

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**POINT PARK UNIVERSITY,**

**Employer,**

**and**

**No. 6-RC-12276**

**No. 6-CA-34243**

**NEWSPAPER GUILD OF PITTSBURGH/  
COMMUNICATIONS WORKERS OF  
AMERICA, LOCAL 38061, AFL-CIO, CLC**

**No. 457 7 F.3d 42 (D.C. Cir 2006)**

**Petitioner.**

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**EMPLOYER'S MOTION FOR RECUSAL OF MEMBER NANCY SCHIFFER**

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**PRELIMINARY STATEMENT**

Point Park University respectfully moves for recusal of National Labor Relations Board ("NLRB" or the "Board") Member Nancy Schiffer from participation in this case. Member Schiffer's participation in this case as an adjudicator would violate due process and the applicable ethical rules because of Member Schiffer's previous employment in the General Counsel's office of the AFL-CIO beginning in 2000 and ending with her retirement as Associate General Counsel in July 2012. *See* Exhibit 1, July 23, 2013 Statement of Nancy Schiffer Before the U.S. Senate's HELP Committee at p.2 and Exhibit 2, Member Schiffer's July 22, 2013 Ethics Agreement.

On July 6, 2012, while Member Schiffer was still employed by the AFL-CIO as Associate General Counsel, the AFL-CIO and the Petitioner filed a Joint Brief with the NLRB ("Joint Brief"). *See* Exhibit 3. Moreover, as shown below, AFL-CIO Attorney James B.

Coppess, with whom Member Schiffer worked at all material times herein, has been actively involved on behalf of the Petitioner in this matter since 2006. See Exhibit 4, Schedule 12 of the AFL-CIO's 2006 Form LM-2.

The relevant facts are as follows:

- In 2003, the Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061, AFL-CIO, CLC filed a Petition in Case No. 6-RC-12276 to represent a bargaining unit of full-time faculty at Point Park University ("Point Park").
- On April 27, 2004, the NLRB Regional Director for the Sixth Region issued a Decision and Direction of Election in which he found, *inter alia*, that the Employer's full-time faculty members were not managerial employees and that a unit of approximately 77 full-time faculty members was appropriate. On June 23, 2004, the Board denied the Employer's Request for Review of that Decision and Direction of Election.
- On May 26, 2004, an election was held in Case No. 6-RC-12276 over the Employer's objection.
- On July 9, 2004, the Board certified the Union as the exclusive collective-bargaining representative of the Unit pursuant to Section 9(a) of the National Labor Relations Act (the "Act").
- On or about July 24, 2004, the Union requested that the Employer recognize it and bargain with it as the exclusive collective-bargaining representative of the Unit. On or about August 4, 2004, the Employer refused to recognize and bargain with the Union.

- On August 11, 2004, the Union filed a charge in Case No. 6-CA-34243 alleging that the Employer's conduct violated Section 8(a)(1) and (5) of the Act, and on August 31, 2004, the Regional Director issued a Complaint based on that charge. Following the filing of the Employer's Answer to the Complaint, on October 4, 2004, Counsel for the General Counsel filed a Motion for Summary Judgment with the Board.
- On February 17, 2005, the Board issued its Decision and Order in Case No. 6-CA-34243, granting Counsel for the General Counsel's Motion for Summary Judgment.
- Point Park refused to comply with the Board's Order and filed a Petition for Review in the United States Court of Appeals for the D.C. Circuit.
- On January 6, 2006, the D.C. Circuit heard oral argument, in *Point Park University v. NLRB*. The Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061, AFL-CIO, CLC argued the cause as an Intervenor.
- Significantly, James B. Coppess, attorney with the AFL-CIO, argued the cause for the Intervenor. With him on the brief was Joseph J. Pass, attorney for Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061, AFL-CIO, CLC. See Exhibit 5, August 1, 2006 D.C. Circuit Court of Appeals Opinion.
- The D.C. Circuit Court of Appeals issued its Decision on August 1, 2006, holding that the Board had "failed to adequately explain why the faculty's role at the University is not managerial." *Point Park University v. NLRB*, 457 F.3d 42, 44 (D.C. Circ. 2006). The Court instructed the Board to identify which of the

relevant factors set forth in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), are significant and which are less so in its determination that the Employer's faculty are not managerial employees and to explain why the factors are so weighted.

