UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

POLYTECHNIC INSTITUTE OF NEW YORK UNIVERSITY,	:	
Employer,	:	
-and-	:	Case No. 29-RC-012054
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),	:	
Petitioner	:	

MOTION FOR RECUSAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

New York University ("NYU") and Polytechnic Institute of New York University ("NYU-Poly") hereby respectfully move for National Labor Relations Board ("NLRB") Member Nancy Schiffer to recuse herself from participating in these cases. As described below, and as supported by the accompanying opinions of government ethics experts Professor Richard Painter and Professor Kathleen Clark, Member Schiffer's participation in these cases as an adjudicator would violate due process and applicable ethical rules because of Member Schiffer's previous employment as Deputy General Counsel of Petitioner International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("UAW").[1]

PRELIMINARY STATEMENT

Due process and the ethical obligations of government officials such as NLRB Members mandate that parties receive a fair hearing before an impartial tribunal, and that where such impartiality may be questioned, officials recuse themselves. The circumstances here call for Member Schiffer to recuse herself because, as Deputy General Counsel of the UAW during an earlier phase of the same matter encompassed by these proceedings, Member Schiffer served as a high-ranking official and legal representative of a party.

By way of summary, the relevant facts are:[2]

- The UAW has engaged in efforts to organize NYU's graduate student assistants since 1998. (Brill Aff. ¶ 4.) These efforts included representation proceedings before the NLRB initiated in May 1999 and resulting in the certification of the

[1] Although the Petitioner in the NYU case is nominally "GSOC/UAW", the UAW has made clear that it is the Petitioner in both cases. (*See* Affidavit of Edward A. Brill ("Brill Aff.") ¶¶ 17, 31.)

[2] We refer to the accompanying Brill Affidavit for a fuller account of the relevant facts.

UAW as the exclusive bargaining representative of graduate student assistants at NYU in 2000 ("*NYU I*"). (*Id.* ¶¶ 4-6.)

- Member Schiffer served as the Deputy General Counsel of the UAW from November 1998 until June 2000. (*Id.* ¶ 8.) In this role, Member Schiffer was responsible for the day-to-day administration of the UAW Legal Department, including NLRA representation cases and organizing campaigns. (*Id.* ¶¶ 10-11, Exs. 4 and 5.) It seems apparent that, at a minimum, Member Schiffer had supervisory responsibility for the UAW's organizing campaign at NYU and the *NYU I* proceeding.

- After an initial collective-bargaining agreement with the UAW expired in 2005, NYU withdrew recognition from the UAW due to the NLRB's decision in *Brown University*, 342 NLRB 483 (2004), overruling *NYU I* and holding that graduate student assistants were not employees under the National Labor Relations Act. (Brill Aff. ¶¶ 14-15.) The UAW has persisted in seeking to represent NYU's graduate student assistants notwithstanding NYU's withdrawal of recognition, and filed the present petition on May 3, 2010. (*Id.* ¶ 16.)

- The UAW has treated the present case as a continuation of its initial organizing drive and the *NYU I* case. (*Id.* ¶¶ 16-20, 22, 32-34, Ex. 7.) Thus, the UAW's submissions in the case repeatedly refer to and explicitly seek to restore the previous bargaining relationship. (*Id.* ¶¶ 16-20, 22, 32-33.)

- The UAW also seeks to represent graduate student assistants at NYU-Poly, which is owned by NYU and will be merged into NYU on January 1, 2014. (*Id.* ¶¶ 24-

25.) It filed a petition to represent graduate assistants at NYU-Poly on May 5, 2011. (*Id.* ¶ 24.) The NYU and NYU-Poly matters involve the same parties and the same issues – in essence, they are the same matter. (*Id.* ¶¶ 27-32, 35-36.)

- The Board granted review in both cases on June 22, 2012 from decisions of the Regional Directors dismissing the UAW's petitions on the basis of *Brown*, and consolidated the cases for briefing. (*Id.* ¶¶ 21, 26, 30.) The Board invited the parties and interested *amici* to address four questions, including the central issue of whether the Board should modify or overrule *Brown*. (*Id.* ¶ 30.)

Under these circumstances, Member Schiffer's participation in adjudicating these cases would constitute a fundamental due process violation because of her role as UAW Deputy General Counsel during the initial organizing campaign and *NYU I* proceeding. NYU and NYU-Poly are entitled to a fair hearing before an impartial and disinterested tribunal, and Member Schiffer, who served as a lawyer and high-ranking official for their adversary (the UAW) in an earlier stage of the same matter, can therefore take no part in the current adjudication. Courts have come to the same conclusion in numerous cases involving administrative adjudication in order to protect the core right of a party to receive a fair hearing.

