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4 October 2013

Expert Opinion

New York University Case No. 2-RC-23481
Polytechnic Institute of New York University Case No. 29-RC-12504

Edward A. Brill
Proskauer Rose LLP
Eleven Times Square
New York NY 10036-8299

Dear Mr. Brill,

You have asked me to render an opinion about whether National Labor Relations Board (NLRB) Member Nancy Schiffer, who formerly served as Deputy General Counsel for the United Auto Workers (UAW), may participate in the NLRB's consideration of two cases involving the UAW and New York University (NYU): New York University, Case No. 2-RC-23481 and Polytechnic Institute of New York University, Case No. 29-RC-12504.

As I explain below, Member Schiffer's earlier employment by and legal representation of the UAW, her supervision of the UAW legal team during the earlier proceedings between the UAW and NYU, and her continuing financial ties to the UAW would cause a reasonable person with knowledge of the relevant facts to question Schiffer's impartiality in these cases. Therefore, I believe that government ethics standards do not permit her to participate in these two cases.

The following sections describe my background and expertise, the documents that I have reviewed in preparing this opinion, the facts that I have assumed, the applicable legal standards, and how those standards apply to those facts.

I. Background

I am a Law Professor at Washington University in St. Louis, where I have taught since 1993.

One of my areas of expertise is government ethics. I am the Associate Reporter for the American Law Institute's PRINCIPLES OF GOVERNMENT ETHICS, and in that capacity am drafting sections of a treatise on government ethics. I have done research in this field since 1992, and have written law review articles, book chapters and newspaper op-eds about government ethics. I have provided opinions about the operation of government ethics standards, have given advice about how government ethics regulations and statutes apply in specific situations, and have trained government officials about these ethics standards. I have also testified about government ethics standards; have taught courses that cover the subject; and have made presentations about government ethics to academics, ethics professionals and government officials. I serve on the Executive Committee of the Ethics Section of the American Society for Public Administration.

In addition to government ethics, I also have expertise in the field of legal ethics, and in particular the ethics standards for government lawyers. I have taught courses on legal ethics since 1993, and have published law review articles and op-eds on the subject. I am a member of the District of Columbia Bar Rules of Professional Conduct Review Committee and the Public Statements Committee of the Association of Professional Responsibility Lawyers. I have been a member of the Executive Committee of the Professional Responsibility Section of the Association of American Law Schools. (A copy of my curriculum vitae is attached as Exhibit 1.)

II. Information Reviewed

In forming my opinions, I reviewed the following documents:

Materials related to Member Schiffer:

- Statement of Nancy Schiffer, Nominee for Member, National Labor Relations Board before the Committee on Health, Education, Labor and Pensions of the United States Senate, July 23, 2013
- Letter from Nancy Schiffer to Margery E. Lieber, Designated Agency Ethics Official, July 22, 2013
- Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278) of Nancy Schiffer, July 19, 2013

NYU II, Case No. 2-RC-23481 & *NYU-Poly*, Case No. 29-RC-12504:

- Petitioner's Reply Brief to the Brief of New York University, August 17, 2012
- Petitioner's Reply Brief to the Brief of Polytechnic Institute of New York University, August 6, 2012
- Brief of the Petitioner, July 23, 2012
- NLRB, Notice and Invitation to File Briefs, June 22, 2012

NYU II, Case No. 2-RC-23481:

- Brief on Review of New York University, July 23, 2012
- Memorandum in Opposition to Motion for Recusal, August 17, 2011
- Motion for Recusal, August 11, 2011
- Petitioner's Request for Review, June 30, 2011
- Region 2 Decision and Order Dismissing Petition, June 16, 2011
- Brief of the Petitioner (Region 2), April 25, 2011
- NLRB Order, 356 NLRB ____, October 25, 2010

NYU-Poly, Case No. 29-RC-12504:

- Opposition to Employer's Conditional Request for Review, September 20, 2011
- Petitioner's Request for Review, September 13, 2011
- Polytechnic Institute of New York University, NLRB Region 29 Decision and Order, August 30, 2011
- Brief of the Petitioner, July 15, 2011

NYU I:

- NLRB Decision on Review and Order, 333 NLRB 1205, October 31, 2000
- correspondence from Daniel J. Ratner copied to UAW Associate General Counsel Betsey Engel, 1999-2000

other documents:

- Letter from David Berry, Inspector General, NLRB, to Hon. Darrell E. Issa, July 20, 2010

III. Facts

For the purpose of my evaluation and this opinion, I have assumed the following facts:

NLRB Member Nancy Schiffer's Past and Current Ties with the UAW

Nancy Schiffer was a member of the UAW's in-house legal team from 1992 until 2000. She was Associate General Counsel from 1992 to 1998, and then was promoted to Deputy General Counsel. In the latter role, she was responsible for "handling the day-to-day administration of the UAW Legal Department."¹ In June of 2000, she became Associate General Counsel of the AFL-CIO. Earlier this year, President Obama nominated and the Senate confirmed her as a Member of the NLRB.

Although Schiffer's employment with the UAW ended in 2000, her July 19, 2013 financial disclosure form indicates that she continues to have significant financial ties to the union, as summarized in the table below.² She receives \$51,158/year from the union's defined benefit pension plan³ along with health coverage and group life insurance for her and her husband.⁴ She participates in UAW Staff Severance Plan,⁵ which appears to be a defined contribution plan.⁶ She has between \$250,001 and \$500,000 in the UAW Strategy Fund,⁷ which appears to be one of the investment funds within the UAW Staff Severance Plan.⁸ Schiffer also has between \$50,001 and \$100,000 in cash deposits in the International Union, UAW Federal Credit Union.

¹ Statement of Nancy Schiffer, Nominee for Member, National Labor Relations Board before the Committee on Health, Education, Labor and Pensions of the United States Senate, July 23, 2013, at 2.

² Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278) of Nancy Schiffer (July 19, 2013) (hereinafter Schiffer Form 278). (A copy is attached as Exhibit 2.)

³ *Id.* at 2, 6. Schiffer's Form 278 indicates that her "Current Monthly Benefit" is \$4263.20, which is \$51,158.40 on an annual basis.

⁴ *Id.* at 6.

⁵ *Id.*

⁶ Vito Curcuru, *Brightscope names the top 10 Detroit companies with the best 401k plans*, DETROIT MARKETING EXAMINER (August 12, 2010) available at <http://www.examiner.com/article/brightscope-names-the-top-10-detroit-companies-with-the-best-401k-plans> (listing UAW Staff Severance Plan as a 401k plan).

⁷ Schiffer Form 278 at 3. Schiffer's form also lists "International Union, UAW Staff Severance Plan." Schiffer Form 278 at 6, which apparently is a defined contribution plan.

⁸ See BrightScope Rating for International Union, UAW, U.A.W. Staff Pension (Severance) Plan available at <http://www.brightscope.com/401k-rating/184618/International-Union-Uaw/187526/Uaw-Staff-Pension-Severance-Plan/> (indicating that UAW Strategy Fund is 74% of U.A.W. Staff Pension (Severance) Plan).

NLRB Member Nancy Schiffer's Financial Ties to the International Union, UAW⁹

Item	Value (if readily ascertainable)	
	Assets	Income
International Union, UAW Staff Retirement Income Plan & Trust (defined benefit plan)		\$51,158.40
International Union, UAW health coverage & group life insurance for self & husband		
International Union, UAW Staff Severance Plan		
UAW Strategy Fund	\$250,001 - \$500,000	
International Union, UAW Federal Credit Union	\$50,001 - \$100,000	< \$201

UAW Organizes NYU Graduate Students and Related NLRB Proceedings (NYU I)

While Schiffer was a member of the UAW's in-house legal team, the UAW engaged in an effort to organize graduate student assistants at NYU and initiated NLRB proceedings related to that effort. Although the UAW (and other unions) had organized graduate student assistants at several public universities, no union had at that point organized graduate student assistants at a private university. On May 3, 1999, the UAW filed a petition with NLRB Region 2 seeking to represent graduate students employed by NYU, arguing that graduate student assistants are properly classified as employees eligible for representation under the National Labor Relations Act (NLRA). NYU opposed this petition, taking the opposite view regarding the legal status of graduate student assistants under the NLRA. The NLRB Regional Director ruled on April 3, 2000 in favor of the UAW's position and against NYU's. NYU asked the full NLRB to review that decision, and the UAW opposed that request. The NLRB granted NYU's request for review, and on June 23, 2000, both the UAW and NYU filed briefs with the NLRB. Later that year, the NLRB ruled that graduate student assistants at private universities can be considered employees under the NLRA, permitting the UAW to represent them and negotiate a collective bargaining agreement on their behalf.¹⁰ I refer to the UAW's effort to organize NYU graduates students during this time period and the ensuing NLRB proceedings as *NYU I*.

UAW General Counsel Office's Involvement in NYU I

While the UAW engaged outside counsel, Daniel J. Ratner, to advocate on its behalf in these NLRB proceedings, Mr. Ratner sent copies of at least some of his correspondence related to these proceeding to a member of the UAW's in-house legal team, Associate General Counsel Betsey Engel.¹¹

Post-NYU I Developments

The UAW and NYU eventually negotiated a collective bargaining agreement. By the time that agreement expired in 2005, the NLRB had issued a decision in a case, *Brown University*, repudiating the position it had taken in *NYU I*.¹² In *Brown*, the NLRB ruled that graduate student assistants at private universities can not be considered to be statutory employees

⁹ The information in this table is based on Schiffer Form 278.

under the NLRA. In light of the *Brown* decision, in 2005, NYU declined to negotiate a second contract with the UAW.

The UAW continued its organizing efforts among NYU graduate student assistants. In 2010, it filed a petition seeking to represent NYU graduate students. The Regional Director dismissed the Petition without a hearing, citing the *Brown* decision. The NLRB reversed and remanded, noting that “there are compelling reasons for reconsideration of the decision in *Brown University*.”¹³ After a hearing, the Regional Director dismissed the petition again, but made a finding that if the Board were to reconsider *Brown* and recognize graduate students as employees, then “it appears on this record that a unit including all graduate students would be appropriate.”¹⁴

In 2011, the UAW filed a petition seeking to represent graduate student assistants at Polytechnic Institute of New York University.¹⁵ (While the Polytechnic Institute was previously independent of NYU, in 2008 it entered into a formal affiliation agreement with NYU. NYU currently owns and controls what is now called Polytechnic Institute of New York University. On January 1, 2014, the two institutions will be fully consolidated as New York University.) After a hearing, the Regional Director of Region 29 found that, but for *Brown*, these graduates students would have the right to organize a union. But on the authority of *Brown*, the Regional Director dismissed the petition. I refer to these proceedings as *NYU-Poly*.

In 2012, the NLRB granted review in both *NYU II* and *NYU-Poly*, and consolidated the cases for the purpose of briefing.¹⁶

IV. Legal Standards

Two sources of law are directly relevant to determining whether an administrative agency official may participate in adjudicating a matter: the constitutional minimum standards for procedural due process and the more robust and detailed “Standards of Conduct” for executive branch employees found in 5 C.F.R. Part 2635.

Due Process: No Actual Bias

The constitution’s due process clause guarantees that parties to an administrative proceeding have a right to decisionmakers who are free from actual bias. Courts have ruled that when a decisionmaker previously represented one of the parties in that same matter, a decision by such an individual is infected by actual bias in violation of the due process guarantee.

¹⁰ New York University, 332 NLRB 1205 (2000).

¹¹ See correspondence from Daniel J. Ratner copied to UAW Associate General Counsel Betsey Engel, 1999-2000, Exhibit 3.

¹² 342 NLRB 483 (2004) (*Brown*).

¹³ New York University, ___ NLRB ___ (2010) (*NYU II*).

¹⁴ *NYU II*, NLRB Region 2, Case No. 2-RC-23481, June 16, 2011, at 26.

¹⁵ Polytechnic Institute of New York University, NLRB Region 29, Case No. 29-RC-12054, at 1-2.

¹⁶ NLRB, Notice and Invitation to File Briefs, *NYU II* [Case 02-RC-02348] and *NYU-Poly* [Case 29-RC-012054] (June 22, 2012).

Executive Branch Regulations: Impartiality & the Appearance of Impartiality

While the due process clause guarantees a right to be free of *actual* bias, the federal government has adopted ethics standards for executive branch officials that go beyond the Due Process guarantee, requiring both impartiality and the *appearance of impartiality*. These requirements are found in the very first section of the Standards of Conduct for executive branch employees, the “Basic obligation of public service.”¹⁷ While the Standards of Conduct are both detailed and voluminous, this first section sets out fourteen “general principles” that provide an overview of and theoretical grounding for those Standards of Conduct. One of those “general principles” is that “[e]mployees shall act impartially. . . .”¹⁸ Another is that employees must “avoid . . . creating the appearance that they are violating the law or the ethical standards set forth in this part.”¹⁹

When officials face situations that the detailed Standards of Conduct do not address, they are required to apply the “general principles” to determine how to act.²⁰ If officials “adhere to the principles of ethical conduct set forth in this [first] section, as well as the implementing standards contained in this part,” then citizens will be able to “have complete confidence in the integrity of the Federal Government.”²¹

This requirement that executive branch employees demonstrate both the appearance and the reality of impartiality is long-standing. It can be found not only in the current executive branch regulations, but also in Executive Orders going back to 1965.²² President Lyndon Johnson’s Executive Order required “that employees avoid any action, whether or not specifically prohibited . . . which might result in, or *create the appearance of* . . . losing complete independence or impartiality of action.”²³

When the executive branch created comprehensive ethics regulations for its employees in 1992,²⁴ it continued this requirement that employees live up to both the reality and the appearance of impartiality.²⁵ But these ethics regulations also gave employees additional guidance about specific situations that may raise questions about an employee’s impartiality.

¹⁷ 5 C.F.R. 2635.101.

¹⁸ 5 C.F.R. 2635.101(b)(8).

¹⁹ 5 C.F.R. 2635.101(b)(14). This provision also indicates that “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.” *Id.*

²⁰ 5 C.F.R. 2635.101(b) (“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.”).

²¹ 5 C.F.R. 2635.101(a).

²² The mandate for both impartiality and the broader appearance standard can also be found in the 1989 executive order that was one of the bases of the 1992 regulations. Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159 at § 101(h) (“Employees shall act impartially . . .”), (n) (“Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order.”). It can also be found in Ex. Ord. 11222, 30 Fed. Reg. 6469 (May 11, 1965).

²³ Ex. Ord. 11222, 30 Fed. Reg. 6469 (May 11, 1965) (emphasis added).

²⁴ 57 FR 35042, Aug. 7, 1992.

²⁵ 5 C.F.R. 2635.101(b)(8), (b)(14).

This additional guidance is found in 5 C.F.R. 2635 Subpart E—Impartiality in Performing Official Duties.²⁶

“Covered Relationship” Includes Financial Tie to a Party

This Subpart identifies a number of specific factual situations which are likely to raise questions about an official’s impartiality, such as when an official has a “covered relationship” with one of the parties²⁷ to a particular matter. A “covered relationship” includes any “business, contractual or other financial relationship that involves other than a routine consumer transaction.”²⁸

If an official has a financial interest in a particular matter (such as litigation), a criminal conflict of interest statute prohibits the official from participating personally and substantially in that matter.²⁹ The regulation on “covered relationships,” on the other hand, addresses a different situation: one where the official has a financial tie to or interest in a *party* rather than in the *matter* itself. Such a financial tie to a party (or “covered relationship”) is not automatically disqualifying by operation of the criminal conflict of interest statute. Instead, the regulation requires the official to determine whether, in light of that financial interest or “covered relationship,” a “reasonable person with knowledge of the relevant facts would question his impartiality in the matter.”³⁰

For example, a government official who has a defined benefit pension through a former employer has a “covered relationship” with that former employer.³¹ The pension does not necessarily create a financial interest in a particular matter involving that former employer, so the criminal conflict of interest statute would not necessarily prohibit an official from participating personally and substantially in a matter involving that party.³² But under the

²⁶ 5 C.F.R. 2635.501 *et seq.*

²⁷ 5 C.F.R. 2635.502(a).