The Court's remand order was unmistakably clear and succinct, holding that:

*Yeshiva* identified the relevant factors that the Board must consider. *LeMoyné-Owen* held that the Board must clearly explain its analysis. The failure to provide such an explanation is grounds for remand to the Board, which we do here.

*Point Park University*, 457 F.3d at 51 (internal citations omitted). The Court made it clear that its remand of the case to the Board was "for proceedings consistent with this opinion so that the Board can provide such an explanation or reconsider its conclusion." *Id.* at 50-51.

- On October 24, 2006, the Board notified the parties that it had accepted the remand from the D.C. Circuit Court of Appeals.
- On November 28, 2007, following an initial remand to the Regional Director and the Employer's request for Review of the Regional Director's Supplemental Decision on Remand, the NLRB granted the Employer's Request for Review.
- On December 12, 2007, the Employer filed a Brief on Review with the NLRB.
- On May 22, 2012, nearly five (5) years after granting the Employer's Request for Review of the Regional Director's Supplemental Decision on Remand, a divided Board, with Members Hayes and Flynn dissenting, issued a Notice and Invitation to the parties and Amici to file briefs:

On December 12, 2007, the Employer filed a brief on review of the Regional Director's Supplemental Decision on Remand. The Petitioner did not file a brief on review. Given the amount of time that has passed since the request for review was granted and the absence of a Brief on Review from the Petitioner, the Board has decided to solicit additional briefing. We acknowledge, as our dissenting colleagues point out, that this case has suffered from considerable delay already. However, given the nature of the D.C. Circuit's remand of the case, we believe

that allowing a short period of time for additional briefing will aid the Board in deciding the important issues at stake.

- On July 6, 2012, a **Joint Brief** of The Newspaper Guild of Pittsburgh/ Communications Workers of America, Local 38061, AFL-CIO, CLC and the AFL-CIO was filed with the NLRB by AFL-CIO Associate General Counsel, James B. Coppess, who earlier presented oral argument on behalf of the Union before the D.C. Circuit in January 2006.

## ARGUMENT

### I. DUE PROCESS MANDATES MEMBER SCHIFFER'S RECUSAL

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

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

*See also Am. Gen. Ins. Co. v. FTC*, 589 F.2d 462, 463 (9th Cir. 1979) ("The principle that a party should not be judge in his own case represents a venerable tradition in Anglo-American legal history."); *Trans World Airlines, Inc. v. Civil Aeronautics Bd.*, 254 F.2d 90, 91 (D.C. Cir. 1958) ("The fundamental requirements of fairness in the performance of [quasi-judicial]

functions require at least that one who participates in a case on behalf of any party . . . take no part in the decision of that case by any tribunal on which he may thereafter sit.").

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

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

disqualified. *Berkshire Employees Ass'n*, 121 F.2d at 238-39.

More significantly, in *SEIU Local 121RN*, 355 NLRB No. 40 (2010), Former Member Becker recused himself from participation in a case in which he had coauthored a **joint brief** on behalf of his client, amicus curiae AFL-CIO, and the respondent in the case, the UAW. *Id.* at \*9 (emphasis added). Becker, in addressing the Moving Parties argument that “[he] should recuse [himself] because ‘[he] served as lawyer on the brief jointly filed by the Respondent UAW and AFL-CIO in opposition to the Charging Parties’ Exceptions to the Board,” stated as follows:

In fact, I did not serve as counsel to a party in the pending case, but rather to amicus curiae American Federation of Labor & Congress of Industrial Organizations (AFL-CIO), and therefore neither 5 C.F.R. § 2635.502 nor Executive Order 13490 requires recusal. **However, as the Moving Parties correctly point out, the Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and Amicus AFL-CIO filed a joint brief in the case and I was a coauthor of that brief. For that reason, I have recused myself from participation in the *Dana* case. Cf. *Trans World Airlines v. Civil Aeronautics Board*, 254 F.2d 90, 91 (D.C. Cir. 1958) (“The fundamental requirements of fairness in the performance of [quasijudicial] functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit.”).**

*Id.* (emphasis added).