It is unsurprising that judicial disqualification standards would clearly require the same result here. Where an administrative agency member is engaged in adjudication – as opposed to rulemaking or other functions – it is particularly important to ensure the impartiality of the proceeding. For this reason, judges and administrative adjudicators alike must disqualify themselves where they participated in the same matter as or on behalf of a party, and in other circumstances in which their impartiality might reasonably be questioned. Any reasonable person with knowledge of all of the facts would question Member Schiffer's impartiality in these

matters because of her senior legal position at the UAW during the first NYU organizing drive and *NYU I*. The Standards of Ethical Conduct for Employees of the Executive Branch and the ABA Model Rules of Professional Conduct align with these same principles.

Member Schiffer's previous position with the UAW during the pendency of this matter is alone sufficient to call for her recusal in these proceedings. Should Member Schiffer decline to recuse herself on that basis, however, NYU and NYU-Poly must, at a minimum, have an opportunity to explore Member Schiffer's role in *NYU I* and the underlying organizing activities at an evidentiary hearing before Member Schiffer participates in adjudicating these cases.

ARGUMENT

I. DUE PROCESS MANDATES MEMBER SCHIFFER'S RECUSAL

"A fair trial in a fair tribunal is a basic requirement of due process . . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 763 (6th Cir. 1966) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). This principle has been repeated and applied on numerous occasions in the context of administrative adjudication, including in *Berkshire Employees Ass'n v. NLRB*, 121 F.2d 235, 238 (3d Cir. 1941), a case decided in the early days of the NLRB in which the Third Circuit stated:

> [I]f the administration of public affairs by administrative tribunals is to find its place within the present framework of our government it is essential that it proceed, on what may be termed its judicial side, without too violent a departure from what many generations of English speaking people have come to regard as essential to fair play. One of these essentials is the resolution of contested questions by an impartial and disinterested tribunal.

See also Am. Gen. Ins. Co. v. FTC, 589 F.2d 462, 463 (9th Cir. 1979) ("The principle that a party should not be judge in his own case represents a venerable tradition in Anglo-American legal

history."); *Trans World Airlines, Inc. v. Civil Aeronautics Bd.*, 254 F.2d 90, 91 (D.C. Cir. 1958) ("The fundamental requirements of fairness in the performance of [quasi-judicial] functions require at least that one who participates in a case on behalf of any party . . . take no part in the decision of that case by any tribunal on which he may thereafter sit.").

In several such cases, an administrative adjudicator has been disqualified or recused where he or she previously participated in the same or related matter. In *American General Insurance*, for example, an FTC member was disqualified from participating in a proceeding in which he had previously represented the Commission as General Counsel. 589 F.2d at 463-65.

Likewise, in *American Cyanamid*, the Chairman of the FTC was disqualified from hearing a case involving the same issues and parties as an earlier Senate subcommittee investigation in which he had served as Chief Counsel and Staff Director. 363 F.2d at 765-67. The Sixth Circuit held that Chairman Dixon's participation in the FTC hearing "amounted . . . to a denial of due process which invalidated the order under review." *Id.* at 767 (quotations and citations omitted). *See also Amos Treat & Co. v. SEC*, 306 F.2d 260, 261-67 (D.C. Cir. 1962) (disqualifying SEC Commissioner from sitting in case where he participated in earlier related investigation as director of Commission's Division of Corporation Finance, citing denial of "administrative due process"); *Trans World Airlines*, 254 F.2d at 91 (vacating order of Civil Aeronautics Board where member had previously participated in the matter as Solicitor of the Post Office Department by submitting a brief on behalf of the Postmaster General, a party to the proceeding). Similarly, in *Berkshire Employees Ass'n*, the court referred the case back to the NLRB to receive additional evidence as to whether Member Smith, who participated in the adjudication of the matter, had previously encouraged a boycott of the respondent-employer's

goods during the strike underlying the NLRB proceeding, and should therefore be disqualified. 121 F.2d at 238-39.

More recently, in *SEIU Local 121RN*, 355 NLRB No. 40 (2010), Member Becker recused himself from participation in a case in which he had coauthored a joint brief on behalf of his client, amicus curiae AFL-CIO, and the respondent in the case, the UAW. *Id.*, slip op. at 6-7 (citing *Trans World Airlines*).

The cases demonstrate not only that an agency adjudicator may not, consistent with due process, decide a matter in which he or she participated as or on behalf of a party, but further, that: (1) such participation need not have been direct or extensive; and (2) the scope of a matter for purposes of determining disqualification is not confined to a specific case or docket number, but instead must be viewed broadly.