²⁸ 5 C.F.R. 2635.502(b)(1)(i). The regulation also identifies four other types of “covered relationships.” *Id.* at 2635.502(b)(1)(ii)-(v).

²⁹ 18 U.S.C. § 208(a).

³⁰ 5 C.F.R. 2635.502(a). This appearance-based restriction is broader than the financial conflict of interest statute in terms of the type of participation restricted. The statute prohibits “substantial participation,” which means “involvement [that] is of significance to the matter,” including making a decision or recommendation. 5 C.F.R. 2640.103(a)(2). The appearance regulation, by contrast, restricts a broader range of participation, even that which does not rise to the level of “substantial” participation.

Perhaps because of its broad scope, the appearance regulation authorizes an agency designee to determine “in light of all relevant circumstances, [whether] the interest of the Government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations.” 5 C.F.R. 2635.502(d). The designee may consider multiple factors, including the sensitivity of the matter and the “nature and importance of the employee’s role . . . , including the extent to which the employee is called upon to exercise discretion in the matter.” For a Board Member or other “official whose position requires Senate confirmation, nearly any level of participation would be deemed ‘. . . substantial.’” OFFICE OF GOVERNMENT ETHICS, GUIDE TO DRAFTING ETHICS AGREEMENTS FOR PAS NOMINEES 36 (2008).

³¹ OGE 99 x 6, Memorandum dated April 14, 1999 from Stephen D. Potts, Director, to Designated Agency Ethics Officer Regarding 18 U.S.C. § 208 and Defined Benefit Pension Plans, n.3 (“A vested interest in a defined benefit plan funded and maintained by a former employer would create a covered relationship.”).

³² On the other hand, if the matter is of such significance to the former employer that it could affect its ability or willingness to pay the pension, that would give the official a financial interest in the matter. OGE 99 x 6 at 2.



impartiality regulation, the employee must inquire whether, in light of the defined benefit pension from her former employer, a reasonable person would question her impartiality in the matter.

Other Circumstances that Raise a Question about Impartiality

The “covered relationships” described in the ethics regulation do not exhaust all the situations in which a government official’s impartiality could reasonably be questioned. The regulation acknowledges that “circumstances other than those specifically described . . . [may] raise a question regarding his impartiality.”³³

Judicial Disqualification Statute, 28 U.S.C. § 455, as Guidance on Impartiality

One of the factual scenarios that the impartiality regulation does not specifically address occurs where a government official was previously an employee of or a lawyer for a party, and more than one year has passed since that employee-employer or lawyer-client relationship ended.³⁴ When members of the NLRB have faced this situation, they have looked to the judicial impartiality standards that are set out in a federal statute, 28 U.S.C. § 455, for guidance. Even though this statute, by its terms, applies directly only to federal judges,³⁵ it is appropriate for administrative agency officials to rely on it because it -- like the executive branch Standards of Conduct -- is aimed at ensuring both impartiality and the appearance of impartiality. Former NLRB Chair Gould³⁶ and former Members Liebman,³⁷ Browning³⁸ and Becker³⁹ all concluded that the judicial disqualification statute sets out the same standard of impartiality as the Standards of Conduct for executive branch employees.

This approach -- looking to the judicial disqualification statute, 28 U.S.C. § 455, for guidance in how to interpret the executive branch mandate for both impartiality and the appearance of impartiality -- has been used not just by NLRB members, but also by the agency that has primary responsibility for executive branch ethics regulations: the U.S. Office of

³³ 5 C.F.R. 2635.502(a).

³⁴ The regulation includes within the definition of “covered relationship” a situation in which the official has, “within the last year, served as attorney, consultant, contractor or employee” of a party. 5 C.F.R. 2635.502(b)(1)(iv).

³⁵ *Greenberg v. Board of Governors of the Federal Reserve*, 968 F.2d 164 (2nd Cir. 1992)

³⁶ *Caterpillar Inc. & International Union, UAW and its Local 974*, 321 NLRB 1130, 1133 (separate statement of Chairman Gould) (“the legal developments governing the standards for recusal/disqualification both in Federal [judicial] and administrative proceedings have been similar”).

³⁷ *Overnite Transportation Company & International Brotherhood of Teamsters*, 329 NLRB 990, 998 (1999) NLRB Member Wilma Liebman (28 U.S.C. § 455 “should apply . . . to officials of administrative agencies, such as Members of the National Labor Relations Board”).

³⁸ *Caterpillar Inc.*, 321 NLRB at 1137 (separate statement of Member Browning) (the judicial impartiality statute’s “criteria are substantially the same as those under the Standards of Ethical Conduct for Employees of the Executive Branch”).

³⁹ *Service Employees International Union, Nurses Alliance, Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB ____ (2010) (Member Becker, ruling on motions) (“the standards set forth [in section 455] as well as their construction by the courts offer useful guidance in the application of the above-described standards applicable to executive branch employees.”).

Government Ethics (OGE). When OGE was asked how to apply the general requirement for impartiality and the appearance of impartiality in a specific factual context, it turned to the judicial impartiality statute for guidance. OGE was asked whether an agency Commissioner could participate in an adjudicatory proceeding if one of the parties in that proceeding was represented by a law firm that employed the Commissioner's son as an associate.⁴⁰ Since no regulation specifically addressed this factual scenario, OGE turned to judicial impartiality standards for guidance. OGE noted, "it seems that the rules applicable to judges would require an inquiry similar to that required by the standards of conduct: whether under the particular circumstances the Commissioner's impartiality might reasonably be questioned . . ."⁴¹

Two parts of the statute are relevant here. Section 455(a) sets out a general standard for judicial disqualification. A judge must not participate "in any proceeding in which his impartiality might reasonably be questioned."⁴² That general standard is essentially the same as the standard found in executive branch regulations: the employee should not participate in a matter if "the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality."⁴³

The statute then goes on to specify several scenarios requiring judicial disqualification.⁴⁴ All of these specified scenarios are situations in which the judge has a direct or indirect connection to a party (such as through a financial or familial interest⁴⁵) or to the controversy itself (such as having personal knowledge of disputed facts⁴⁶). These specified scenarios are specific situations in which the judge's "impartiality might reasonably be questioned." The statute makes clear that in those specified situations, the judge need not go through the analysis of whether or not his "impartiality might reasonably be questioned." In essence, Congress already went through that analysis and requires disqualification in those specified scenarios.⁴⁷

One of the specified scenarios requiring judicial disqualification is if the judge, while previously "in private practice . . . served as lawyer in the matter in controversy."⁴⁸ Essentially, there is an irrebuttable presumption that someone who formerly served as a private sector lawyer in a matter cannot later act impartially as a judge in that matter. This standard recognizes that if an individual worked as a lawyer on a particular matter on behalf of a client, that individual cannot be expected to be impartial in later adjudicating that same matter.

⁴⁰ OGE Letter to a DAEO [Designated Agency Ethics Officer] dated November 16, 1983, 83 x 18.

⁴¹ *Id.*

⁴² 28 U.S.C. § 455(a).

⁴³ 5 C.F.R. 2635.502(a). See also *id.* at § 2635.101(b)(8) ("Employees shall act impartially") and 2635.101(b)(14) ("Employees shall endeavor to avoid any actions creating the appearance that they are violating . . . ethical standards . . .").

⁴⁴ 28 U.S.C. § 455(b)(1)-(5).

⁴⁵ 28 U.S.C. § 455(b)(4), (b)(5).

⁴⁶ 28 U.S.C. § 455(b)(1).

⁴⁷ See *Preston v. United States*, (9th Cir. 1991) ("We need not explore whether an appearance of partiality existed in [a § 455(b)(2)] case. The drafters of section 455 have accomplished this task for us.").

⁴⁸ 28 U.S.C. § 455(b)(2).

Imputed Disqualification under 28 U.S.C. § 455

The statute goes even further, though, and imputes disqualification. A judge who was associated previously in private practice with other lawyers must be disqualified from a matter if any of those other lawyers “served during such association as a lawyer concerning the matter.”⁴⁹ This judicial ethics standard is consistent with the norms of legal ethics, where the disqualification of one lawyer in a firm is imputed to all the lawyers in a firm.⁵⁰ It applies to in-house lawyers as well as to lawyers at law firms.

The NLRB has applied not just the general impartiality standard found in § 455(a), but also the former representation/imputation standard found in § 455(b)(2). In a dispute between a Teamsters Local and an employer, for example, Member Liebman noted that although she had worked in-house as a lawyer for the International Brotherhood of Teamsters, she had not personally served as a lawyer on that case. She then wrote that “[t]he remaining issue under § 455(b)(2) is whether ‘a lawyer with whom [I] previously practiced law served during such association as a lawyer concerning’ issues involving” that matter. After reviewing the facts, Liebman found that “no ‘lawyer with whom [I] previously practiced law served during such association as a lawyer concerning’” that matter.⁵¹ Similarly, the NLRB Inspector General (IG) applied the imputation standard when asked whether NLRB Member Becker acted improperly when he participated in the *St. Barnabas* matter. After an investigation, the IG noted that neither Becker nor the lawyers with whom he practiced at the SEIU represented or made an appearance for the party involved in that matter.⁵²

Particularly in light of the regulatory mandate that executive branch officials have both the reality and the appearance of impartiality, it is appropriate to use the imputation disqualification standard found in section 455(b)(2).

V. Application of Legal Standards to These Facts

This section describes how the requirements for impartiality and the appearance of impartiality apply to NLRB Member Nancy Schiffer in light of her current and former connections to the UAW.

Member Schiffer Has a “Covered Relationship” with the UAW

As discussed above, one of the ways that the executive branch has implemented the requirements for impartiality and the appearance of impartiality is by identifying specific types of relationships that could cause a “reasonable person with knowledge of the relevant facts . . .

⁴⁹ 28 U.S.C. § 455(b)(2).

⁵⁰ See ABA Model Rules of Professional Conduct Rule 1.10(a).

⁵¹ *Overnite Transportation Company & International Brotherhood of Teamsters*, 329 NLRB 990, 999-1000 (1999) (separate statement of Member Liebman).

⁵² Letter from David Berry, Inspector General, NLRB, to Hon. Darrell E. Issa, July 20, 2010 (Exhibit 4).

[to] question [the official's] impartiality in the matter."⁵³ These "covered relationships" include any financial relationship that involves other than a routine consumer transaction."⁵⁴

Member Schiffer has multiple financial ties to the UAW, as reflected in the Table on page 3. She has been receiving more than \$50,000/year from her defined benefit plan, and has also received health coverage and group life insurance for herself and her husband. Each of these financial ties, standing alone, would create a "covered relationship" between Member Schiffer and the UAW, triggering an inquiry into whether "the circumstances would cause a reasonable person with knowledge of the relevant facts to question [her] impartiality in the matter."⁵⁵

Recusal for Matters in which Schiffer Participated as a Private Sector Lawyer

In addition to the appearance concerns raised by Schiffer's multiple financial ties to the UAW, there is an additional concern stemming from her former work as a lawyer for the UAW. A government official who formerly worked as a lawyer for a private party must not participate in any matter in which she previously participated as a private sector lawyer.⁵⁶ Member Schiffer's ethics agreement acknowledges this restriction with respect to her most recent former client. She has agreed not to participate "participate personally and substantially in any particular matter involving specific parties in which I previously participated in my role as Associate General Counsel with the AFL-CIO."⁵⁷ That is the correct standard, but it needs to be applied not just to the work she did for the AFL-CIO, but also to the work for other former clients, including the UAW.

NYU I is the Same "Matter in Controversy" as NYU II and NYU-Poly

In applying this standard, one must evaluate the relationship between a current matter facing a government official and earlier matters she worked on as a private sector lawyer. The government ethics regulations use the terminology, "particular matter involving specific parties."⁵⁸ The judicial ethics standards use different terminology but the same idea: whether the earlier and later cases are the same "matter in controversy."⁵⁹

First, it is necessary to determine whether *NYU I*, *NYU II* and *NYU-Poly* are the same "matter in controversy" for purposes of the judicial disqualification statute. A key question is

⁵³ 5 C.F.R. 2635.502(a).

⁵⁴ 5 C.F.R. 2635.502(b)(1)(i). The regulation also identifies four other types of "covered relationships." *Id.* at 2635.502(b)(1)(ii)-(v).

⁵⁵ 5 C.F.R. 2635.502(a).

⁵⁶ See OFFICE OF GOVERNMENT ETHICS, GUIDE TO DRAFTING ETHICS AGREEMENTS FOR PAS NOMINEES § 5.4.0 (2008).

Sometimes PAS [Presidential Appointment, Senate confirmation] nominees are appointed to positions in which their responsibilities are likely to include matters in which they previously participated before entering Federal service. In such cases, the Government may have concerns about the potential for an appearance that the PAS nominee is "switching sides," especially if the PAS nominee is an attorney, a lobbyist or an employee of an association.

⁵⁷ Letter from Nancy J. Schiffer to Margery E. Lieber, Associate General Counsel, NLRB, July 22, 2013 (Exhibit 5).

⁵⁸ 5 C.F.R. 2635.502(a).

⁵⁹ 28 U.S.C. § 455(b)(2).

whether the issues in dispute are “sufficiently related’ to constitute parts of the same matter in controversy.”⁶⁰ Factors include whether the cases involve the same parties, legal theories and facts. Rather than applying this standard in a mechanical fashion, it is appropriate to take a more pragmatic, functional approach in assessing the similarity between the earlier and later proceedings.⁶¹ There are situations where the relationship between the cases is more “attenuated” or “tangential,”⁶² and other situations where there is substantial overlap regarding facts and legal issues that are central to the cases.

For example, a lawsuit brought by black athletes suing Auburn University for policies that violated Equal Protection was not the same “matter in controversy” as a lawsuit thirteen years later by the federal government against multiple Alabama universities seeking to dismantle the vestiges of *de jure* segregation.⁶³ In coming to the conclusion that these two cases were not the same “matter in controversy,” the court noted that “[b]oth the legal theories and the relevant facts pertaining to the cases [we]re different.”⁶⁴

On the other hand, the legal issues and party structure do not have to be identical for two cases to be considered the same “matter in controversy.” The Ninth Circuit found that a district court judge should have recused himself from a Federal Torts Claims Act case brought by the heirs of a deceased Hughes Aircraft employee because the judge had been Of Counsel at Latham & Watkins while other lawyers at the same firm represented Hughes in a state court action also stemming from the Hughes’ employee’s death.⁶⁵

The *NYU II* and *NYU-Poly* cases have much in common with *NYU I*. There is substantial overlap on at least three axes: the identity of the parties, the central legal issues in the cases and the factual context.⁶⁶ The parties in *NYU II* and *NYU-Poly* (the UAW and NYU) are the same parties that were involved in *NYU I*. When the NLRB consolidated *NYU II* and *NYU-Poly*, it

⁶⁰ *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998) (quoting *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 839 F.2d 1296, 1302 (8th Cir.1988)).