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

Thus, in *American General Insurance*, the court emphasized that this principle would

apply even where "the judge's or quasi-judicial officer's participation in the case as counsel may have been superficial rather than substantial . . . . [M]ere responsibility for administrative supervision of the [party], regardless of the extent of his knowledge and his approval of the acts of his subordinates, has been deemed sufficient to activate the disqualification rule." *Am. Gen. Ins. Co.*, 589 F.2d at 464-65. Moreover, Member Becker recused himself in one of the cases discussed in *SEIU Local 121RN* even though he did not represent any party in the case at issue. *SEIU Local 121RN*, 355 NLRB No. 40, at \*6.<sup>1</sup>

II. MEMBER SCHIFFER IS REQUIRED TO RECUSE HERSELF PURSUANT TO 28 U.S.C. § 455

Title 28 U.S.C. § 455 governs disqualification of justices, judges, and magistrate judges.

It states, in relevant part, that:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

...

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter...

While Section 455 applies by its terms to Article III judges, it is generally accepted that Section 455's standards apply to officials of administrative agencies, including Members of the National Labor Relations Board. *Overnite Transp. Co.*, 329 NLRB 990, 998 (1999) (Separate Statement by Member Liebman). *See also Lee v. E.P.A.*, 115 M.S.P.R. 533, 545 (Dec. 9, 2010)

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<sup>1</sup> In the analogous context of the criminal restrictions on government employees under 18 U.S.C. § 208, the OGE has said that "personal and substantial participation requiring recusal" may include "[i]nvolvement in preliminary discussions, in interim evaluations, in review or approval at intermediate levels, or in supervision of subordinates working on a matter . . . . Employees should understand that many other degrees of participation short of primary responsibility or final approval could require recusal." OGE 99x8: Recusal Obligation and Screening Arrangement, Memorandum dated April 26, 1999, from Stephen D. Potts, Director, to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements. *See* Exhibit 10.

(“In determining whether an administrative judge should be disqualified on grounds other than bias, the [Merit Systems Review] Board is to follow the standard set out at 28 U.S.C. § 455(a)...”); *Appeal of Env'tl. Safety Consultants, Inc.*, No. DACW38-95-C-0102. 2006 WL 1806497 at \*1 (A.S.B.C.A. Jun. 19, 2006) ([The] [Armed Services Board of Contract Appeals] looks to 28 U.S.C. § 455 for guidance on recusal issues.”); *Hydro Res., Inc.* 47 N.R.C. 326, 331 (Jun. 5, 1998) (“Licensing Board members are governed by the same disqualification standards...that apply to federal judges.”). Even Member Becker, who stated in *SEIU, Local 121RN*, 355 N.L.R.B. 40 at \*9, that he was not bound by Section 455, expressly recognized that “the standards set forth therein as well as their construction by the courts offer useful guidance in the application of the...standards applicable to executive branch employees.” Furthermore, the undersigned counsel could find no case in which an agency adjudicator exercising quasi-judicial functions refused to recuse himself where such recusal would be warranted under Section 455. In the instant case, Member Schiffer’s recusal would be warranted under both subsection (a) and subsection (b)(2) of Section 455.