Thus, in *American General Insurance*, the court emphasized that this principle would apply even where "the judge's or quasi-judicial officer's participation in the case as counsel may have been superficial rather than substantial . . . . [M]ere responsibility for administrative supervision of the [party], regardless of the extent of his knowledge and his approval of the acts of his subordinates, has been deemed sufficient to activate the disqualification rule." 589 F.2d at 464-65. Moreover, Member Becker recused himself in one of the cases discussed in *SEIU Local 121RN* even though he did not represent any party in the case at issue. 355 NLRB No. 40, slip op. at 6.[3]

[3] In the analogous context of the criminal restrictions on government employees under 18 U.S.C. § 208, the OGE has said that "personal and substantial participation requiring recusal" may include "[i]nvolvement in preliminary discussions, in interim evaluations, in review or approval at intermediate levels, or in supervision of subordinates working on a matter . . . . Employees should understand that many other degrees of participation short of primary responsibility or final approval could require recusal." OGE 99x8: Recusal Obligation and Screening Arrangements, Memorandum dated April 26, 1999, from Stephen D. Potts, Director, to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements.

With respect to the boundaries of the "matter" for purposes of determining whether the administrative adjudicator participated in the "same matter", the cases and other persuasive authority support a broad approach. In *American Cyanamid*, as described above, the disqualified FTC Chairman did not participate in an earlier stage of the FTC proceeding itself, but rather in a Senate subcommittee investigation on related issues involving the same parties. 363 F.2d at 765-67. In *Berkshire Employees Ass'n*, the court found that the allegations if proven, would call for disqualification of an NLRB Member who did not represent any party in NLRB proceeding but rather allegedly advocated the boycott of the respondent-employer *before* the NLRB proceeding was even commenced. 121 F.2d at 238-39.[4]

The ethics regulations applicable to federal employees and guidance thereunder likewise eschew a narrow conception of what constitutes the "same matter". Under 5 C.F.R. § 2641.201(h)(5):

> The same particular matter may continue in another form or in part. In determining whether two particular matters involving specific parties are the same, all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed.[5]

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[4] Similarly, in *In re Sofaer*, 728 A.2d 625, 626-27 (D.C. 1999), a former Legal Advisor to the U.S. Department of State who participated in the government's investigation of the 1988 bombing of Pan American Flight 103 over Lockerbie, Scotland, and related diplomatic and legal activities, was sanctioned by the D.C. Board on Professional Responsibility by undertaking to represent the government of Libya in connection with criminal and civil disputes and litigation arising from the same bombing. The court viewed the "matter" at issue broadly, agreeing with the Board's recognition that "'[t]he core fact at the heart of each piece of legal activity is . . . why and how Pan Am 103 blew up over Lockerbie.' The contours of the bombing and the government's investigation and related responses to it were defined sharply enough to constitute a 'matter' . . . ." *Id.* (some internal quotations omitted).

[5] While 5 C.F.R. § 2641.201 interprets 18 U.S.C. § 207(a)(1), which restricts *former* Federal employees from representing parties before the government in certain circumstances, the definition of "same particular matter" applies to *current* Executive Branch employees via 5 C.F.R. § 2635.502(b)(3). This latter regulation states that "particular matter involving specific parties has the meaning set forth in § 2637.102(a)(7) of this chapter." § 2637, however, has since been replaced by § 2641. In any event, the interpretation of "same particular matter" by the Office of Government Ethics ("OGE") provides persuasive authority for determining this issue in various contexts.

The OGE has analyzed the issue of whether two particular matters are the same consistent with this regulation. *See* OGE 99x14(2): Determining When a Matter is the Same Particular Matter under 18 U.S.C. § 207, Letter to a Federal Employee dated July 7, 1999; OGE 84x16: Determining Whether Two Proceedings are "Same Particular Matter" under 18 U.S.C. § 207(a), Letter to a DAEO dated December 17, 1984.

In addition, Rule 1.11 of the ABA Model Rules of Professional Conduct, which governs "Special Conflicts Of Interest For Former And Current Government Officers And Employees", and the Comments thereto, interpret the term "matter" consistent with OGE regulations with respect to the issue of whether two matters constitute the "same particular matter". Thus, Comment [10] to the Rule provides:

> [A] "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

MRPC 1.11, Comment [10].

Member Schiffer has already recognized that her participation as an NLRB Member in any matter in which she participated in her role as Associate General Counsel with the AFL-CIO would be inappropriate. (*See* Ethics Agreement of Nancy J. Schiffer, dated July 22, 2013 (Brill Aff. ¶ 38, Ex. 9.)) This recognition is an implicit acknowledgment of the foregoing principle that an administrative adjudicator may not, consistent with due process, determine a matter in which he or she participated as or on behalf of a party.