⁶¹ *Little Rock Sch. Dist.*, 839 F.2d at 1302 (“the question of what kinds of cases are sufficiently related for the purposes of Sec. 455(b)(2) would remain a question of judgment and degree”).

⁶² *E.I. DuPont De Nemours & Co. v. Kolon Indus.*, 847 F.Supp.2d 843 (E.D. VA 2012) (this misappropriation of trade secrets case and an earlier patent infringement case “are really quite different in nature. . . . The most that could be said is that there was an attenuated, tangential relationship.”). See also *DeTemple*, 162 F.3d at 285 (rejecting recusal and noting only a “tangential” connection between cases).

⁶³ *United States v. State of Alabama*, 582 F.Supp. 1197 (N.D. Ala. 1984).

⁶⁴ *United States v. State of Alabama*, 582 F.Supp. at 1207.

⁶⁵ *Preston v. United States*, 923 F.2d 731 (9th 1991) (applying imputed disqualification). Although Hughes was not a party to the FTCA lawsuit, Latham & Watkins lawyers did represent Hughes in a deposition and other proceedings during the FTCA case. 923 F.2d at 734.

At least one court has adopted a narrow reading of § 455(b)(2) so that it applies only if the two matters have the same docket number. *Blue Cross & Blue Shield of Rhode Island v. Delta Dental*, 248 F. Supp.2d (D. R.I. 2003). But the better approach – and an approach consistent with executive branch ethics standards -- is to examine a range of factors to determine whether the legal issues and facts are so similar that the two cases constitute the same “matter in controversy.”

⁶⁶ The federal government’s regulation addressing post-employment conflicts of interest similarly identifies factors to consider when determining whether a former federal employee’s earlier work for the government is the “same matter” as her later work in the private sector: the extent to which the two matters involve related issues, the same or related parties, the same basic facts, the same confidential information, and the amount of time elapsed. 5 C.F.R. 2641.201(h)(5).

invited the parties and amici to address four legal issues. Two out of those four are broad legal issues that were also of central concern in *NYU I*:

1. whether “graduate student assistants who perform services at a university in connection with their studies are . . . statutory employees within the meaning of Section 2(3) of the” NLRA and
2. whether those “graduate student assistants engaged in research funded by external grants” are statutory employees.⁶⁷

The first question is a close approximation of what the NLRB characterized as the “principle issue presented” in *NYU I*: “whether a university’s graduate assistants (teaching assistants, graduate assistants, and research assistants) are employees within the meaning of Section 2(3) of the” NLRA.⁶⁸ Similarly, in framing the second question, the NLRB itself cited its decision in *NYU I*.⁶⁹

In addition, the factual context of these cases is substantially similar. Both *NYU II* and *NYU I* have the same institutional context: NYU’s policies toward its graduate students who perform services. While the passage of time has brought some changes in NYU’s policies toward its graduate students, both cases ask whether the same types of graduate student employees in this institutional setting qualify as statutory employees. *NYU II* and *NYU I* involve the same parties, legal issues and factual context. On the record as I understand it, *NYU II* is the same matter in controversy as *NYU I*.

The *NYU-Poly* case arose in an institutional setting that was -- at the time -- distinct from New York University. Unlike New York University, Polytechnical Institute’s programs were limited to the sciences and engineering. It had its own standards for and policies regarding the employment of graduate students as teaching assistants, research assistants and in other positions. If the *NYU-Poly* case had come to the NLRB with a factual record limited to the Polytechnical Institute itself, then these factual distinctions would make the question of whether *NYU-Poly* and *NYU I* are the same matter in controversy a closer call.

But *NYU-Poly* has not come to the NLRB in isolation. The UAW’s argument in the *NYU-Poly* case is not limited to the facts of *NYU-Poly* itself. Instead, the UAW also relies on the factual record in *NYU-II*, and in particular the record of collective bargaining that took place at New York University as a result of *NYU I*. The UAW argues that the *Brown* decision was based on factual assumptions, and that the factual record of bargaining between NYU and the UAW in the wake of *NYU I* demonstrates the falsity of *Brown’s* assumption.⁷⁰ In other words,

⁶⁷ NLRB, Notice and Invitation to File Briefs, *NYU II* [Case 02-RC-02348] and *NYU-Poly* [Case 29-RC-012054] (June 22, 2012) at 1.

⁶⁸ *NYU I*, 332 NLRB 1205 (2000).

⁶⁹ NLRB, Notice and Invitation to File Briefs at 1-2. The NLRB cited footnote 10 of *NYU I*. That footnote, in turn, cites “the reason set forth by the Regional Director” in his April 3, 2000 decision. While it is not clear exactly when in 2000 Member Schiffer left the UAW, she began work at the AFL-CIO in June of that year.

The Regional Director in *NYU-Poly* noted that in *NYU II*, the Board directed that a hearing be held to develop a record on, inter alia, two issues that “have applicability to the case herein: the issue of research assistants working on external grants and whether they may be excluded from any determined unit based on the Board’s decision in New York University, (*NYU I*), 332 NLRB 1205 (2000); and whether the decision in *Brown* should be reconsidered.” NLRB Region 29, *NYU-Poly*, at n. 4, August 30, 2011.

⁷⁰ Brief of the Petitioner before Region 29, at 26 (“After being certified in *NYU I*, the UAW and NYU negotiated a collective bargaining agreement that includes a provision . . . provid[ing] extensive protection for . . . academic freedom Thus the record in this case . . . contradicts the speculation in *Brown*.”); Petitioner’s Reply Brief to

the UAW is asking the NLRB to look at the factual record that resulted from *NYU I* and is found in the official record of *NYU II*. For this reason, it does not seem possible to consider the *NYU-Poly* case in isolation from *NYU II* and *NYU I*.

In light of this overlap of party identity, legal issues and factual context, I believe that *NYU-Poly*, like *NYU II*, is the same matter in controversy as *NYU I* for purposes of the judicial disqualification statute.

Whether Schiffer Served as a Lawyer in NYU I

Although Member Schiffer was not the attorney of record in the *NYU I* proceedings, one would need more facts to determine whether she “served as a lawyer” in that matter.⁷¹ In particular, one would need the answers to the following questions:

- Did Schiffer participate in discussions or give advice about the UAW’s organizing campaign at NYU or the related NLRB proceedings, *NYU I*?
- In her role as Deputy General Counsel, did she supervise the work of Associate General Counsel Betsey Engel in connection with the *NYU I* case?
- Did she review the pleadings in *NYU I*?
- Did she provide advice on the legal arguments that the UAW advanced?
- Did outside counsel consult with her regarding his representation of the UAW?
- Did she direct, provide feedback on or evaluate his work?

If the answer to any of these questions is “yes,” then Schiffer did “serve as a lawyer” in *NYU I*. If so, without going through any further analysis, the individual recusal provision of 28 U.S.C. § 455(b)(2) would require that she not participate in *NYU II* or *NYU-Poly*.

Whether an Associated Lawyer Served during that Association as a Lawyer in NYU I

While the documents I have reviewed do not indicate that Schiffer served as a lawyer in *NYU I*, they do seem to indicate that a lawyer with whom she was associated served during that association as a lawyer in *NYU I*.

The UAW engaged outside counsel, Daniel J. Ratner, to be its advocate in the NLRB proceedings in *NYU I*. In addition, it appears that at least one member of the UAW’s in-house legal team, Associate General Counsel Betsey Engel, also served as a lawyer for the UAW while

the Brief of Polytechnic Institute of New York University, *NYU-Poly* at 1 (“The actions of the employer in the companion case, *NYU*, shows how readily the employment relationship can be separated from graduate students’ academic program.”); Brief of the Petitioner, *NYU II* and *NYU-Poly*, at 26 (“*Brown* is . . . based upon assumptions that are irrelevant to labor policy [and] contradicted by actual experience at NYU and at public sector universities . . .”); *Id.* at 24 (“available empirical evidence and the record at NYU directly contradict the assumptions upon which *Brown* was based”).

⁷¹ The Office of Government Ethics has provided guidance on a similar issue: what types of activities constitute “personal and substantial participation.” OGE 99 x 8, Memorandum from Stephen D. Potts, Director, to Designated Agency Ethics Officers on Recusal Obligation and Screening Arrangements, April 26, 1999 (“Involvement in preliminary discussions, in interim evaluations, in review or approval at intermediate levels, or in supervision of subordinates working on a matter may be personal and substantial participation requiring recusal. . . . [M]any other degrees of participation short of primary responsibility or final approval could require recusal.”).

Schiffer was Deputy General Counsel. During 1999-2000, outside counsel Ratner copied Ms. Engel on at least some of the correspondence regarding those NLRB proceedings.⁷² Therefore, it appears that a lawyer with whom Schiffer was associated in private practice served as a lawyer in this "matter in controversy" during that association. The imputation provision of 28 U.S.C. § 455(b)(2) requires Schiffer's recusal in *NYU II* and *NYU-Poly*.

Impartiality Standard

The two cases currently before the NLRB, *NYU II* and *NYU-Poly*, call for Board Members to address the same legal issues that the Board addressed in *NYU I*. These legal issues involve the same parties as in *NYU I*, and have arisen in nearly the same factual context as *NYU I*.

Board Member Schiffer was Deputy General Counsel of one of those parties, the UAW, during much of the pendency of *NYU I* (1999-2000). She worked with (and may have supervised) one of the UAW's lawyers, Betsey Engel, who had some involvement in *NYU I*. Schiffer continues to have multiple financial ties to the UAW.

After considering all of these circumstances as well as the impartiality and appearance of impartiality mandates found in 5 C.F.R. §§ 2635.101(b)(8), 2635.101 (b)(14), 2635.502(a) and 28 U.S.C. § 455(a), (b)(2), I believe that Board Member Schiffer's impartiality in deciding these two cases could reasonably be questioned.

VI. Conclusion

For the reasons set forth above, it is my opinion that Nancy Schiffer's former employment by and current financial ties to the UAW would cause a reasonable person with knowledge of the relevant facts to question her impartiality in these two NLRB matters involving the UAW: New York University, Case No. 2-RC-23481 or Polytechnic Institute of New York University, Case No. 29-RC-12504. Therefore, Member Schiffer should not participate in these two matters.

Sincerely,



Kathleen Clark

Exhibit 1: c.v.

Exhibit 2: Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278) of Nancy Schiffer, July 19, 2013

Exhibit 3: correspondence from Daniel J. Ratner copied to UAW Associate General Counsel Betsey Engel, 1999-2000

⁷² A copy of this correspondence is attached as Exhibit 3.

Exhibit 4: Letter from David Berry, Inspector General, NLRB, to Hon. Darrell E. Issa, July 20, 2010

Exhibit 5: Letter from Nancy J. Schiffer to Margery E. Lieber, Associate General Counsel, NLRB, July 22, 2013





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ACADEMIC EXPERIENCE

Courses taught: Secrecy & Whistleblowing, The Law of Whistleblowing in Comparative Perspective, The Legal Profession, Legal Ethics Seminar, Lawyer as Fiduciary, The Ethics of Lawyering in Government, National Security Law & Uniform Commercial Code: Sales

Washington University School of Law <i>John S. Lehmann Research Professor of Law (2012-13)</i> <i>Israel Treiman Faculty Fellow (2010-11)</i>	1993-present
Utrecht University	2009, 2013
University of Michigan Law School	Visiting Professor 2000
Cornell Law School	Visiting Professor 1999

EDUCATION

Yale Law School, J.D. Harlan Fiske Stone Prize for Best Oralist in Moot Court Competition Senior Editor, <u>Yale Law Journal</u> Conducted research for Supreme Court briefs in <ul style="list-style-type: none">• <i>Webster v. Reproductive Health Services</i>, <u>492 U.S. 490</u> (1989)• <i>Board of Estimate of New York City v. Morris</i>, <u>489 U.S. 688</u> (1989)	1990
<u>Pushkin Russian Language Institute</u> (Moscow, Russia, USSR)	1984
Yale College, B.A. in <u>Physics & Philosophy</u> , cum laude	1984

ARTICLES & BOOK CHAPTERS

Organizational Privilege & Organizational Insiders: Guidelines for Whistleblower Lawyers, J. PROF. LAWYER (forthcoming)

Faux Transparency: Ethics, Privacy and the Demise of the STOCK Act's Massive Online Disclosure of Employees' Finances, in INTERNATIONAL HANDBOOK ON TRANSPARENCY (Padideh Ala'I & Robert Vaughn, eds.) (forthcoming 2013) (with Cheryl Embree)

Lawyer Confidentiality, Open Government Laws & Whistleblowing, 21 PUB. LAW. 14 (Summer 2013)

Conflicts, Confidentiality and the Client of the Government Lawyer, 21 PUB. LAW. 11 (Winter 2013)

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United States and Canada, in SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW (David Cole et al., eds.) (2013) (with Nino Lomjaria)

Limited Oversight: Legislative Access to Intelligence Information in the United States and Canada, 6 J. PARLIAMENTARY & POLITICAL L. 523 (2012) (with Nino Lomjaria)

Ethics, Employees and Contractors: Financial Conflicts In and Out of Government, 62 ALAB. L. REV. 955 (2011)

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ETHICS FOR AN OUTSOURCED GOVERNMENT (Administrative Conference of the United States 2011)

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"A New Era of Openness?": Disclosing Intelligence to Congress under Obama, 26 CONST. COMM. 313 (2010)

The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program, 2010 B.Y.U. L. REV. 357

Restrictions on Gifts and Outside Compensation for Executive Branch Employees (with Beth Nolan), in THE LOBBYING MANUAL (William V. Luneburg & Thomas M. Susman, eds.) (4th ed. 2009)

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excerpted in PROBLEMS IN TAX ETHICS (Donald B. Tobin, Richard Lavoie & Richard Trogolo, eds.) (West 2009)

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- reprinted in PATOLOGIE W ADMINISTRACJI PUBLICZNEJ ("Pathologies in Public Administration") (Patrycja J. Suwaj & Dariusz R. Kijowski, eds.) (Wolters Kluwer 2009)
- featured in ETHICAL PROBLEMS IN THE PRACTICE OF LAW (2nd ed. 2008) by Lisa G. Lerman & Philip G. Schrag
- excerpted in LEGAL ETHICS IN THE PRACTICE OF LAW (3rd ed. 2007) by Richard A. Zitrin, Carol M. Langford, Nina W. Tarr)

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excerpted in RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW (2007) (

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- excerpted in PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER (3rd ed. 2011) by John T. Noonan, Jr. & Richard W. Painter
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NEWSPAPER OP-EDS

Klokkenluidershuis wordt Tandeloos Instituut [The House of Whistleblowers is a Toothless Institution], NCR (July 26, 2013) (with Iris van Domselaar)

What the District Can Learn from the Graham Affair, WASH. POST (Dec. 14, 2012)

Whistleblowing Incentives for Lawyers?, NATL. L.J. (Sept. 3, 2012)

Already, a Conflict for the New D.C. Board of Ethics, WASH. POST (June 24, 2012) (with Robert Wechsler)

The Revolving Door: Who Really Cares?, NATL. L.J. (May 28, 2012)

Torturing the Law: The Justice Department's Legal Contortions on Interrogation, WASH. POST, June 20, 2004, at B03 (co-authored with Julie Mertus)

OTHER PUBLICATIONS

White Paper on the Law of Whistleblowing (2013)

An Overview of Government Ethics Standards (2012)

Congressional Access to Intelligence Information: The Appearance of a Check on Executive Power (2012)

Information Security & Fear-Mongering about WikiLeaks, IntLawGrrls.com (2010)

TESTIMONY

<u><i>Assessing Ethical Risk</i></u> , D.C. Board of Ethics & Government Accountability	2013
Ethics Problem at the D.C. Board of Ethics, D.C. Council	2012
An Ethics Manual for D.C. Government Employees, D.C. Council	2011
Analysis of Proposed Ethics Legislation, D.C. Council	2011
<u><i>Alleged Legal Ethics Violations by Justice Department Lawyers</i></u> , U.S. Senate Judiciary Committee Subcommittee on Administrative Oversight	2009
<u><i>Over-Regulation of Government Ethics in the United States</i></u> , Commission of Inquiry into Certain	2009

Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney (Oliphant Commission)

President Bush's Order on Military Trials of Non-Citizens, U.S. Senate Judiciary Committee 2001

AMICUS BRIEFS

Center for Constitutional Rights v. Bush, 633 F. Supp.2d 949 (N.D. Ca. 2007) – brief on behalf of legal ethics professors and practitioners regarding lawyers' confidentiality obligation

United States v. Moussaoui, 365 F.3d 292 (4th Cir. 2004) – brief on behalf of the Center for National Security Studies about criminal defendant's access to exculpatory information

Williams v. Taylor, 529 U.S. 420 (2000) – brief on behalf of legal ethics professors regarding prosecutors' disclosure obligations

PROFESSIONAL EXPERIENCE

American Law Institute (ALI) 2011-present
Associate Reporter, PRINCIPLES OF GOVERNMENT ETHICS: Drafting treatise on government ethics restrictions.