Title 28 U.S.C. § 455(a) establishes broad grounds for disqualification. *Bilzerian v. United States*, No. 95 CIV. 1215 (RJW), 1995 WL 758754 at \*1 (S.D. N.Y. Dec. 22, 1995). The statute provides that “[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). In considering a motion to recuse, **“the Court must...ask whether ‘a reasonable person, knowing all the facts, would conclude that the court’s impartiality might reasonably be questioned.’”** *United States v. Pitera*, 5 F.3d 624, 626 (2d Cir. 1993) (emphasis added). In effect, “Section 455(a) ‘sets out an objective standard for recusal, creating the so-

called ‘appearance of justice’ rule.’” *Cobell v. Norton*, 237 F.Supp.2d 71, 78 (D.C. Cir. 2003) (citing *DeLuca v. Long Island Lighting Co.*, 862 F.2d 427, 428 (2d Cir. 1988)).

If Member Schiffer directly participated in the preparation of the Joint Brief, fundamental fairness considerations require her to recuse herself. In *SEIU, Local 121RN*, 355 N.L.R.B. 40 at \*9 (2010), Former Member Becker recused himself from a pending unfair labor practice case when the moving party correctly pointed out that “Amicus AFL-CIO filed a joint brief in the case and [he] was a coauthor of that brief.” In support of his decision to recuse himself Member Becker cited *Trans World Airlines v. Civil Aeronautics Board*, 254 F.2d 90, 91 (D.C. Cir. 1958) for the proposition that “[t]he fundamental requirements of fairness in the performance of [quasi-judicial] functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit.”

Even assuming *arguendo* that Associate General Counsel Schiffer did not directly participate in preparing the Joint Brief, the arguments and positions advanced in the Joint Brief fall within the scope of her responsibilities at the AFL-CIO. In the Joint Brief, the AFL-CIO encourages the NLRB to “take a more analytical approach to applying the Supreme Court’s *Yeshiva* decision by undertaking a thorough reconsideration of the question of what authority would make college professors ‘managerial’ employees.” *See* Exhibit 3 at p. 6. It also urges the Board to “rethink its approach to determining the ‘managerial’ status of college faculty members based on the legal analysis underlying the *Yeshiva* decision, rather than the particular factual circumstances of that case.” *See* Exhibit 3 at pp. 6-7. Insofar as these issues cited by the AFL-CIO in the Joint Brief are issues touching on NLRA jurisprudence, they go to the heart of Member Schiffer’s work focus as Associate General Counsel with the AFL-CIO. *See* Exhibit 6,

ABA Web Store Biography of Nancy Schiffer (“Nancy Schiffer is an Associate General Counsel with the American Federation of Labor and Congress of Industrial Organizations. Her work focuses on NLRA jurisprudence and procedure, worker organizing . . .”). Thus, even without her signature, the very issues raised in the Joint Brief go to the heart of Associate General Counsel Schiffer’s responsibilities at the AFL-CIO.

Member Schiffer must also recuse herself under Section 455(a) because her employment with the AFL-CIO as Associate General Counsel at the time the Joint Brief was prepared and filed would undoubtedly cause a reasonable person to question her impartiality with respect to this matter. Similarly, in *Hampton v. City of Chicago*, 643 F.2d 478 (7th Cir. 1981), the Seventh Circuit Court upheld the district judge’s decision to recuse himself under Section 455(a) “on the basis that his impartiality might reasonably be questioned since he could be linked to the filing of an amicus curiae brief...during an earlier stage of [the] litigation.” Indeed, Member Schiffer’s impartiality is also called into question by her twelve-year tenure as Associate General Counsel with the AFL-CIO in a small office of lawyers.

At all relevant times, there were only eight (8) attorneys, including Member Schiffer, in the AFL-CIO’s General Counsel’s Office. See Exhibits 7 and 8, Schedule 12 to the AFL-CIO’s 2012 and 2013 Form LM-2s, respectively. Member Schiffer’s tenure overlapped with the employment of Associate General Counsel James B. Coppess, Associate General Counsel Matthew Ginsburg and General Counsel Lynn Rhinehart, all signatories of the Joint Brief. Thus, Member Schiffer must also recuse herself under Section 455(a) because she was employed with the AFL-CIO as Associate General Counsel when the Joint Brief was prepared and filed, and, at a very minimum, she served in a small office of attorneys which included the signatories of the Joint Brief at the times relevant to this matter.

