and manage the agency to promote effective labor-management relations in federal government.

We are aware that Ranking Member Portman, in a recent HSGAC hearing mentioned "distressing allegations regarding conduct by nominees to serve on the Federal Labor Relations Authority." Ranking Member Portman also revealed he has requested a FLRA Inspector General's report on DuBester and Rumsfeld based on records produced by a FOIA request. It is our understanding that this FOIA request is part of a politically motivated effort to disparage these nominees who have distinguished careers in public service. It is our belief that the facts will ultimately prove the day, and any attempts to smear qualified public servants for political gain will reside on the wrong side of American history.

Therefore, we request you vote to report DuBester and Rumsfeld favorably to the Senate. In doing so, we ask you to disregard the baseless witch hunt from dark money political sources meant to unethically smear the reputations of legitimate civil servants. Instead, we insist that you consider and review DuBester and Rumsfeld's careers in public service, their conversations with you, with Committee Members and staff, and the qualifications they have amassed as distinguished practitioners of federal labor law.

We thank you, in advance, for considering our request and our concerns. If you have any questions, contact FWA legislative co-chairs Faraz Khan at fkhan@ifpte.org or Steve Lenkart at slenkart@nffe.org.

Sincerely,

American Federation of State, County, and Municipal Employees (AFSCME)
American Federation of Teachers, AFL-CIO (AFT)
Antilles Consolidated Education Association (ACEA)
Federal Education Association/National Education Association (FEA/NEA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAMAW)
International Brotherhood of Electrical Workers (IBEW)
International Brotherhood of Teamsters (IBT)
International Federation of Professional and Technical Engineers (IFPTE)
International Organization of Masters, Mates and Pilots (MM&P)
Metal Trades Department, AFL-CIO (MTD)
National Association of Government Employees, SEIU (NAGE)
National Federation of Federal Employees (NFFE)
National Weather Service Employees Organization (NWSEO)

Overseas Federation of Teachers, AFT, AFL-CIO
Professional Aviation Safety Specialists, AFL-CIO (PASS)
Patent Office Professional Association (POPA)
Seafarers International Union/NMU (SIU)
Service Employees International Union (SEIU)
SPORT Air Traffic Controllers Organization (SATCO)
United Power Trades Organization (UPTO)