Chemonics Sarajevo, Bosnia & Herzegovina (BiH) 2013
Consultant: Drafted whistleblowing regulations for adoption by BiH government institutions; provided anti-corruption and whistleblowing training to staff of BiH Anti-Corruption Agency.

Office of the Attorney General, District of Columbia 2011-12
Special Counsel

- Wrote ethics manual for the District of Columbia's 32,000 employees.
- Created live and web-based training modules about ethics standards and the Freedom of Information Act (FOIA).
- Provided legal advice about federal and DC ethics standards and transparency requirements.
- Advised DC Attorney General on ethics and campaign finance reforms.

Federal Deposit Insurance Corporation (FDIC) 2012-13
Training Consultant: Created legal ethics training course for federal agency's lawyers.

U.S. Transportation Command (US TRANSCOM) 2012
Provided training for military command's procurement officials regarding contractors' ethics.

Administrative Conference of the United States (ACUS) 2010-11
Consultant: Wrote report that became basis for ACUS and ABA recommendations that Federal Acquisition Regulatory (FAR) Council apply government ethics standards to certain service contractor personnel.

U.S. Senate Judiciary Committee 1991-93
Counsel

- Drafted health care fraud legislation and prepared hearings to support introduction of that legislation.
- Prepared Committee Chair for confirmation hearings on Attorney General & other DoJ nominees.

U.S. District Court for the District of Columbia 1990-91
Judicial Clerk to Judge Harold H. Greene

Kiev Radical Economic Reform Project 1990
Met with legal advisors to Ukrainian parliament and established contacts for legal exchange program.

Yale Law School 1988-90
Teaching Assistant to Prof. Akhil Amar
Research Assistant to Prof. Paul Kahn

During law school, I worked for these law firms in Washington, DC:

<u>Davis, Polk & Wardwell</u>	1990
<u>Paul, Weiss, Rifkind, Wharton & Garrison</u>	1989
<u>Clinica Legal Latina - Ayuda</u>	1989
<u>Jones, Day, Reavis & Pogue</u>	1988

Institute for Policy Studies 1985-87
Researcher: Conducted large declassification campaign under FOIA and wrote article about US military's preparations for nuclear war.

SAIC Foreign Applied Sciences Assessment Center 1984-85
Wrote and presented briefings about Soviet scientific efforts.

INTERNATIONAL LAW REFORM ACTIVITIES

International Ethics and Anti-Corruption Training

- Provided ethics & whistleblowing training for anti-corruption agency Bosnia 2013
- Created and taught comparative law course on whistleblowing for students Netherlands 2013
from the Europe, Asia, North and South America 2009
- Facilitated legal ethics seminar for Russian law students Russia 2012
- Lectured on corporate compliance at Moscow State University Russia 2012
- Lectured on government lawyer ethics at Bialystok School of Public Administration Poland 2009
- Lectured on prosecutors' ethics at Doshisha Law School Japan 2005
- Trained prosecutors and judges for ABA's CEELI Kosovo 2002
- Led Transparency International anti-corruption workshops for NGOs Nigeria 2000
- Led workshop on government ethics for graduate students from Poland & Ukraine Poland 2000
- Consulted with University of Carabobo School of Law faculty on integrating Venezuela 2000
ethics into law school curriculum

Evaluation of Government Ethics and Other Laws

- Evaluated draft whistleblower legislation Bosnia 2013
- Presented assessment of US whistleblower laws to Russian Labor Ministry roundtable Russia 2012
- Evaluated anti-corruption legislation in Zanzibar for UN Development Programme (UNDP) 2011
- Testified before the Oliphant Commission of Inquiry on US ethics laws Canada 2009
- Evaluated anti-corruption legislation in Vietnam for UNDP 2005
- Advised CEELI on its Legal Profession Reform Index 2003
- Evaluated Uzbekistan's proposed lawyer code of conduct 1996
- Initiated contacts with government advisors regarding economic reforms Ukraine 1990



PRESENTATIONS

Faculty Workshops:

University of California, Los Angeles (2013)	University of Iowa (2009)
Indiana University (2013)	American University (2009)
<u>Chicago-Kent College of Law</u> (2013)	University of Pittsburgh (2009)
Widener University (2013)	University of Akron (2009)
Pennsylvania State University (2012)	Rutgers University (2006)
Duquesne University (2012)	Temple University (2006)
<u>University of Baltimore</u> (2012)	University of California, Los Angeles (2004)
University of Arizona (2011)	University of San Francisco (2003)
George Washington University (2011)	University of Missouri (2001)
University of Maryland (2011)	University of Houston (2001)
Brooklyn Law School (2011)	University of Michigan (2000)
University of Miami (2011)	University of Toledo (2000)
Georgia State University (2011)	Pennsylvania State University (2000)
Hofstra University (2010)	Cornell University (1999)
Seattle University (2010)	Emory University (1997)
Denver University (2010)	Sydney University (1996)
University of Colorado (2010)	Indiana University (1996)
Brooklyn Law School (2010)	St. Johns University (1996)

Conferences:

The House for Whistleblowers: A U.S. Perspective

- University of Amsterdam (2013)

Financial Incentives for Whistleblowing Lawyers? The False Claims Act & Dodd-Frank

- 39th Annual ABA National Conference on Professional Responsibility (San Antonio 2013)

Legal Ethics in the News

- American Law Institute Continuing Legal Education Program (DC 2013)

Ethics for an Outsourced Government

- 8th Annual ABA State & Local Procurement Symposium (Nashville 2013)
- Council of the ABA Administrative Law Section (Chicago 2012)
- Washington Metropolitan Area Corporate Counsel Association (2012)
- National Contract Management Association (Denver 2011)
- U.S. Office of Government Ethics Conference (Orlando 2011)
- Interagency Ethics Council (DC 2011)
- Administrative Conference of the United States (ACUS) Plenary Session (DC 2011)

Ethics, Privacy and the STOCK Act's Massive Online Disclosure of Employees' Finances

- Washington University Political Theory Workshop (2013)

The Law of Whistleblowing

- American Society for Public Administration Workshop on Ethics & Quality of Governance (New Orleans 2013)

Organizational Privilege & Organizational Insiders

- Association of American Law Schools (AALS) Annual Meeting (New Orleans 2013)

Interdisciplinary Approaches to Solving National Security Legal Problems

- ABA Standing Committee on Law & National Security Seminar on Teaching National Security Law (Syracuse, NY 2012)



Buying Silence: Confidentiality, Professional Role & Financial Incentives for Whistleblowing Lawyers

- Fifth International Legal Ethics Conference (Banff 2012)
- 38th Annual ABA National Conference on Professional Responsibility (Boston 2012)
- Association of Professional Responsibility Lawyers (APRL) (Chicago 2012)
- ABA National Institute on Civil False Claims Act and Qui Tam Enforcement (DC 2012)

Congress's Right to Counsel in Intelligence Oversight:

- AALS Annual Meeting - Workshop on the Future of the Legal Profession and Legal Education (DC 2012)
- ABA Standing Committee on Law & National Security (SCOLANS) 22nd Annual Review of the Field of National Security Law (DC 2012)
- University of Texas National Security Law Workshop (2010)
- Fourth International Legal Ethics Conference (Stanford Law School 2010)
- Hofstra University Conference on The Legal Ethics of Lawyers in Government (2009)
- William Mitchell College of Law National Security Law Retreat (St. Paul 2009)

Constitutional Challenge to the STOCK Act

- Council on Government Ethics Laws (COGEL) (Columbus 2012)

Texting, Personal Email & Open Government Laws

- COGEL (Columbus 2012)

Whistleblowing Law: The U.S. Experience

- Russian Labor Ministry Roundtable on the Protection of Whistleblowers (Moscow 2012)

Representing Organizational Clients

- Moscow State University (2012)

Professional Responsibility & Ethics in the Global Legal Market (Moscow 2012)

Conflicts Between Government Lawyers and their Clients

- ABA National Conference on Professional Responsibility (Boston 2012)

Challenges & Solutions in Government Ethics

- New York City Conflict of Interest Board Seminar (2012)

The Foreign Corrupt Practice Act and Dodd-Frank's Whistleblower Incentives

- Association of Professional Responsibility Lawyers (Istanbul 2012)

Legislative Oversight of Intelligence in the United States and Canada

- International Association of Constitutional Law Workshop on Secrecy, National Security, and the Vindication of Constitutional Law - Bocconi University (Milan 2011)

Ethics Lessons within National Security Law Courses

- ABA SCOLANS Seminar on Teaching National Security Law (DC 2011)

Who Should Prosecute Corruption?

- NYU Annual Survey of American Law Symposium on Policing, Regulating, & Prosecuting Corruption (2011)

Synthesizing the Field of Government Ethics: The American Law Institute Process

- Council on Government Ethics Laws Annual Conference (Nashville 2011)

Principles of Government Ethics

- American Law Institute (DC 2011)

Constitutional and Ethical Obligations to Disclose Exculpatory Information

- U.S. Department of Justice Professional Responsibility Officers' Conference (Columbia, SC 2011)
- Administrative Office of the U.S. Courts – Winning Strategies Seminar (Philadelphia & Minneapolis 2005)
- U.S. Attorney's Annual Law Seminar, Southern District of Ohio (2001)
- National Ethics Seminar for Federal and State Prosecutors (Columbia, SC 2001)
- American University Washington College of Law (2001)
- National Habeas Corpus Training (Nashville 2000)

Ethics Violations by the Justice Department Torture Lawyers

- Southern Methodist University Conference on National Security and Civil Liberties (2011)
- ABA SCOLANS Seminar on Teaching National Security Law (DC 2010)
- Bialystok School of Public Administration (Poland 2009)
- Pathologies in Public Administration - International Conference of the Polish Association for Public Administration Education (Białowieża, Poland 2009)
- University of California, Berkeley National Lawyers Guild (2009)
- ABA SCOLANS 18th Annual Review of the Field of National Security Law (DC 2008)



- American Society of International Law (DC 2007)
- Wisconsin State Bar Association (Madison 2006)
- AALS Annual Meeting Joint Program on The Roles of Lawyers and the War on Terror (San Francisco 2005)
- American University Conference on Ethical Issues for Government Lawyers (2005)
- Doshisha University Law School (Kyoto 2005)
- Wisconsin Department of Justice (Madison 2005)

Fiduciary Standards for TARP Bailout Contractors

- University of Minnesota Symposium on Government Ethics and Bailouts: The Past, Present, and Future (2010)

A Primer on Government Ethics Standards

- National Association of Latino Elected Officials National Institute for Newly Elected Officials (DC 2010)

Ethical Standards for Government Lawyers Who Blow the Whistle

- United States Senate Office of Education and Training Legal and Government Ethics of the Congressional Staff Lawyer (2010)
- University of California, Hastings Conference on The Public Lawyer's Role In Ensuring the Integrity of Public Institutions (San Francisco 2009)
- Wisconsin Attorney General's Office (Madison 2008)
- Illinois Attorney General's Office (Chicago 2008)
- Washington University Conference on Political Theory (2007)
- ABA National Conference on Professional Responsibility (Vancouver 2006)

The Movement to Lift the Ban on the Military: Lessons for Human Rights Advocates

- American University Human Rights Summer Institute (2010)

Political & Legal Efforts to Lift the Ban on Gays in the Military

- Midwest LGBT Law Conference (St. Louis 2010)
- Missouri History Museum Panel Discussion on "Don't Ask, Don't Tell" (St. Louis 2009)
- AALS Annual Meeting (DC 2007)
- Society of American Law Teachers (Boston 2006)
- American Association of Law Libraries Annual Meeting (St. Louis 2006)
- Boston College Law School Conference on Rumsfeld v. Fair (2005)
- University of Virginia Law School (2003)
- Lawyers for Equality (St. Louis 2006)
- Bar Association of Metropolitan St. Louis Individual Rights & Responsibilities Committee (2005)

Ethical Accountability in Congress

- AALS Annual Meeting (New York 2008)

Representing Unpopular Clients

- ABA National Conference on Professional Responsibility (Boston 2008)

The Architecture of Government Accountability

- AALS Constitutional Law Conference (Cleveland 2008)
- Washington University Political Theory Workshop (2008)
- Law & Society Association Annual Meeting (Berlin 2007)

Impact of the Military's Gay Ban on Women

- AALS Annual Meeting (New York 2008)

Criminal Prosecution of National Security Leaks

- AALS Annual Meeting (DC 2007)

Ethical Issues In the Guantanamo Military Commissions

- Federalist Society Panel on Waging the War on Terror in the Supreme Court (DC 2004)

Comments on "Defining the Limits of Conflicts Regulation"

- International Conflicts of Interests Conference (Trento, Italy 2004)

Empirical Data On Prosecutors' Failure to Disclose Exculpatory Information

- Innocence Projects Conference (San Diego 2002)
- University of Indiana International Conference on Whistleblowing (2002)
- University of Illinois Law Review Symposium (2002)
- U.S. Attorney's Annual Law Seminar (Columbus, Ohio 2002)
- National Habeas Corpus Training (Nashville 2001)



Conflicts of Interest Facing Corporate Lawyers

- Washington University Conflict of Interest Conference (2002)

Reinvigorating Legal Ethics Teaching Through Curricular Options & Simulation Exercises

- AALS Annual Meeting (New Orleans 2002)

Multi-State Practice and Limits on the Unauthorized Practice of Law

- National Association of Attorneys General (Minneapolis 2001)

Lobbying, the Adversary System, and Lawyers' Ethics

- Widener Law School Conference on Legal Ethics for Government Lawyers (2000)

The End of Attorney-Client Privilege for the Government?

- University of California, Hastings Public Servant or Hired Gun Conference (2002)

Lawyers, Lying and the Legacy of Watergate for Legal Ethics

- Hastings College of Law Conference: From Watergate to Generation Next (2000)

Prosecutorial Discretion and Prosecutors' Prudence

- Georgetown University Symposium on Prosecutorial Misconduct (2000)

The Over-Criminalization of Government Ethics

- Conference on Ethics in Public Administration (Wigry, Poland 2000)

Comments on Economic Analyses of Corruption Prosecutions

- Western Economic Association International Conference (Vancouver - 2000)

Forgiveness in the Law: Lessons from South Africa

- Cornell University Peace Studies Program (1999)

The Licensing of Professionals as a Tool for Curbing Corruption

- Ninth International Anti-Corruption Conference (Durban, South Africa 1999)

From the Watergate Disbarments to Clinton's Impeachment: How Honest Should We Expect Lawyers and Government Officials to Be?