Turning to the instant matter, Member Schiffer's recusal is necessary here because of her apparent involvement in representation of the UAW in connection with the initial phase of the UAW organizing campaign and the NLRB proceedings in *NYU I*, which undoubtedly constitutes the same matter as the instant proceedings.

A. *NYU I* and the Underlying Organizing Campaign Is the Same Matter As the Instant Proceedings

First, there is no doubt that *NYU I* and the underlying UAW organizing campaign on the one hand, and the instant cases on the other, constitute the same particular matter involving specific parties. This is nowhere more evident than in the UAW's own submissions in these proceedings, in which the UAW has repeatedly made clear that its intention is to *restore* the collective bargaining relationship and bargaining unit established in *NYU I*. (*See, e.g.*, Petitioner's Request for Review at 1 (Brill Aff. ¶ 22) ("[The UAW] seeks to *represent the same unit of graduate student employees* employed by New York University . . . that it represented before *Brown* . . . . [T]he time has come to reverse *Brown*, return to the holding of *NYU I*, and *restore the bargaining rights of the graduate student employees at New York University.*") (emphasis added); *see also* Brill Aff. ¶¶ 19-20, 32-33.)

The decisions in *American Cyanamid*, *In re Sofaer*, and *Berkshire Employees Ass'n* further support the conclusion that the current proceedings and *NYU I* are one and the same. In each of those cases, the courts found grounds for disqualification even though the earlier matter was not nominally or technically the same matter as the later proceeding. Indeed, there were greater differences between the two matters in each of those proceedings – *American Cyanamid* (Senate subcommittee investigation vs. FTC proceeding); *In re Sofaer* (government investigation and diplomatic/legal consultation vs. civil/criminal litigation); and *Berkshire Employees Ass'n* (ex parte advocacy of boycott during strike vs. NLRB proceeding) – than there are between *NYU I* and the current proceedings, which differ only with respect to the passage of time. The same conclusion – that the two matters in each of those cases were the *same* matter – should thus obtain here.

There can be no dispute that the current proceedings involve the same basic facts, the same parties, and the same issues as *NYU I*. The core factual and legal issue in both *NYU I* and the current cases is whether NYU's graduate assistants are "employees" within the meaning of the NLRA. Furthermore, because the UAW expressly seeks to "restore" the bargaining unit found to exist in *NYU I*, a substantial portion of the hearing in the current NYU case involved the presentation of evidence by the parties as to the duties and responsibilities of the graduate assistants in 1999-2000 compared to the present. (*See* Brill Aff. ¶ 20.) Accordingly, virtually all of the relevant factors under the OGE regulations and guidance and the Model Rules of Professional Conduct support the conclusion that *NYU I* and the current matters are the same matter. While there has been some passage of time between *NYU I* and its underlying organizing drive, and the instant matters, the UAW itself has treated the three matters as part and parcel of the same continuous unionization effort.[6] Moreover, Member Schiffer's Ethics Agreement acknowledges that it would be inappropriate to sit in a case in which she participated at *any* time during her tenure as Associate General Counsel with the AFL-CIO – which lasted for approximately 12 years (Brill Aff. ¶ 38, Ex. 9.) – and thus, that the passage of time is in no way a controlling or even significant factor in the analysis.

Although *NYU I* did not involve NYU-Poly, which at that time was not owned by or affiliated with NYU, the facts demonstrate that the representation proceeding at NYU-Poly is the same matter as the related proceedings with respect to NYU proper – and thus, the same matter as *NYU I*. The parties in the NYU-Poly case are the same: the UAW on one side and NYU – which wholly owns NYU-Poly – on the other. (Brill Aff. ¶¶ 24-25, 31.) Furthermore, NYU-Poly will merge with NYU and become NYU's School of Engineering and Applied Science

[6] The GSOC-UAW has published a timeline on its website that lists its unionization efforts at NYU over the past 15 years as part of a single, ongoing campaign. (Brill Aff. ¶ 34, Ex. 7.)

