UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK UNIVERSITY,	:	
	:	
Employer,	:	
	:	Case No. 2-RC-23481
	:	
-and-	:	
	:	
GSOC/UAW,	:	
	:	
Petitioner.	:	August 17, 2011

MEMORANDUM IN OPPOSITION TO MOTION FOR RECUSAL

This case raises the question whether the Board should reverse Brown University, 342 NLRB 483 (2004) and return to the holding of New York University, 332 NLRB 1205 (2000) (NYU I) that graduate assistants are statutory employees entitled to the protections of the Act. Six weeks after the Petitioner filed its Request for Review presenting that issue to the Board, the Employer has now moved for recusal of the Chairman. The Employer claims that her impartiality might be questioned, based upon a conversation with the Petitioner's expert witness at an academic conference during which there was some discussion of the Brown decision. The Employer's suggestion that it is improper for academics, government officials and practitioners to exchange ideas about legal issues is offensive and ridiculous. The Employer's motion should be denied.

I. The Expert Testimony

The Board in Brown "declare[d] the federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act." 342 NLRB at 493. The Board based this holding on its conclusion that there was a "strong likelihood" that collective bargaining would have a detrimental effect on the education

process by interfering with the relationships between students and their faculty advisors and by impinging upon academic freedom. Ibid. The dissenting Board members, including now-Chairman Liebman, argued that there was no evidence to support the claim that collective bargaining would have any injurious impact on student-mentor relationships or academic freedom. 342 NLRB at 499.

In the instant hearing, the Petitioner introduced the testimony of Dr. Paula Voos, a labor economist and professor at Rutgers University. She testified regarding a survey that she conducted in conjunction with Dr. Adrienne Eaton, also a Rutgers professor, and Sean Rogers, a Rutgers graduate assistant. That survey compared the responses of doctoral students at universities where graduate assistants are represented by labor organizations with responses from doctoral students at similar schools where graduate assistants are unrepresented. The researchers posed questions designed to probe the student/faculty relationship and the state of academic freedom. The study found no evidence that unionization damages either student-faculty relationships or academic freedom. The Employer called Dr. Henry Farber of Princeton to critique Dr. Voos's study. Dr. Farber was forced to concede that there is no evidence that unionization of graduate assistants harms the student/faculty relationship or undermines academic freedom. (Tr. 1062)[1].

II. Dr. Voos's Testimony about a LERA Conference Attended by Chairman Liebman

On cross examination, Dr. Voos testified that she spoke with Chairman Liebman at a function sponsored by the Labor and Employment Relations Association ("LERA") (Tr. 103-04). LERA is the leading nationwide professional group for academics,

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[1] The Employer provided copies of Dr. Voos's testimony with its motion. A copy of the cited testimony of Dr. Farber is attached hereto.

neutrals, government officials and party advocates in the field of labor and employment relations (Tr. 116). Dr. Voos is a past president of the organization, when it was known as the Industrial Relations Research Association (Tr. 76-77). During a LERA meeting, Chairman Liebman made some suggestions about areas of academic research that might help to inform Board decision-making, including the impact of collective bargaining on faculty-student relationships and academic freedom (Tr. 103-05). Dr. Voos also testified that she mentioned the Brown decision to Chairman Leibman during an informal conversation at a LERA reception (Tr. 103-04). Her entire testimony regarding that informal conversation was "I think I knew about her dissent and said something to her about it in passing." (Tr. 103).

III. There is no Basis for Recusal

The Employer argues that Chairman Liebman should disqualify herself because the communication with Dr. Voos described above might create an appearance of partiality. There is absolutely no basis for this claim. Forums such as LERA provide people involved in the labor relations field an opportunity to share ideas and discuss issues away from the competition and conflict inherent in litigation and in many aspects of labor relations. Conversation about important legal issues and decided cases are part of the function of such organizations. Indeed, Dr. Voos also discussed the Brown decision with former Board member Raudabaugh, a Republican appointee (Tr.102-103) Moreover, in another recent hearing, the Employer's attorney described his own participation in a similar type of forum in which he appeared on a panel with Dr. Eaton and in which they discussed the same study (NYU Poly Transcript, p. 16, attached). There is nothing wrong in a government official at such a forum suggesting to a social

scientist areas of research that might assist government decision-making.[2]