- ABA National Conference on Professional Responsibility (San Diego 1999)

The U.S. Approach to Government Ethics and a Fiduciary-Based Alternative

- Ethics Practitioners' Association of Canada (Ottawa 1998)

Reforming Campaign Finance Law to Protect the Public Trust

- Sixth International Conference on Ethics in Public Service (Netherlands 1998)
- American Society for Public Administration (Philadelphia 1997)
- American Political Science Association Annual Meeting (Boston 1998)
- University of Paris Symposium on Money, Politics and Corruption (1998)
- Law & Society Association (Aspen 1998)

Legal Defense Funds for Government Officials

- Stanford Law Review Symposium on Law and the Political Process (1998)
- Fifth International Conference on Ethics in Public Service (Brisbane, Australia 1996)

Promoting Ethics by Promoting 'Voice': The Case for an Inspector General in the White House

- St. Louis University Law School Symposium on The Presidency: 25 Years After Watergate (1998)
- Mercer University Law School Symposium on the Independent Counsel Statute (1997)

Lawyering is Not a Morality-Free Zone: A Rebuttal to the Notion of Lawyers' Amoral Ethical Role

- Hofstra University Conference on Access to Justice (1998)

Conflicts and Confidences

- Catholic University Conference on Developments in Legal Externship Pedagogy (1998)

The Ethics of Mentoring and Group Identity

- Association for Practical and Professional Ethics (Dallas 1998)

Applying Ethical Principles to Campaign Finance Law

- Association for Practical and Professional Ethics (Missoula 1997)
- National Conference of State Legislatures (St. Louis 1996)

Do We Promote More Ethical Behavior By Promulgating More Ethics Rules?

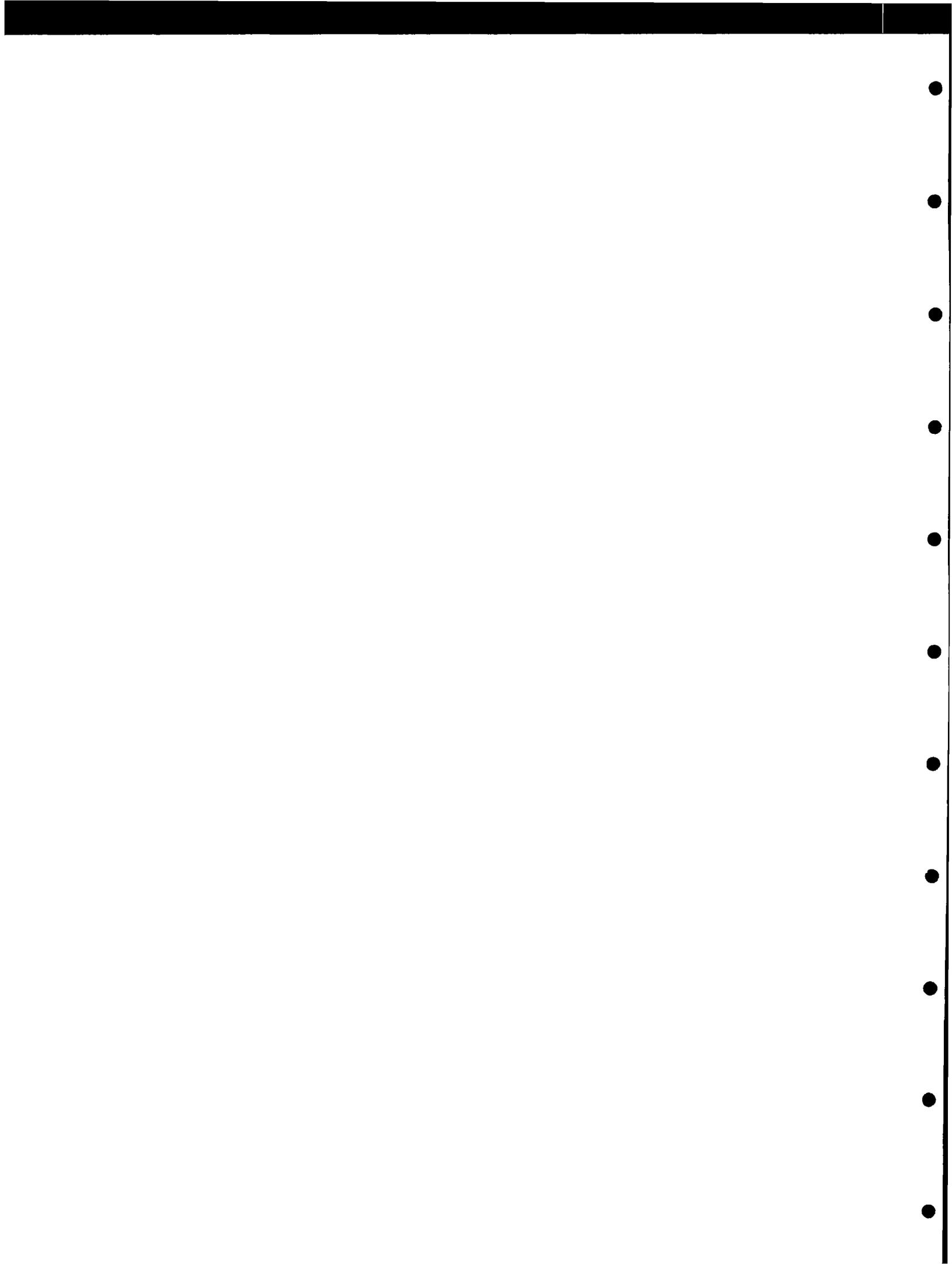
- American Society for Public Administration (Philadelphia 1997)

Government Ethics Since Watergate

- Ethical Society of Saint Louis (1997)

Being 'Out' on the Teaching Market

- Yale Law School (1997)



Fiduciary Theory and its Implications for Campaign Finance Reform

- Pew Charitable Trust (DC 1996)

Reducing Complexity in Government Ethics Regulation

- South East Conference on Public Administration (Savannah 1995)

Ethics Restrictions on the Work of Former Federal Prosecutors

- ABA Annual Meeting, Government and Public Sector Lawyers Division (Chicago 1995)

Other presentations

Transparency in Congressional Travel, Lawyer2Lawyer Podcast (2012)

Are Prosecutors Irrelevant? The Criminal Law's Limited Role In Controlling Corruption, American Association of University Women – DC Branch (2012)

Government Contractor Ethics, ALI/ABA Continuing Education Program on The Ethics of Doing Business with the Government (2010)

McGeorge School of Law Conference on Ethics in Government (Sacramento 2009)

ALI/ABA Red Flags, Client Troubles, and the Ethics of Representation (2005)

ALI/ABA Ethics Webcast (2004)

Columbus Bar Association (2002)

Hofstra University Legal Ethics Conference (2001)

SELECTED PROFESSIONAL & COMMUNITY SERVICE

<u>American Society for Public Administration</u> – Ethics Section Executive Committee	2013-present
<u>Government Accountability Project (GAP) Board</u> Member	2013-present
<u>D.C. Bar Rules of Professional Conduct Review Committee</u>	2012-present
<u>Association of Professional Responsibility Lawyers</u> Public Statements Committee	2012-present
<u>GAP Whistleblowing Curriculum Development Committee</u>	2010-present
<u>Institutional Conflicts of Interest (ICOI) Review Committee</u>	2009-11, 2013-present
<ul style="list-style-type: none">• Helped establish procedures for evaluating financial holdings of research institution and its high-ranking officials to prevent conflicts of interest.	
<u>Pay Equity Study Committee</u>	2008-10
Center for the Study of Ethics & Human Values - Planning & Program Committee	2002-09
<u>Journal of National Security Law & Policy</u> , Editorial Board	2005-08
Workshop on Empirical Research in Law, Coordinator	2008-09
<u>Servicemembers Legal Defense Network (SLDN) Board</u> Member	2003-07
<ul style="list-style-type: none">• <u>Advocated</u> to lift the ban on gays in the military	
Society of American Law Teachers - Committee on <u>LGBT Issues in the Academy</u> , Chair	2006-07
Association of American Law Schools - Executive Committee for the Sections on:	
<ul style="list-style-type: none">• <u>National Security Law</u> (Chair-2006)	2004-06
<ul style="list-style-type: none">• <u>Legislation</u>	1999-2000
<ul style="list-style-type: none">• <u>Professional Responsibility</u>	1996-98
<u>Public Integrity</u> , Reviewer	1998
<u>The Immigration Project</u> , Board Member	1995-2003

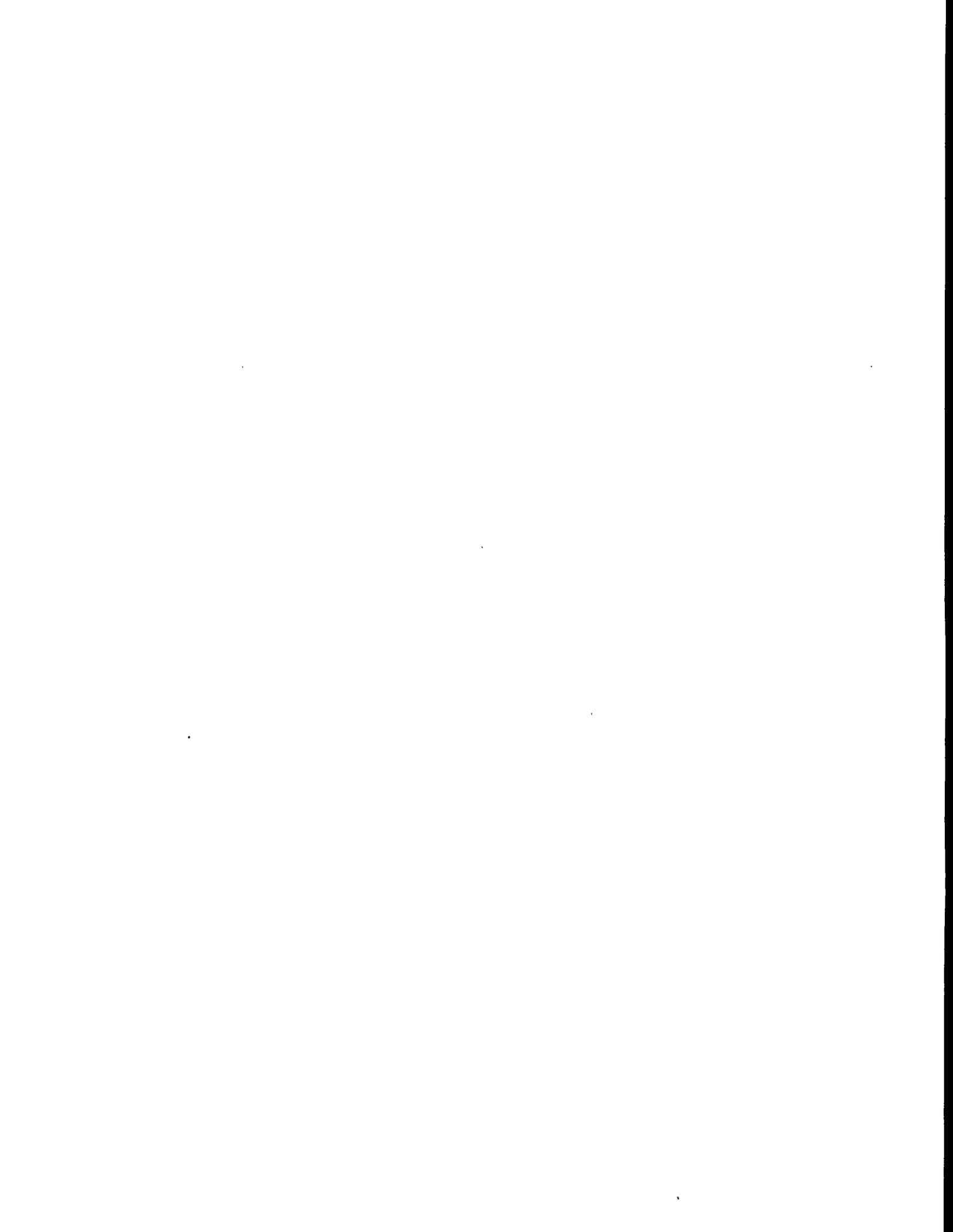
BAR ADMISSIONS

District of Columbia

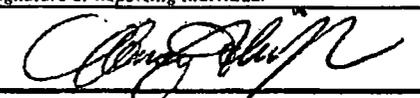
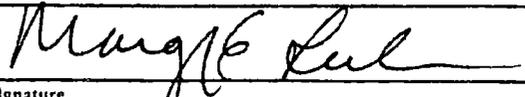
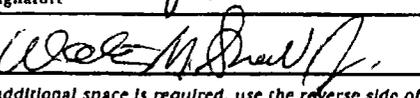
U.S. Court of Appeals for the Fourth Circuit

U.S. Supreme Court





Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT

Date of Appointment, Candidacy, Election, or Nomination (Month, Day, Year)	Reporting Status (Check Appropriate Boxes)	Incumbent <input type="checkbox"/>	Calendar Year Covered by Report _____	New Entrant, Nominee, or Candidate <input checked="" type="checkbox"/>	Termination Filer <input type="checkbox"/>	Termination Date (If Applicable) (Month, Day, Year) _____	<p style="text-align: center;">Fee for Late Filing</p> <p>Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period, shall be subject to a \$200 fee.</p> <p style="text-align: center;">Reporting Periods</p> <p>Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.</p> <p>Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.</p> <p>Nominees, New Entrants and Candidates for President and Vice President:</p> <p>Schedule A—The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.</p> <p>Schedule B—Not applicable.</p> <p>Schedule C, Part I (Liabilities)—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.</p> <p>Schedule C, Part II (Agreements or Arrangements)—Show any agreements or arrangements as of the date of filing.</p> <p>Schedule D—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.</p>
Reporting Individual's Name	Last Name Schiffer		First Name and Middle Initial Nancy J				
Position for Which Filing	Title of Position Member		Department or Agency (If Applicable) National Labor Relations Board				
Location of Present Office (or forwarding address)	Address (Number, Street, City, State, and ZIP Code) 1099 14th Street NW Washington, DC 20570			Telephone No. (Include Area Code) (202) 273-1000			
Position(s) Held with the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held						
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination Committee on Health, Education, Labor and Pensions			Do You Intend to Create a Qualified Diversified Trust? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
Certification	Signature of Reporting Individual				Date (Month, Day, Year)		
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.					7-19-13		
Other Review (if desired by agency)	Signature of Other Reviewer				Date (Month, Day, Year)		
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official				Date (Month, Day, Year)		
On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in the box below).					7-23-13		
Office of Government Ethics Use Only	Signature				Date (Month, Day, Year)		
					7-23-13		
Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)							
(Check box if filing extension granted & indicate number of days _____) <input type="checkbox"/>							
(Check box if comments are continued on the reverse side) <input type="checkbox"/>							
Agency Use Only							
OGE Use Only							