effective January 1, 2014. (Brill Aff. ¶ 25.) The issue is likewise the same: the status of graduate assistants for purposes of determining the applicability of the NLRA and an appropriate bargaining unit, if any, thereunder. (Brill Aff. ¶¶ 24, 27-28, 32.) Indeed, the NLRB and the UAW have both effectively treated the current NYU and NYU-Poly cases as the same matter. The NLRB consolidated the two cases for purposes of briefing. (Brill Aff. ¶ 30.) In its Request for Review in the NYU-Poly case, the UAW expressly referred to and incorporated its Request for Review in the NYU case, noting that it raised the same issue. (Brill Aff. ¶¶ 27-28.) The UAW also filed a single consolidated brief in both cases. (Brill Aff. ¶ 31.) Furthermore, the UAW has relied on the factual record in the NYU case as to the history of collective bargaining at NYU following the decision in *NYU I*, in support of its argument in both cases that *Brown* was incorrectly decided and should be overruled. (Brill Aff. ¶ 29, 35-36.) In short, the NYU-Poly case is inextricably bound together with the NYU case, and the two cases must be viewed as the same matter for purposes of determining whether Member Schiffer should recuse herself.

B. Member Schiffer Served as Deputy General Counsel of the UAW at the Time of *NYU I* and the Underlying Organizing Campaign

Second, it appears virtually certain that Member Schiffer represented the UAW or participated in some way in the UAW's efforts to unionize graduate student assistants at NYU that ultimately culminated in the *NYU I* proceeding. Member Schiffer served as Deputy General Counsel of the UAW from 1998-2000 during the time when the UAW began its efforts to organize NYU's graduate student assistants and pursued its initial representation petition, in that connection, in proceedings before the NLRB. (Brill Aff. ¶ 8.) During this period, Member Schiffer was responsible for the day-to-day administration of the UAW Legal Department, and her practice areas included "NLRA and public sector representation and unfair labor practice

cases . . . [and] public and private sector organizing campaigns." (Brill Aff. ¶¶ 10-11, Exs. 4-5.) The NYU organizing drive and *NYU I* were extraordinarily important for the UAW, which was expanding its representation of graduate students in public universities and sought to open the door to such representation at private universities. (Brill Aff. ¶ 12, Ex. 6.) Thus, at a minimum, Member Schiffer must have had supervisory responsibility for the UAW's first organizing campaign at NYU and the related NLRB proceeding.[7]

Accordingly, Member Schiffer's role as UAW Deputy General Counsel during this period calls for her recusal here on due process grounds. *Am. Gen. Ins.*, 589 F.2d at 464-65 ("[M]ere responsibility for administrative supervision of the [party], regardless of the extent of [the adjudicator's] knowledge and his approval of the acts of his subordinates, has been deemed sufficient to activate the disqualification rule."). *See also United States v. Smith*, 995 F.2d 662, 675-76 (7th Cir. 1993) (finding attorney's involvement to be "personal and substantial" for purposes of analogous provisions of the ABA Model Rules of Professional Conduct where he had supervised another attorney in a related investigation, attended high-level meetings, and signed an immunity agreement for a government witness); OGE 99x8, *supra* at note 3 (citing several activities "short of primary responsibility or final approval" requiring recusal in the context of the criminal restrictions on government employees under 18 U.S.C. § 208).

Moreover, notwithstanding the extent of her participation in *NYU I* and the underlying organizing campaign, Member Schiffer should recuse herself from the instant proceedings because of her role as the Number 2 officer in the UAW's legal department during the former matter. If "no man can be a judge in his own case . . .," then it follows that a high-ranking

[7] To the extent that this evidence may be deemed insufficient to warrant recusal, due process requires that NYU be permitted to have an evidentiary hearing as to the extent of Member Schiffer's involvement in *NYU I*, as explained in further detail below.

official of an entity cannot, consistent with due process, adjudicate a case involving the same entity. Impartiality is not a switch that can be flipped on when an individual leaves an organization from such a position. As an officer for the UAW during *NYU I* and the initial phase of organizing, Member Schiffer stood in the shoes of the UAW, and the resulting risk to her impartiality here is too great to ignore.

II. MEMBER SCHIFFER'S RECUSAL WOULD BE REQUIRED UNDER 28 U.S.C. § 455

The statutory ethical standards applicable to judges – and the role of an NLRB Member sitting in an adjudicatory capacity is akin to that of a judge – likewise would require Member Schiffer's recusal in these proceedings.

28 U.S.C. § 455 ("Section 455") provides, in relevant part:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> * * *
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter . . . .

While Section 455 applies by its terms to Article III judges, it is in essence a codification of the due process principles discussed above. Moreover, every NLRB Member considering the issue has recognized the applicability or, at a minimum, the utility of Section 455 in analyzing the ethical obligations of NLRB Members. *See Overnite Transp. Co.*, 329 NLRB 990, 998-1000 (1999) (Member Liebman agreeing that Section 455 standards apply to officials of administrative agencies, including NLRB Members); *SEIU Local 121RN*, 355 NLRB No. 40, slip op. at 6

(2010) (Member Becker stating that the "standards set forth [in Section 455] as well as their construction by the courts offer useful guidance in the application of the . . . standards applicable to executive branch employees"); *Caterpillar, Inc.*, 321 NLRB 1130, 1132-34 (1996) (Chairman Gould stating that he "take[s] seriously the standards applicable to judges and believe[s] that [his] participation in these cases conforms with such standards"); *id.* at 1134-37 (Member Browning stating that "the standards for disqualification of administrative adjudicators and judges are clearly compatible . . ." and analyzing her proposed recusal under both standards, including Section 455).

Member Liebman's opinion in *Overnite Transportation* is particularly useful. She found that the standards of Section 455 were applicable to NLRB Members, in light of the principle that parties to Board proceedings "are entitled as a matter of fundamental due process to a fair hearing." 329 NLRB at 998. Overnite Transportation moved for Member Liebman's recusal, in an unfair labor practice case involving the Teamsters union, based on her employment 10 years earlier as a staff attorney for the Teamsters. Member Liebman denied the motion only after determining that she had never worked on any matter involving Overnite while she was employed by the Teamsters, nor did she work with any lawyers in the Teamsters legal department who worked on "the matter in controversy."[8]

Courts and the OGE have similarly recognized the value of Section 455 in analyzing the ethical obligations of administrative adjudicators. *See Am. Gen. Ins. Co. v. FTC*, 589 F.2d at 463 n.3 (citing Section 455 in analyzing disqualification of FTC Commissioner); OGE 83x18: Recusal of a Commissioner when Son's Law Firm Represents a Party, Letter to a DAEO dated

[8] Member Liebman assumed for purposes of the recusal determination that the "matter in controversy" was the "history of bargaining" between Overnite and the Teamsters that began in 1982 – 12 years before the events involved in the unfair labor practice case then before the NLRB.

Nov. 16, 1983 (analyzing recusal under Section 455, stating that "[b]ecause the Commission's proceedings are adjudicatory in nature, we believe that guidance may be drawn from the rules applicable to judges").[9]

Thus, it is unsurprising that *we have found no case in which an agency adjudicator refused to recuse himself or herself where such recusal would be warranted under Section 455.* This is plainly a case where recusal would be warranted under Section 455.

As described in more detail above, Member Schiffer almost certainly served as a lawyer in the matter in controversy here while in private practice as Deputy General Counsel of the UAW, thereby calling for her disqualification under the first prong of Section 455(b)(2). At a minimum, however, Member Schiffer plainly served with at least one other UAW attorney who served as a lawyer for the UAW during the first NYU organizing drive and *NYU I.* Betsy Engel, Associate General Counsel in the UAW legal department, was routinely copied on correspondence from the UAW's outside counsel in *NYU I.* (Brill Aff. ¶ 9, Exs. 2-3.) Member Schiffer admittedly was responsible for handling the day-to-day administration of the UAW legal department, including NLRA matters and organizing campaigns. Under these circumstances, Member Schiffer would be disqualified under the second prong of Section 455(b)(2), regardless of whether she had any personal involvement in the NYU matter.

The result in *Preston v. United States*, 923 F.2d 731 (9th Cir. 1991) is instructive here. In *Preston*, the plaintiffs sued the United States in a wrongful death action, and moved to recuse the District Judge due to his previous association with the law firm Latham & Watkins ("Latham").

[9] The OGE also noted in the same letter that where "the potentially biased individual would be called in at some late stage of the proceeding to cast what would obviously be the deciding vote," the result "would be *far worse* than his having participated in the matter from the beginning," and thus, the individual should not participate. *Id.* (emphasis added). This is precisely the situation presented here. Member Schiffer's participation is unnecessary to achieve a quorum or otherwise ensure the availability of a decision maker. Thus, recusal is especially appropriate here because of the risk that Member Schiffer's potential bias will manifest to break a tie in favor of the UAW, which admittedly seeks to change existing NLRB law.

Id. at 732. The recusal motion was denied and the District Judge granted judgment in favor of the government after a bench trial. *Id.* Latham represented Hughes Aircraft Company ("Hughes") which, although not a party in the underlying litigation, would have been subject to an indemnification claim brought by the government had judgment been rendered against the government in the wrongful death action. *Id.* Latham also represented Hughes in a state court action involving the same death and in the underlying proceeding by: (1) filing Hughes' objections to a subpoena and its designation of witnesses for a deposition; (2) representing Hughes during depositions; and (3) submitting an affidavit of a Latham partner for the government's use in opposing the plaintiffs' motion for an order extending discovery cutoff and rescheduling a pretrial conference. *Id.* at 734. The Ninth Circuit held that in these circumstances, the recusal motion was improperly denied because the relationship between the judge and an interested party presented a risk that the judge's impartiality might reasonably be questioned by the public. *Id.* at 734-35.