Member Schiffer's recusal is also warranted under Section 455(b)(2), which requires recusal "[w]here in private practice [s]he served as lawyer in the matter in controversy, **or a lawyer with whom [s]he previously practiced law served during such association as a lawyer concerning the matter.**" 28 U.S.C. § 455(b)(2) (emphasis added). This 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.<sup>2</sup> It applies to in-house lawyers as well as to lawyers at law firms.

In *Preston v. United States*, 923 F.2d 731, 733-34 (9th Cir. 1991), the Ninth Circuit stated that whereas "Section 455(a) covers circumstances that **appear** to create a conflict of interest, whether or not there is actual bias...Section 455(b) covers situations in which an **actual** conflict of interest exists, even if there is no appearance of one." (citations omitted) (emphasis added).

In her separate statement in *Overnite Transp. Co.*, 329 NLRB 990, 998(1999), Former NLRB Chair Wilma Liebman accepted the standards applicable to federal judges under § 455, because a party "is entitled as a matter of fundamental due process to a fair hearing" and because § 455 "enumerates specific grounds for disqualification." In *Overnite* Liebman carefully considered the evidence and denied a motion for recusal in a case involving the Teamsters union and Overnite Transportation based on her service ten (10) years earlier as a staff attorney for the Teamsters. She found that recusal was not warranted because she had never worked on any case involving Overnite while employed by the Teamsters union nor did she work with any lawyers in the Teamsters legal department who worked on the "matter in controversy." *Id.* at 999. Liebman even conducted her own search of the case records to determine if a staff attorney with whom she was associated at the Teamsters ever "served...as a lawyer" with respect to the relevant matter, and found nothing. *Id.* Hence, Former Member Liebman underscored the

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<sup>2</sup> See ABA Model Rules of Professional Conduct Rule 1.10(a).

explicit requirement found in § 455(b)(2) that lawyers—like Member Schiffer—who associated with other lawyers concerning the matter in controversy must recuse themselves.

Here, unlike the factual circumstances involving Member Liebman, Member Schiffer practiced as Associate General Counsel with the AFL-CIO at the same time as General Counsel Lynn Rhinehart, Associate General Counsel James Coppess and Associate General Counsel Matthew Ginsburg, all signatories of the Joint Brief. Moreover, this Joint Brief was actually filed on the Board and the Parties by James Coppess at a time when Member Schiffer was still employed as Associate General Counsel with the AFL-CIO; thus, they served concurrently as “lawyers concerning this matter.” 28 U.S.C. § 455(b)(2). Furthermore, on January 17, 2006, Associate General Counsel Coppess argued before the D.C. Circuit on behalf of the Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061, AFL-CIO, CLC in *Point Park University v. NLRB*, which involved the same matter in controversy and the same parties as the instant case. See Exhibit 5.

Clearly, James Coppess has had an extensive involvement on behalf of the union in this matter for the last seven (7) years, and, given that both he and Member Schiffer were employed by the AFL-CIO at all times material herein, the plain language of Section 455(b)(2) mandates Member Schiffer’s recusal from this matter. See Exhibit 4.

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

Members of the NLRB are bound by the Standards of Ethical Conduct for Employees of the Executive Branch as set forth in Title 5 of the Code of Federal Regulations. 5 C.F.R. § 2635; See *SEIU 121RN*, 355 NLRB No. 40, at \*5. Indeed, while being questioned by Member Senator Orrin Hatch (R-Utah) before the U.S. Senate’s Health, Education, Labor and Pensions (HELP)

Committee prior to her confirmation, Member Schiffer acknowledged that she would be bound by 5 C.F.R. § 2635, among other provisions, when determining whether to recuse herself:

Senator Hatch: As we discussed...in the history of the NLRB, only two other members were appointed to the Board directly after working in-house for a labor union . . . . If confirmed, you would be the first such member. As you may know, the first union lawyer appointed to the Board made numerous commitments to the committee to recuse himself in matters involving his former employer. Yet, during his time on the Board, he never fully recused himself. What standard will you use in determining whether to recuse yourself in matters before the Board that involve your former employers?