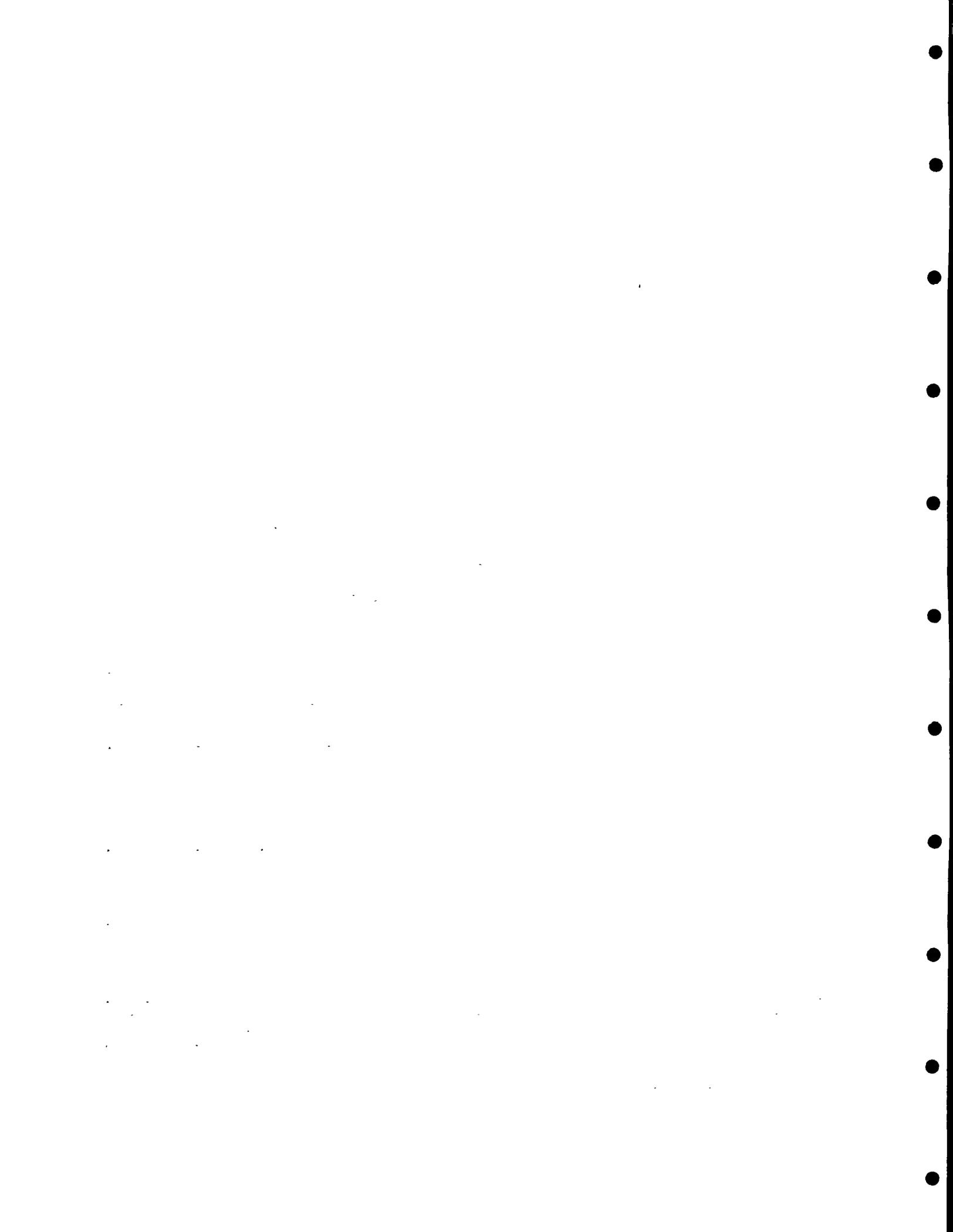
Reporting Individual's Name Schiffer, Nancy J	SCHEDULE A	Page Number 2 of 7
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Assets and Income BLOCK A	Valuation of Assets at close of reporting period BLOCK B											Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item. BLOCK C																
For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period, or which generated more than \$200 in income during the reporting period, together with such income. For yourself, also report the source and actual amount of earned income exceeding \$200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than \$1,000 (except report the actual amount of any honoraria over \$200 of your spouse). None <input type="checkbox"/>	None (or less than \$1,001)	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000*	\$1,000,001 - \$5,000,000	\$5,000,001 - \$25,000,000	\$25,000,001 - \$50,000,000	Over \$50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Type				Amount							Date (Mo., Day, Yr.) Only if Honoraria	
																Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than \$201)								Other Income (Specify Type & Actual Amount)
																				\$201 - \$1,000	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$1,000,000		
Examples	Central Airlines Common			x												x								Law Partnership Income \$150,000				
	Doc Jones & Smith, Hometown, State		x																									
	Kempstone Equity Fund			x									x															
	IRA: Heartland 500 Index Fund					x							x															
1	International Union, UAW Staff Retirement Income Plan & Trust (Defined Benefit Plan)																								Monthly Benefit \$5,492.20 (1/1/12-7/1/12)			
2	(Value Not Readily Ascertainable)																								Current Monthly Benefit \$4,238.20			
3	AFL-CIO Staff Retirement Plan (Defined Benefit Plan - Value Not Readily Ascertainable)																								Monthly Benefit of \$4,097.80			
4	AFL-CIO																								Salary \$106,009			
5	AFL-CIO Deferred Compensation Plan and Trust (401(k) Plan):																											
6	T Rowe Price New Horizons Fund	x											x												Income amount not readily ascertainable			

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.







Do not complete Schedule B if you are a new entrant, nominee, or Vice Presidential or Presidential Candidate

Reporting Individual's Name Schiffer, Nancy J	SCHEDULE B	Page Number 5 of 7
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Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent children during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded \$1,000. Include transactions that resulted in a loss.

Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

None

	Identificatinn of Assets	Transaction Type (x)			Date (Mo., Day, Yr.)	Amount of Transaction (x)													
		Purchase	Sale	Exchange		\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	Over	\$1,000,001 - \$5,000,000	\$5,000,001 - \$25,000,000	\$25,000,001 - \$50,000,000	Over	\$50,000,000	Certificate of divestiture	
Example	Central Airlines Common	x			2/1/99			x											
1																			
2																			
3																			
4																			
5																			

* This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

Part II: Gifts, Reimbursements, and Travel Expenses

For you, your spouse and dependent children, report the source, a brief description, and the value of: (1) gifts (such as tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than \$350 and (2) travel-related cash reimbursements received from one source totaling more than \$350. For conflicts analysis, it is helpful to indicate a basis for receipt, such as personal friend, agency approval under 5 U.S.C. § 4111 or other statutory authority, etc. For travel-related gifts and reimbursements, include travel itinerary, dates, and the nature of expenses provided. Exclude anything given to you by

the U.S. Government; given to your agency in connection with official travel; received from relatives; received by your spouse or dependent child totally independent of their relationship to you; or provided as personal hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the total value from one source, exclude items worth \$140 or less. See instructions for other exclusions.

None

	Source (Name and Address)	Brief Description	Value
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/99 (personal activity unrelated to duty)	\$500
	Frank Jones, San Francisco, CA	Leather briefcase (personal friend)	\$385
1			
2			
3			
4			
5			



Reporting Individual's Name Schiffer, Nancy J	SCHEDULE C	Page Number 6 of 7
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Part I: Liabilities
 Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

None

Creditors (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term If applicable	Category of Amount or Value (x)																
					\$10,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000*	\$1,000,000 - \$5,000,000	\$5,000,000 - \$25,000,000	\$25,000,001 - \$50,000,000	Over \$50,000,000						
Examples First District Bank, Washington, DC John Jones Washington DC	Mortgage on rental property, Delaware Promissory note	1991 1999	8% 10%	25 yrs. on demand			x														
1																					
2																					
3																					
4																					
5																					

* This category applies only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher categories, as appropriate.

Part II: Agreements or Arrangements
 Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

None

Status and Terms of any Agreement or Arrangement	Parties	Date
Example Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/00.	Doe Jones & Smith, Hometown, State	7/85
1 I am a participant in the UAW Staff Retirement Income Plan and Trust. Pursuant to defined benefit pension plan, I am currently receiving monthly retirement benefits.	International Union, UAW Staff Retirement Income Plan & Trust Detroit, MI	10/82
2 I am a participant in the AFL-CIO Staff Retirement Plan. Pursuant to defined benefit pension plan, I am currently receiving monthly retirement benefits.	AFL-CIO Staff Retirement Plan Washington, DC	6/00
3 I am a continuing participant in the AFL-CIO Deferred Compensation and Trust Plan. I no longer contribute to the plan nor does my employer.	AFL-CIO Deferred Compensation Plan and Trust Washington, DC	6/00
4 I am continuing participant in the UAW Staff Severance Plan. I no longer contribute to the plan nor does my employer.	International Union, UAW Staff Severance Plan Detroit, MI	10/82
5 Pursuant to retirement plan, I am entitled to health coverage and group life insurance for both me and my spouse for life.	International Union, UAW Detroit, MI	10/82
6 Pursuant to retirement plan, I am entitled to health coverage and group life insurance for both me and my spouse for life.	AFL-CIO Washington, DC	6/00



Reporting Individual's Name Schiffer, Nancy J	SCHEDULE D	Page Number 7 of 7
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Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature. None

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1	AFL-CIO Washington, DC	Labor Union	Associate General Counsel	06/2000	7/2012
2	American Bar Association Washington, DC	Professional Association	Program, Co-Chair, Committee on Practice and Procedure Before NLRB	08/2011	7/2012
3	College and Labor and Employment Lawyers Annapolis, MD	Professional Association	Chair, Credentials Committee for the District of Columbia Circuit	02/2010	7/2012
4					
5					
6					

Part II: Compensation in Excess of \$5,000 Paid by One Source

Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source. Do not complete this part if you are an Incumbent, Termination Filer, or Vice Presidential or Presidential Candidate. None

	Source (Name and Address)	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1	AFL-CIO Washington, DC	Legal Services
2		
3		
4		
5		
6		





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80 Eighth Avenue
New York, New York 10011-5126

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*Admitted in NY, MA and DC
*Admitted in NY, NJ and PA

Owen M. Rumelt*
Pamela Jeffrey
Sherri Levine
Elizabeth Baker
Veronica Villanueva*
Tarik Fouad Ajami
Carl J. Levine

Counsel:
Michael Steven Smith
David P. Horowitz†
Sally Orosio

*Admitted in NY and DC
†Admitted in NY and MA
oAdmitted in NY, NJ and CT



May 6, 1999

BY HAND

Richard Semeraro, Esq.
Senior Associate Counsel
and Director of Labor Relations
New York University
Elmer Holmes Bobst Library
70 Washington Square South
New York, NY 10012-1091

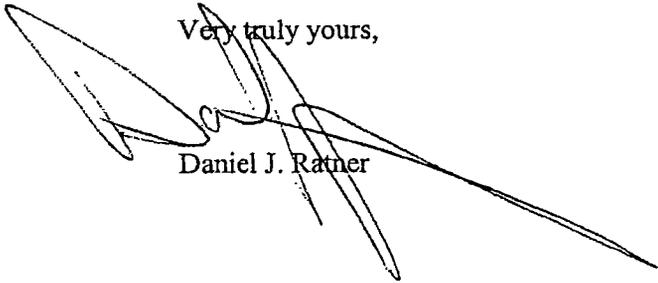
Re: UAW -and- NYU (Graduate Assistants)
2-RC-22082

Dear Mr. Semeraro:

Enclosed please find the UAW's subpoena *duces tecum* in the above-referenced matter.

After you have had an opportunity to review the documents we seek, please give me a call so that we can discuss any concerns or questions that you have with the subpoena, and the most efficient means of producing the material to expedite the hearing process.

Very truly yours,


Daniel J. Ratner

Enclosure

cc: Julie Kushner
Betsey Engel, Esq.

DJR:nkl
Z:\DRATNER\LTR\rs5-6.99.wpd

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Sherri Levine
Elizabeth Baker
Veronica Villanueva*
Tarik Fouad Ajami
Carl J. Levine

Counsel
Michael Steven Smith
David P. Horowitz†
Sally Orosco

*Admitted in NY and DC
†Admitted in NY and MA
oAdmitted in NY, NJ and CT

May 24, 1999

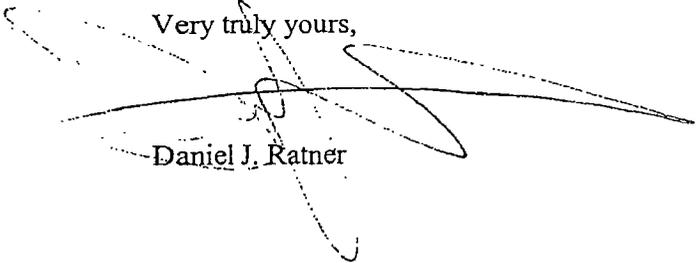
Daniel Silverman, Regional Director
Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278-0104

Re: UAW -and- NYU
Case No. 2-RC-22082

Dear Mr. Silverman:

Accompanying this letter is Petitioner UAW's Statement in Opposition to New York University's Motion to Dismiss the above-referenced proceeding.

Very truly yours,


Daniel J. Ratner

Enclosure

cc: Ed Brill, Esq.
Julie Kushner
Betsey Engel, Esq.

DJR:nkl
Z:\DRATNER\LTR\ds5-24.99.wpd

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June 10, 1999

Via Facsimile

John J. Toner, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Room 11613
Washington, D.C. 20570

Re: Case No. 2-RC-22082

Dear Mr. Toner

This firm represents the Petitioner, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO. Yesterday morning we received the Employer's Request For Special Review of Order Denying Motion to Dismiss Petition or Stay Proceedings filed by New York University ("NYU"), the Employer in the above referenced matter.

I am writing to inform you that we will file a response in opposition to NYU's request by the close of business on Wednesday June 16, 1999. Please let me know if this schedule is acceptable.

Very truly yours,

Daniel J. Ratner

cc: Julie Kushner
Betsey Engel, Esq.
Ed Brill, Esq.

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June 15, 1999



Daniel Silverman, Regional Director
Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278-0104

Re: UAW -and- NYU
Case No. 2-RC-22082

Dear Mr. Silverman:

Enclosed please find the UAW's Petition to Revoke Subpoena B-341720 served by the Employer, NYU, in the above-referenced matter.

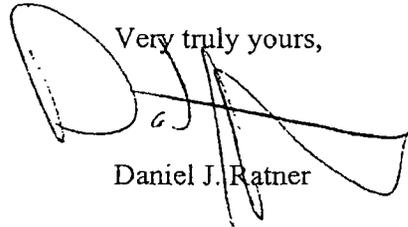
I would call your attention with particular note to items 7-12 in the Subpoena (copy enclosed). The Employer has made its demand for documents in those requests conditional upon your future decision on the question of the admissibility of evidence regarding Graduate Assistant representation at other colleges and universities. As the demand for documents is conditional, we have noted our intent to move to revoke the subpoena with respect to those items, but we request the opportunity to file a supplemental petition to revoke at such time as you make your ruling on the Employer's future motion to limit such testimony. Obviously, our response to those requests will be conditioned upon your decision and the contours of such decision. As a conditional demand for documents is quite out of the ordinary, I

LEVY, RATNER & BEHROOZI, P.C.

June 15, 1999
Page 2

request your guidance as to whether I need to respond more specifically to items 7-13 now or whether I can file the supplemental petition to revoke at such time as you issue your decision.

Very truly yours,

A handwritten signature in black ink, appearing to read "DJR", is written over the typed name "Daniel J. Ratner". The signature is stylized and somewhat illegible.