The lack of foundation for the Employer's argument is revealed by its citation to Day v. United States of America, Veterans Administration Medical Center, 1997 U.S. Dist. LEXI 11777 (8/5/97). The Employer cites this as a case in which a judge recused herself based upon her "acquaintance" with an expert witness. While the decision does not describe that "acquaintance" in detail, the judge characterized her relationship with the expert as "a long and personal acquaintance...." The record in this case, in contrast, discloses a professional relationship among people in the same field. There is no suggestion of a "personal" relationship or anything that could call the Chairman's objectivity into question.

Accordingly, the Employer's Motion for Recusal should be denied.

RESPECTFULLY SUBMITTED

BY: _____

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[2] In this regard, one should recall that it was the Brown majority that made assumptions about the impact of collective bargaining on education. It is reasonable and rational to ask to have those assumptions subjected to empirical testing.

CERTIFICATE OF SERVICE

This hereby certifies that the foregoing Memorandum in Opposition to Motion for Recusal was electronically mailed, on this 17th day of August 2011 to all counsel of record as follows:

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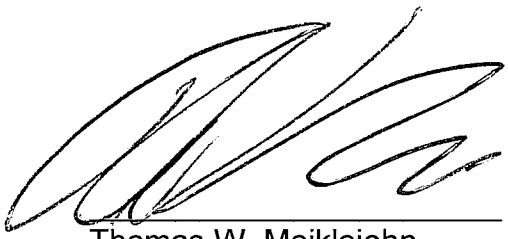

Thomas W. Meiklejohn

TESTIMONY OF HENRY FARBER

MR. BRILL: I just object. I don't think that she studied the University of Washington?

MR. MEIKLEJOHN: I'm sorry, what?

MR. BRILL: Washington State. It's confusing with Seattle.

MR. MEIKLEJOHN: Sorry. Well us east coast people have that problem.

Q Do you want me to repeat the question using Washington State or do you understand the question? Never mind. Let me just ask you this. Are you aware of any studies that establish or suggest that union representation of graduate students at universities harms the faculty/student relationship?

A No.

Q Are you aware of any studies that support the proposition that union representation of graduate student at universities reduces academic freedom?

A No.

MR. MEIKLEJOHN: No further questions.

HEARING OFFICER EVEILLARD: Mr. Brill?

MR. BRILL: Just give me a minute.

HEARING OFFICER EVEILLARD: Off the record.

(Recess.)

HEARING OFFICER EVEILLARD: On the record. No further questions?

MR. BRILL: No.

HEARING OFFICER EVEILLARD: Professor Farber, thank you so

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of: Case No. 29-RC-12054

POLYTECHNIC INSTITUTION
of NEW YORK UNIVERSITY,

Employer,

and

INTERNATIONAL UNION, UAW,

Petitioner

Place: Brooklyn, NY
Dates: May 24, 2011
Pages: 1 Through 109
Volume: 1

OFFICIAL REPORTERS

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there was no dispute at NYU that the TAs were employees.

And as I said with respect to the RAs, the situation here at Poly is much different even then it was at NYU. We have -- at NYU we had a binding Board decision at NYU that the science RAs were not employees and we -- we relied on that -- a decision and therefore did not have the motivation that Polytechnic would have not to cross-examine the study in that respect.

HEARING OFFICER ANDERSON: Um-hmm.

MR. BRILL: And finally I just want to mention that the study, as it was admitted, was a preliminary report of data that had not been fully analyzed and not been peer reviewed and had not been published. And since that point I know, because I participated in the panel discussion with Dr. Eaton, who was the co-author of that study, that further analysis had been done and -- and so the preliminary data that was reported in the NYU case does not necessarily reflect the current status of that study.

And in particular it was my understanding from the panel discussion, which is participated in, incidentally together with an official of the UAW, Nick Paluzzi (ph), that at least to some extent the conclusions that had been suggested in the NYU case have been limited in response to some of the criticisms that NYU's expert, Dr. Farber, had levied.

So for all those reasons, we -- and this can be elaborated