The facts in *Preston* demonstrate, *a fortiori*, why Member Schiffer's recusal is appropriate here. First, unlike Member Schiffer, neither the judge in *Preston* nor his prior law firm actually represented or worked for any named party in the case. Second, the judge in *Preston* also did not even *personally* represent any party *with an interest* in the case; rather he merely had been associated with a law firm that represented such a party. And third, the Ninth Circuit held that recusal was appropriate and reversed in *Preston* even though the case had already been tried to a final judgment. Here, where Member Schiffer represented, or at a minimum, worked for a named party in the case, and alongside an attorney who represented that party, recusal is even more appropriate than it was in *Preston*.

Should there be any doubt that Member Schiffer's recusal is appropriate under the specific circumstances described in Section 455(b)(2), such recusal would nevertheless be appropriate under the broader standard articulated in Section 455(a) because Member Schiffer's "impartiality might reasonably be questioned" in this proceeding. Thus, even assuming *arguendo* that Member Schiffer did not directly participate in the UAW's activities surrounding *NYU I*, and/or that *NYU I* is not the same matter as the instant proceedings – and, as described above, neither of these assumptions is sustainable – Member Schiffer's mere service as attorney and officer of the UAW during the events of *NYU I* would reasonably raise questions concerning her impartiality in these cases.

The passage of time since *NYU I* and Member Schiffer's employment with the UAW cannot alone resolve such questions concerning her impartiality. Indeed, as discussed above, Member Schiffer herself has recognized that her participation in matters on behalf of her most recent former employer, the AFL-CIO, even as long as 13 years ago, would preclude her from sitting in such a case as a Member of the NLRB. (Brill Aff. ¶ 38, Ex. 9.)

In addition, judges have recused themselves under Section 455(a) under circumstances that were far less questionable than those presented here. For example, in *Melendres v. Arpaio*, No. CV-07-2513-PHX-MHM, 2009 U.S. Dist. LEXIS 65069 (D. Ariz. July 15, 2009), the District Judge recused herself in a lawsuit alleging racial profiling and unlawful detention of persons of Hispanic appearance and/or descent due to the fact that the judge's sister was serving as President and CEO of the National Council of La Raza, the largest national Latino civil rights organization in the country, and the organization's maintenance of a website addressing similar issues as the lawsuit and attacking some of the defendants in the lawsuit. *Id.* at *3-4, 37-53. The court noted that she had no connection to the website, nor was there any evidence that her sister

had any involvement in preparing the offending articles on the website. *Id.* at *49-50. Nevertheless, the court was "mindful that it must be vigilant to avoid even the slightest appearance of impropriety." *Id.* at *50. Thus, while it was a "close call", the court was "unwilling to take [the] risk" that "its continued participation in a high profile lawsuit could taint the public's perception of the fairness of the outcome." *Id.* at *52-53.

Member Schiffer's prior association with a party in these cases during a period in which the same underlying organizing drive and related NLRB proceedings were ongoing – involving the same parties and the same issues – raises much more direct and obvious questions concerning her impartiality than the "close call" in *Melendres*. The most appropriate way for Member Schiffer to resolve such questions is to recuse herself from participating in these proceedings.

III. MEMBER SCHIFFER SHOULD RECUSE HERSELF UNDER THE STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH

Members of the NLRB are bound by the Standards of Ethical Conduct for Employees of the Executive Branch set forth in Title 5 of the Code of Federal Regulations. 5 C.F.R. Part 2635; *see SEIU Local 121RN*, 355 NLRB No. 40, slip op. at 5. The relevant sections of Part 2635 provide:

> **§ 2635.101 Basic obligation of public service.**
>
> * * *
>
> (b) *General principles.* The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.
>
> * * *

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

* * *

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

* * *

§ 2635.502 Personal and business relationships.

(a) *Consideration of appearances by the employee.* Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

* * *

(2) An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.

(b) *Definitions.* For purposes of this section:

(1) An employee has a *covered relationship* with:

(i) A person, other than a prospective employer described in § 2635.603(c), with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction . . . .

There are two grounds for Member Schiffer's recusal under § 2635.502. First, Member Schiffer has a covered relationship with the UAW. She is vested in the UAW Staff Retirement Income Plan and Trust, a defined benefit plan from which she is receiving retirement benefits of more than $50,000 per year and from which she and her spouse are entitled to receive health and group life insurance coverage for life. (Brill Aff. ¶¶ 37-38, Exs. 8-9.)[10] The OGE has made clear that "[a] vested interest in a defined benefit plan funded and maintained by a former employer would create a covered relationship. Therefore, in such cases, an employee should comply with the requirements of section 2635.502(a) when acting in matters involving his former employer who is the sponsor of the plan."[11] OGE DO-99-015: 18 U.S.C. § 208 and Defined Benefit Pension Plans, Memorandum to Designated Agency Ethics Officials from Stephen D. Potts, Director dated Apr. 14, 1999, at n.3.

In addition, as explained in more detail above, a reasonable person with knowledge of the relevant facts would question Member Schiffer's impartiality in this matter given her prior relationship with the UAW. Coupled with Member Schiffer's covered relationship with the UAW, a party to this matter, these circumstances call for Member Schiffer's recusal here.

Second, even if Member Schiffer did not have a covered relationship with the UAW – although it cannot be seriously disputed that she does – her recusal in this matter is appropriate under the "catch-all" provision in § 2635.502(a)(2), as well as the general principles set forth in

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[10] According to her Public Financial Disclosure Report (OGE Form 278), Member Schiffer receives a current monthly benefit of $4,263.20 – or $51,158.40 per year – from the UAW Staff Retirement Income Plan & Trust. She also reports having between $250,001 and $500,000 in the UAW Strategy Fund and between $50,001 and $100,000 in cash deposits in the International Union, UAW Federal Credit Union. (Brill Aff., Ex. 8).

[11] Member Schiffer agreed in her Ethics Agreement that she would not participate in a matter that would have a direct and predictable effect on the ability or willingness of the UAW to provide these benefits unless she obtained a waiver or qualified for a regulatory exemption. (Brill Aff. ¶ 38, Ex. 9.) This pledge reflects the criminal restrictions on government employees under 18 U.S.C. § 208. The ethical obligations of government employees, however, are broader than these criminal restrictions. Moreover, the Ethics Agreement does not exhaustively state all of the ethical obligations by which Member Schiffer is bound.

§ 2635.101. Specifically, the circumstances of Member Schiffer's former employment with the UAW – her role as the Number 2 officer in the UAW's Legal Department during the initial phase of the UAW's organizing campaign at NYU and the NLRB representation case; her handling of the "day-to-day administration" of the UAW Legal Department; her responsibility for NLRA representation cases and private sector organizing campaigns; and the importance of the NYU case to the UAW – raise serious questions concerning her impartiality in this matter, compelling her recusal.

IV. UNDER THE CIRCUMSTANCES, AT A MINIMUM, AN EVIDENTIARY HEARING IS NECESSARY TO DETERMINE WHETHER MEMBER SCHIFFER SHOULD BE DISQUALIFIED

The foregoing discussion compels the conclusion that Member Schiffer's service as Deputy General Counsel of the UAW during *NYU I* and the UAW's organizing campaign at NYU requires her recusal in this matter – without the need to explore additional evidence of Member Schiffer's precise involvement in *NYU I*.

Should Member Schiffer decline to voluntarily recuse herself, however, NYU is entitled, at a minimum, to an evidentiary hearing to determine the extent of Member Schiffer's involvement in *NYU I* and the underlying organizing campaign. *See Amos Treat*, 306 F.2d at 267 (ordering full evidentiary hearing for purpose of determining upon a complete record whether or not any Commissioner should have been disqualified); *Berkshire Employees Ass'n*, 121 F.2d at 238-39 (granting petition to adduce additional testimony concerning NLRB Member's impartiality where it was alleged that Member had advocated for boycott of respondent-employer's goods during strike underlying case before the Board); *cf. Hurles v. Ryan*, 706 F.3d 1021, 1038-40 (9th Cir. 2013) (remanding for evidentiary hearing on habeas

petitioner's claim of judicial bias where state court deficiently made findings of fact without such a hearing).

CONCLUSION

Member Schiffer should recuse herself from participating in these matters. In the event that she fails to do so, the Board should conduct an evidentiary hearing for the purpose of determining whether recusal is necessary.

Dated: New York, New York
October 7, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the within Motion for Recusal; Affidavit of Edward A. Brill with exhibits; Expert Opinion of Richard Painter with exhibits; and Expert Opinion of Kathleen Clark with exhibits; in Case No. 2-RC-23481 and Case No. 29-RC-012054 have been served by U.S. Mail on this date on:

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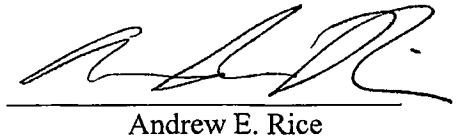

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