Daniel J. Ratner

Encl.

cc: Ed Brill, Esq.
Julie Kushner
Betsey Engel, Esq.
Lisa Jessup

DJR:nkl
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June 15, 1999

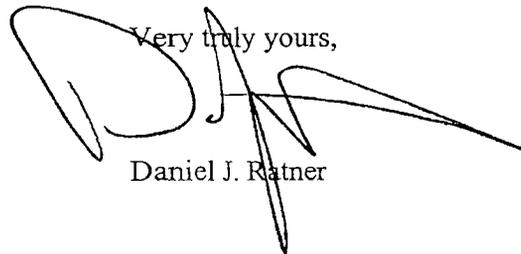
John J. Toner, Esq.
Executive Secretary
National Labor Relations Board
1099 Fourteenth Street, N.W.
Washington, D.C. 20570

Re: UAW -and- NYU
Case No. 2-RC-22028

Dear Mr. Toner:

Enclosed is Petitioner UAW's Statement in Opposition to NYU's Special Appeal of the Region 2 Director's dismissal of the Employer's motion to dismiss, or stay, the above-referenced proceeding.

Very truly yours,



Daniel J. Ratner

Enclosure

cc: Daniel Silverman, Esq.
Ed Brill, Esq.
Julie Kushner
Betsey Engel
Lisa Jessup

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June 15, 1999



Daniel Silverman, Regional Director
Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278-0104

Re: UAW -and- NYU
Case No. 2-RC-22082

Dear Mr. Silverman:

Enclosed please find the UAW's Petition to Revoke Subpoena B-341720 served by the Employer, NYU, in the above-referenced matter.

I would call your attention with particular note to items 7-12 in the Subpoena (copy enclosed). The Employer has made its demand for documents in those requests conditional upon your future decision on the question of the admissibility of evidence regarding Graduate Assistant representation at other colleges and universities. As the demand for documents is conditional, we have noted our intent to move to revoke the subpoena with respect to those items, but we request the opportunity to file a supplemental petition to revoke at such time as you make your ruling on the Employer's future motion to limit such testimony. Obviously, our response to those requests will be conditioned upon your decision and the contours of such decision. As a conditional demand for documents is quite out of the ordinary, I

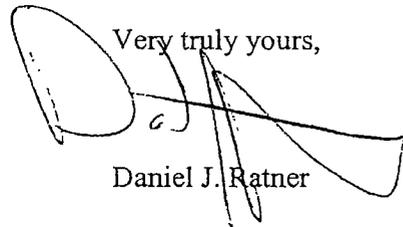
LEVY, RATNER & BEHROOZI, P.C.

June 15, 1999

Page 2

request your guidance as to whether I need to respond more specifically to items 7-13 now or whether I can file the supplemental petition to revoke at such time as you issue your decision.

Very truly yours,

A handwritten signature in black ink, appearing to read "Daniel J. Ratner", written over a horizontal line. The signature is stylized and somewhat cursive.

Daniel J. Ratner

Encl.

cc: Ed Brill, Esq.
Julie Kushner
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July 16, 1999

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Nick Lewis
National Labor Relations Board, Region 2
26 Federal Plaza, Rm. 3614
New York, NY 10278-0104



Re: UAW -and- NYU (Graduate Assistants)
2-RC-22082

Dear Mr. Lewis:

This letter responds to your request that the UAW state its position in writing regarding the relevancy of evidence showing that two Employer benefit policies differentiate between graduate students based upon their status as students or as Graduate Assistants ("GAs")¹. This issue arises because we have requested that New York University ("NYU" or the "Employer") produce documents relating to the Employer's policies with respect to book store discounts and disability services. The Employer has objected to the production of these documents, claiming that the Region has held that Employer benefit policies are not relevant.

The Board considers the benefits offered, or not offered, to putative employees as a central factor in determining employee status. See, e.g., American Indus. Cleaning Co., 291 NLRB 399 (1988) (benefits are a factor in the determination of whether an employee is a supervisor); Scranton Tribune, 294 NLRB 692 (1989) (benefit levels a factor in determining that newspaper columnists were not managers); Blackberry Creek Trucking, 291 NLRB 474 (1988) (benefits are one factor in deciding that truck owner-operators are not independent contractors).

Below we show that the benefits here in issue are mandatory subjects of bargaining under the Act. The fact that GAs are accorded the same bookstore discount as conceded employees (faculty), but are denied disability services, evidences that NYU treats GAs as employees. In fact, the Hearing Officer has already affirmed the relevancy of benefit policies in denying NYU's motion

¹GAs shall refer collectively to all classifications in the petitioned-for unit.



Nick Lewis
National Labor Relations Board, Region 2
July 16, 1999
Page 2

to revoke the UAW's subpoena duces tecum, which included requests for documents containing information about such policies.

Background

Petitioner initially demanded the production of documents relating to all policies and benefits affecting graduate students and/or GAs in its subpoena duces tecum. Subpoena (B-345589) is announced as Exhibit A. In particular items 1, 2, 4, and 5 of the subpoena specifically cover the policies here in issue. The Employer moved to revoke the subpoena, challenging the relevancy of the documents in respect to items 1, 2, and 5. On May 19, 1999, the Hearing Officer denied the Employer's motion, in respect, inter alia, to items 1, 2, and 5. Thus, since May 19th, the Employer has been under a legal duty to furnish documents relating to these policies.

The Triggering Events

On July 1, 1999, Jessica Catalino testified that she was denied disability services at the Employer's Center for Students with Disabilities ("Center"). She testified that she was told by Center representatives that such services could only be provided to graduate students in their capacities as students, and not in their capacities as GAs. The Region sustained the Employer's objection to the admission of such evidence because Catalino's testimony was ruled hearsay testimony.² Subsequently we made a specific demand for production of any documents setting forth the Center's policies on eligibility for such services. See Exhibit B.

Also, it has come to our attention that the Employer has a policy according graduate students a 15% discount at its bookstore, during semesters when the students are performing as GAs.

The Policies In Question Evidence That The Employer Differentiates Between The Status Of GAs and Graduate Students Who Are Not GAs

The Employer argues that performing as a GA is merely part of a student's graduate education -- no different from taking a graduate course or writing a paper. Petitioner argues that when a student performs as a GA they are an employee because they are required to perform a service for NYU for which they receive compensation. Thus, benefits or policies which differentiate

² It is our position that as the statements were made by an appropriate agent of NYU, they were admissible as admissions.



Nick Lewis
National Labor Relations Board, Region 2
July 16, 1999
Page 3

between individuals based upon their status as graduate student or GA are directly relevant to the determination of the GAs' status. See cases cited supra. Moreover, where the policies involve benefits which would constitute mandatory subjects of bargaining under the Act, they are directly relevant to a determination of employee status.

1. Book Store Discounts:

Information we have received in preparing GAs' testimony shows that the Employer offers graduate students 15% discounts on purchases at the University book store during semesters when the students are performing as GAs. The same discount is offered to faculty, but it is not offered to graduate students who are not performing GA duties.

Employee discounts are a mandatory subject of bargaining. See, e.g., Gulf Refining and Marketing Co., 238 NLRB 129 (1970); Owen Corning Fiberglass Corp., 282 NLRB 609 (1987); General Counsel Opinion, 1984 NLRB GCM Lexis 37. Thus, the Employer accords graduate students in their capacity as GAs, an economic benefit, similar to that accorded to conceded employees (faculty), which it does not make available to individuals solely in their capacity as students.

2. Disability Aid

It is also relevant to the inquiry and determination of GAs' employee status if there are disability services which the Employer makes available to individuals in their student capacities but denies to the same individuals in their role as GAs. In the first place, such a policy would show that NYU, at least in this regard, treats the work done by graduate students in their capacity as GAs as distinguishable from academic work performed by graduate students. In addition, any such policy is relevant in that the Americans With Disabilities Act (ADA) imposes legal obligations on employers to accommodate disabled employees. If the differentiation between students and GAs in the Center's provision of disability services is based on concerns about the obligations/liabilities which would be imposed on NYU under the ADA if it provided such services to GAs (by providing services to accommodate GAs it would require them to provide similar services to all other employees), then it would provide evidence that NYU recognizes that GAs are a employees, at least for purposes of ADA liability.

Moreover, it is undisputed that disability benefits are a mandatory subject of bargaining. See, e.g., Texaco, Inc., 290 NLRB 1182 (1988); Jim Walter Resources, Inc., 289 NLRB No. 163 (1988).

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Nick Lewis
National Labor Relations Board, Region 2
July 16, 1999
Page 4

**As The Policies Can Be Stipulated Into The Record, Or
Entered By Documents, The Proceedings Will Not Be Delayed**

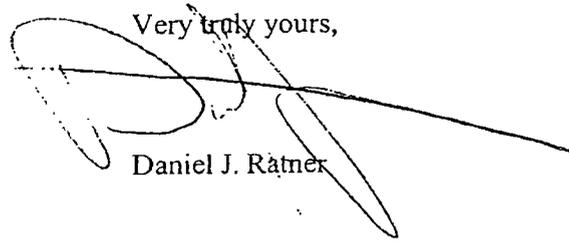
The book store discount policy, apparently, is not in dispute and can be stipulated into the record. When we requested a stipulation regarding the discount at our meeting on July 8th with the Employer's counsels, Mr. Brill did not challenge the existence or accuracy of the policy. Instead, he stated that NYU had no obligation to consider such a stipulation because the Region allegedly had held that "benefits" were not relevant to the determination of GAs' status, based upon the Region's decision on the Catalino testimony (disability services). If the Region clarifies that this was not its position as to relevancy (as opposed to the form of the evidence), the existence and parameters of the book store discount policy could be entered into the record by a stipulation of two or three sentences.

If the Region rules that the Center's disability policy is relevant, then NYU can produce any documents which set forth such policy, or we can call the Center's director to testify to the contours of this policy.

Petitioner is currently unaware of any other "benefits" which differentiate between students and Gas.

Based on the forgoing we respectfully request that the Region clarify its position with respect to these two benefits, and direct NYU to produce the relevant information and either enter into a stipulation or identify the appropriate management witnesses with knowledge of the two policies.

Very truly yours,



Daniel J. Ratner

cc: Ed Brill, Esq.
Julie Kushner
Betsy Engel, Esq.
Lis Jessup





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December 8, 1999

Sherril Levine
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Counsel
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Sally Orosio

VIA FACSIMILE AND REGULAR MAIL

Nicholas Lewis, Hearing Officer
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278-0104

*Admitted in NY, MA and DC
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Admitted in NY, NJ and CT



Re: UAW -and- NYU - Case No. 2-RC-22082

Dear Mr. Lewis:

Petitioner UAW submits this statement of position with respect to whether the hearings in the above-referenced matter should be reopened in light of the recent NLRB decision in Boston Medical Center Corp. ("Boston Medical"), 330 NLRB No. 30 (1999).

NYU requests reopening of the hearings to introduce evidence showing the amount of time GAs spend on their academic studies in relation to the time they spend on their GA duties, the number of semesters that students work as GAs, and a review of benefits available to GAs. The Region should deny this request. Below, we show that evidence of the amount of time GAs devote to their graduate studies is not relevant legally under Boston Medical. Further, attempting to put into the record such evidence from a representative sample of GAs would require another 40 days of hearings. In addition, extensive evidence of the number of semesters GAs work is already in the record. Therefore, no further hearings are necessary in respect to these questions. Indeed, even if the Region determines that this evidence is marginally relevant, the amount of time necessary to put this evidence into the record will prejudice UAW as it will likely preclude a representation election this academic year.

During the hearings, the Hearing Officer precluded the UAW from offering evidence (1) as to the collective bargaining experience of graduate assistants ("GAs") at state universities, and (2) evidence relating to GA benefits. We believe that both rulings were improper. However, the legal recognition of GAs as employees by state governments, and the resulting extension of collective bargaining rights to GAs at a large number of state universities, is already a matter of public record. Further, insofar as the record in this proceeding contains sufficient evidence of benefits and otherwise overwhelmingly demonstrates that GAs are employees under the Boston Medical criteria, it is unnecessary to reopen the record with respect to either of these issues. Therefore, we are prepared to proceed to decision on the existing record. If the Region reopens the record, however,

Nicholas Lewis, Hearing Officer
National Labor Relations Board, Region 2
December 8, 1999
Page 2

we should be afforded the opportunity to present limited evidence on benefits, and on the experience at state universities, which can be admitted through documents and stipulations to undisputed facts.

NYU's Contentions

Despite the fact that there have now been over 40 days of hearings, NYU argues that the Boston Medical decision makes it necessary to take further evidence on the question of how much time students spend performing academic work as opposed to performing assistantship-related duties. In support of this position NYU cites the portion of the decision that states:

Third, house staff provide patient care for the Hospital. Most noteworthy is the undisputed fact that house staff spend up to 80 percent of their time at the Hospital engaged in direct patient care.

330 NLRB at 10.

NYU apparently misunderstands the significance of this finding and, thus, reaches an erroneous conclusion that the evidence it seeks to present is legally relevant. In Boston Medical it is undisputed that the tasks performed by interns and residents as students, and the tasks they perform as employees, are coextensive. There are no interns and residents who attend in-service educational programs but have no direct patient-related obligations. The non-patient care responsibilities of house staff are an integral part of their appointments as interns and residents. As all of the medical students at issue in Boston Medical are required to serve as interns and residents, it was not possible for the Board to compare and contrast the amount of time spent on employment-related duties and the time spent on strictly education-related obligations. This is made clear explicitly by the Board in the very same paragraph upon which NYU relies:

The advanced training in the specialty the individual receives at the Hospital is not inconsistent with "employee" status. It complements, indeed enhances, the considerable services the Hospital receives from the house staff, and for which the house staff are compensated. That they also obtain educational benefits from their employment does not detract from this fact.

Id.

However, in the case of NYU, where only 10% of all graduate students serve as assistants, and where there is a clear division between duties performed in a student's capacity as an assistant and those performed in their capacity as a student, the relevant inquiry is not into relative hours spent performing as an assistant as compared to those spent performing as a student. The relevant inquiry under Boston Medical is into the hours spent performing tasks (e.g. teaching) that provide a direct service to NYU, as compared to the time spent training students to perform these tasks with greater competence (e.g. TA orientation sessions). Not only does the record already reflect, in great detail, the time spent by students in performing as assistants, NYU has extensively developed the record



Nicholas Lewis, Hearing Officer
National Labor Relations Board, Region 2
December 8, 1999
Page 3

as to the nature and scope of training provided to assistants as assistants, including the time spent on such training activities.¹

Citing the Board finding in Boston Medical that house staff are employed from 3-7 years and, therefore, are not temporary employees, NYU also maintains that it is necessary to further develop the record regarding the number of semesters that students serve as Assistants while at NYU. While Petitioner does not dispute the relevance of this information, the record is already fully developed on this point, and further, NYU has been on notice since shortly after the current hearings commenced that the Region, in determining whether graduate assistants at NYU are employees under the NLRA, would look, at least in part, to the common law definition of employee.² The Supreme Court has previously held that one of the factors which the common law looks to in determining employee status is "the duration of the relationship between the parties." Nationwide Mutual Insurance Co. v. Darden, 112 S. Ct. 1344, 1348 (1992) (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)). Thus, NYU was on notice well before the issuance of the Boston Medical decision that length of service might be a relevant factor effecting the Region's determination as to the status of the NYU assistants. If NYU believed that additional evidence was necessary on this point, it should have presented such evidence earlier.

In any event, testimony on this issue, from both UAW and NYU witnesses, has already been thoroughly developed. Testimony on this subject was taken, not only from the 14 students and former students who have testified,³ but also from faculty members and administrators called by both

¹ In this regard Petitioner's position parallels the position taken by the Board in Boston Medical, i.e., that this training "complements, indeed enhances, the considerable services" NYU receives from its assistants.

² See Board Ex. 3C (order denying NYU's motion to dismiss).

³ The record reflects the fact that Laura Tannenbaum (Comparative Literature) has served as an assistant for 8 semesters, and has been accepted to serve in EWP, which the record reflects generally requires a 4 semester commitment, that Mimi Halpern (Italian) has served as a TA for 6 semesters, that Francis Greene (German) has served as a TA for 7 semesters and plans to do so for both semesters of the current academic year, that Jessica Catalino (Anthropology) has served for 2 semesters and is currently a TA; that Jane Rothstein (Hebrew and Judaic Studies/History) has served for 4 semesters; that Travis Williams has served as an Assistant for 2 semesters and has been assigned to assistantships for the next 2 semester, that Kitty Krupat (American Studies) has served for 7 semesters, that Ben Stewart (Performance Studies) has served in EWP for 4 semesters and is committed to remain with EWP for at least 2 more semesters, that Renee Kramer has served for 2 semesters and is a TA this semester, that Mia Manzulli, NYU's witness, served as an assistant for 10 semesters, 8 of them in EWP, that Emily DeVoti (Tisch) served as an assistant for 2 semesters and will be an assistant in both semesters of the current academic





Nicholas Lewis, Hearing Officer
National Labor Relations Board, Region 2
December 8, 1999
Page 4

parties, including Vice President Berne,⁴ Dean Stimpson,⁵ and others.⁶ There is also evidence in the record that approximately half of all Ph.D. candidates in the Graduate School of Arts and Sciences support themselves solely through serving as assistants.⁷ Further, we know from the record that large numbers of Assistants, including all of the students who serve as assistants pursuant to the MacCracken program and those accepted to serve as Instructors in EWP, are expected to serve as assistants for two or more years.⁸ Finally, NYU has presented evidence relating to a limited number of departments which require students to teach for a minimum number of semesters.⁹

year, that Mark Dunetz (Education) served as an assistant for 4 semesters, that Sandra Graham (Music), NYU's witness, served as an assistant for 6 semesters, and that Judith Goldberg (Economics), NYU's witness, served as an assistant for four semesters.

⁴ Tr. 151 (some assistants may serve for 3-5 years).

⁵ Tr. 452 (MacCrackens are always required to teach for 2 years).

⁶ See e.g., Tr. 961 (Hoy testifying that EWP TAs usually stay for 3 years but often as many as 5); Tr. 1652 (Matthews testifying that some Psychology students serve as assistants for up to 4 years); Tr. 3138 (Professor Hilferty testifying that students assigned as assistants in the Design Department usually keep their appointments throughout their time in the program); Tr. 3506 (Professor Bishop testifying that students in the French Department often teach for 3-4 years); Tr. 3869-70 (Dean Marcus testifying that in the School of Education about 70-80% of the TAs and GAs are in their first year as graduate students at NYU, and of those, about 55% (at least of TAs) continue to serve as assistants for a second year); Tr. 4509 (Professor Mitchell testifying that assistants in the Center of Near Eastern Studies generally remain assistants for 2 years).

⁷ EX20 at 22 ("Somewhere in the vicinity of half of all Ph.D. candidates are supported only on assistantships and never have the relative luxury of being able to devote full time to their studies and research.").

⁸ Tr. 452 (2 year requirement for MacCrackens); EX41 (EWP TAs are expected to teach for 2 years).

⁹ There was testimony that the Neural Science Department requires students to serve as TAs for at least 2 semesters (Tr. 357), that Biology students are generally expected to teach for 2-3 years, and that the Physics Department also requires students to serve in a teaching capacity (Tr. 2737-38). Professor Matthews testified that students in Cognition and Perception, and in Social Personality, have been required to teach 2 semesters (Tr. 1518, 1521), and that the Psychology Department as a whole has just implemented a requirement that students teach for 3 semesters (Tr. 1517, 1655-56).



Nicholas Lewis, Hearing Officer
National Labor Relations Board, Region 2
December 8, 1999
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Evidence the UAW Has Sought To Put into the Record

As previously noted, the UAW believes, notwithstanding the incorrect rulings on benefits and state bargaining, that the record is sufficient to proceed to decision. However, if the hearings are reopened, then the UAW should be permitted to introduce limited evidence concerning certain aspects of benefits provided to GA, in relation to non-GAs, and to Sackler GAs, in relation to non-Sackler GAs. We believe that this evidence can best be admitted by stipulation or by the introduction of documents.

1. Book Store Discounts: We attempted to show that graduate students working as GAs are entitled to a book store discount available to conceded employees, including faculty, but unavailable to non-GA graduate students, including graduate students receiving fellowships/scholarships. This evidence could be introduced by the admission of the employee handbook (showing the conceded employee benefits) and by a stipulation (acknowledging its application to GAs but not to non-GAs).
2. Tuition remission: We attempted to introduce evidence that conceded employees receive tuition remission, including employees taking graduate level courses. This could be admitted through the employee handbook.
3. Sackler Benefits: We attempted to develop evidence that Sackler GAs receive certain benefits available to conceded Sackler employees, and which benefits are not available to non-Sackler GAs.
 - a. Health Insurance - The insurance carrier and coverage available to main campus GAs, and the carrier(s) and coverage(s) available to Sackler GAs and Sackler laboratory technicians/technologists could be identified by stipulation.
 - b. Housing - By stipulation it could be established whether medical students and conceded employees at the medical school are entitled to the same housing made available to Sackler GAs.

With respect to state university collective bargaining, we suggest the admission of the Directory of Faculty Contracts and Bargaining Agreements in Institutions of Higher Education, (National Center for the Study of Collective Bargaining in Higher Education and the Professions, School of Public Affairs, Baruch College, City University of New York) Volume 23, January 1997, which specifically identifies all graduate employee bargaining units in the United States.





LEVY, RATNER & BEHROOZI, P.C.

Nicholas Lewis, Hearing Officer
National Labor Relations Board, Region 2
December 8, 1999
Page 6

Based of the foregoing, we urge the Regional Director to close the hearings and proceed to decision so that a representation election can be held during the current academic year. Alternatively, if the record is reopened it should be reopened only for a limited basis to narrowly permit additional evidence which the Region deems to be necessary to complete the record.

Very truly yours,

 (17)

Daniel J. Ratner

cc: Ed Brill, Esq.
Julie Kushner
Betsy Engel, Esq.
Lisa Jessup





file

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May 1, 2000

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Michael Steven Smith
David P. Horowitz†
Sally Oros*

**BY FACSIMILE AND
FIRST-CLASS MAIL**

Hon. Daniel Silverman
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278-0104

* Admitted in NY, MA and DC
* Admitted in NY, NJ and PA
* Admitted in NY and DC
^ Admitted in NY and NJ
† Admitted in NY and MA
o Admitted in NY, NJ and CT



Re: UAW -and- NYU
NLRB Case No. 2-RC-22082

Dear Mr. Silverman:

On behalf of Petitioner UAW, we request that the Region subpoena records showing the names of all graduate assistants ("Assistants") who received checks issued from payroll codes 101, 130 and 131, on or immediately preceding March 26, 2000.

As the Region is aware, there were a substantial number of challenged ballots in the representation election on April 25 - 27, 2000. In the Decision and Direction of Election ("Decision"), the Region described the bargaining unit as, inter alia, all Assistants "who are classified under 101, 130, 131." Decision at p. 38. The Direction of Election specifically defines eligibility as "those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision ..." Decision at p. 39.

We believe that the vast majority of challenged ballots can be resolved by reference to checks issued for each of the payroll codes on or immediately preceding the eligibility date. If the Board grants review, it may be a period of time before the Region focuses on the challenged ballots. To ensure that the payroll records are available to the Region when a review of the challenged ballots occurs, we strongly urge the Region to obtain the relevant payroll records at this time.

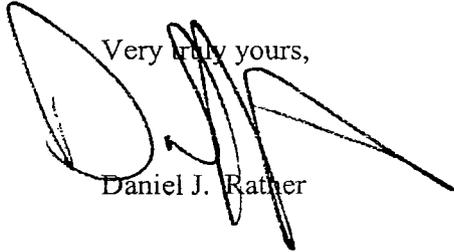


LEVY, RATNER & BEHROOZI, P.C.

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National Labor Relations Board
May 1, 2000
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Therefore, for the reasons set forth above, we request that the Region require the Employer to produce the computerized payroll runs showing the name of all Assistants who received checks from payroll codes 101, 130 and 131 on or immediately preceding the eligibility cut-off date.

Very truly yours,


Daniel J. Rather

DJR:job

cc: Edward Brill, Esq. ✓
Julie Kushner
Lisa Jessup
Betsy Engel, Esq.





United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF INSPECTOR GENERAL
Washington, DC 20570-0001

July 20, 2010

The Honorable Darrell E. Issa
Ranking Minority Member
Committee on Oversight and Government Reform
United States House of Representatives
Washington, DC 20515-6143

Dear Congressman Issa:

Pursuant to your request of June 15, 2010, I completed an inquiry into Member Craig Becker's participation in the decision St. Barnabas Hospital and Committee of Interns and Residents, Local 1957, SEIU, dated June 3, 2010.

During the course of the inquiry, I collected information at the National Labor Relations Board, verified information, and consulted with the Office of Government Ethics. After doing so, I determined that Member Becker's participation in the St. Barnabas Hospital decision did not violate Government ethics regulations, the President's Ethics Pledge found in Executive Order 13490, or the ethics agreement that he executed prior to his appointment as a Board Member.

In making that determination, I found that Member Becker was assigned to the case in the normal course of business and that he took no action in that assignment process. I also found that Member Becker's ruling on motions for his recusal found in the decision Service Employees International Union, Nurses Alliance, Local 121RN (Pomona Valley Hospital Medical Center) and Carole Jean Baderscher, dated June 8, 2010, is applicable, in part, to the St. Barnabas Hospital matter. I have enclosed a copy of that decision with this letter.

Both the Government ethics regulations, at 5 CFR 2635.502, and the Ethics Pledge require that Member Becker not participate in certain matters. The Ethics Pledge cited in your letter requires that Member Becker "not for a period of 2 years from the date of [his] appointment participate in any particular matter involving specific parties that is directly and substantially related to [his] former employer or former clients. . . ." For purposes of the Ethics Pledge, "former employer" is defined as "any person for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner. . . ." The definitions for the Ethics Pledge also state that "directly and substantially related to my former employer or former clients" means "matters in which the

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appointee's former employer or a former client is a party or represents a party." The regulation has a similar proscription on participating in matters involving a former employer, but the time limit is 1 year.

In the Pomona Valley Hospital Medical Center decision, Member Becker accurately states that the Federal courts and the National Labor Relations Board both recognize that international unions and their affiliated local unions are separate legal entities. Member Becker was employed by the Service Employees International Union (SEIU), the international union, not the Committee of Interns and Residents, Local 1957, SEIU. Because the two are considered separate legal entities, and SEIU was not a party or representing the local union, neither the regulation nor the Ethics Pledge automatically required Member Becker's recusal in the St. Barnabas Hospital matter based solely upon his employment with SEIU.

Aside from his status as a former employee of SEIU, there are also certain situations involving local unions that are affiliated with SEIU that may require Member Becker to recuse himself from participation. Some of those issues were identified in his ruling on the recusal motions in the Pomona Valley Hospital Medical Center decision. Those particular situations were not present in the St. Barnabas Hospital matter. Member Becker has not represented the Committee of Interns and Residents, Local 1957, SEIU, in the St. Barnabas Hospital matter or any other matter within the 2 years prior to his appointment. When asked, Member Becker stated that during his employment with SEIU, he did not provide advice or in any way assist SEIU; the Committee of Interns and Residents, Local 1957, SEIU; or attorneys for either entity with regard to the St. Barnabas Hospital matter. The attorney of record for the Committee of Interns and Residents, Local 1957, SEIU, confirmed that Member Becker had not in any manner assisted or provided advice in the St. Barnabas Hospital matter. A review of the Agency's records of parties and their representatives found that SEIU's attorneys did not represent or make an appearance for the Committee of Interns and Residents, Local 1957, SEIU, in the St. Barnabas Hospital matter.

In addition to the ethics regulation and the Ethics Pledge, Member Becker executed an ethics agreement prior to his appointment. That agreement states in part that Member Becker "will not participate personally and substantially in any particular matter involving specific parties in which either the SEIU or the AFL-CIO is a party or represents a party, unless [he is] first authorized to participate, pursuant to 5 CFR 2635.501(d)." In making his determination with regard to his recusal from decisions involving local unions affiliated with SEIU, Member Becker acted in accordance with his ethics agreement and 5 CFR 2635.501(d) by consulting with and receiving advice from the Designated Agency Ethics Official. The advice he received was that his participation in those decisions would not violate the ethics regulations or the Ethics Pledge and would be consistent with the National Labor Relations Board's past practice. That advice was based upon the analysis that an international union and an affiliated local union are two separate legal entities. Therefore, as with the ethics regulation and the Ethics Pledge,



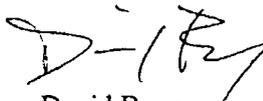
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Members Becker's participation in the St. Barnabas Hospital decision was in compliance with the ethics agreement.

The determinations and analysis outlined in this letter are limited to the recusal requirements of the ethic's regulations, the Ethics Pledge, and the ethics agreement.

I appreciate your interest and concern with regard to the National Labor Relations Board. If you or your staff has any questions, please contact me at (202) 273-1960 or david.berry@nlrb.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Berry".

David Berry
Inspector General

Enclosure

cc: Chairman
Member Becker





July 22, 2013

Margery E. Lieber
Associate General Counsel
(Designated Agency Ethics Official)
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

Dear Ms. Lieber:

The purpose of this letter is to describe the steps I will take to avoid any actual or apparent conflict of interest if I am confirmed as a Board Member of the National Labor Relations Board.

As required by 18 USC § 208(a), I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my financial interests or those of any person whose interests are imputed to me, unless I first obtain a written waiver, pursuant to 18 USC § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 USC § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

I am vested in the UAW Staff Retirement Income Plan and Trust and the AFL-CIO Staff Retirement Plan. Both are defined benefits plans from which I am currently receiving monthly retirement benefits. Because I will continue to participate in both plans, I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of either the UAW or the AFL-CIO to provide me with these contractual benefits, unless I first obtain a written waiver pursuant to 18 USC § 208(b)(1), or qualify for a regulatory exemption pursuant to 18 USC § 208(b)(2).

Pursuant to both the UAW Staff Retirement Income Plan and Trust and the AFL-CIO Staff Retirement Plan, both my spouse and I are entitled to receive health and group life insurance coverage for life. Therefore, I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of either the UAW or the AFL-CIO to provide these contractual benefits, unless I first obtain a written waiver pursuant to 18 USC § 208(b)(1), or qualify for a regulatory exemption pursuant to 18 USC § 208(b)(2).

I retired from my position as Associate General Counsel with the AFL-CIO in July 2012. I will not participate personally and substantially in any particular matter involving specific parties in which I previously participated in my role as Associate General Counsel with the AFL-CIO.

I understand that as an appointee I am required to sign the Ethics Pledge (Executive Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.



Finally, I have been advised that this ethics agreement will be posted publicly, consistent with 5 USC § 552, on the website of the U.S. Office of Government Ethics with other ethics agreements of Presidential nominees who file public financial disclosure reports.

Sincerely,



Nancy J. Schiffer

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NLRB
ORDER SECTION