Member Schiffer: I take my ethical obligations very seriously. This includes any obligation that I may have to recuse myself from a specific case. I will **fully** comply with the ethics agreement I have entered into with the NLRB and with the standards of recusal applicable to executive branch officials set forth in 5 CFR 2635 and in Executive Order No. 13490. If any case brought before me raised a question about my ethical obligations, I would consult with the Designated Agency Ethics Official (DAEO) at the National Labor Relations Board. It is my understanding that if I am confirmed to the Board, before I am sworn in, I will be **fully** briefed on all of [*sic*] applicable ethical guidelines. Further, I pledge that I will make every effort to fully comply with all of them.

*See Exhibit 9, Responses of Kent Hirozawa and Nancy Schiffer, nominees for the National Labor Relations Board, to Questions for the Record Submitted by Republican Members of the HELP Committee, 113th Cong. (2013) (Questions of Sen. Orrin Hatch, Member, Senate HELP Comm.) (emphasis added).*

Here, the relevant sections of 5 C.F.R. § 2635 are Section 2635.101, which provides general principles applicable to all executive branch employees, and Section 2635.502 governing personal and business relationships. According to Section 2635.101:

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

...

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

...

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

5 C.F.R. § 2635.101 (emphasis added).

Additionally, Section 2635.502 requires as follows:

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

...

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

...

b) Definitions. For purposes of this section:

(1) An employee has a covered relationship with:

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

Here, Member Schiffer must recuse herself under the broad, general admonitions against the appearance of ethical impropriety found in Section 2635.101 and the “catch-all” provision in Section 2635.502(a)(2), which covers circumstances that “would raise a question regarding [her] impropriety.” The circumstances in the instant case are such that a person would reasonably

question her impartiality. *See supra* Part II. Additionally, Member Schiffer has a “covered relationship” with the AFL-CIO as contemplated under Section 2635.502. In her ethics agreement—*see* Exhibit 2 hereto—she admits that “[she is] vested in the...AFL-CIO Staff Retirement Plan,” which is a “defined benefits plan from which [she] is currently receiving monthly retirement benefits.” Additionally, under such Plan both Member Schiffer and her spouse “are entitled to receive health and group life insurance coverage for life.” The Office of Government Ethics had made it clear that:

**[a] vested interest in a defined benefit plan funded and maintained by a former employer would create a covered relationship.** Therefore, in such cases, an employee should comply with the requirements of section 2635.502(a) when acting in matters involving his former employer who is the sponsor of the plan.

*See* Exhibit 10, *OGE DO-99-015: 18 U.S.C. § 208 and Defined Pension Plans*, Memorandum to Designated Agency Ethics Officials from Stephen D. Potts, Director, dated Apr. 14, 1999, at n. 3 (emphasis added).

IV. MEMBER SCHIFFER RECOGNIZED THAT IT WOULD BE INAPPROPRIATE FOR HER TO PARTICIPATE AS AN NLRB MEMBER IN ANY MATTER IN WHICH SHE HAD PARTICIPATED AS ASSOCIATE GENERAL COUNSEL WITH THE AFL-CIO

On or about July 22, 2013, Member Schiffer signed a required ethics agreement which purported to “describe the steps [she] will take to avoid any actual or apparent conflict of interest if [she is] confirmed as a Board Member of the National Labor Relations Board.” *See* Exhibit 2. Member Schiffer was confirmed by the Senate on July 30, 2013, and sworn in as a Board Member on August 2, 2013, rendering her subject to the dictates of the ethics agreement. In the agreement, Member Schiffer acknowledged that “[she] retired from [her] position as Associate General Counsel with the AFL-CIO in July 2012” and that, as a result, “[she] will not participate personally and substantially in any particular matter involving specific parties in which [she]

previously participated in [her] role as Associate General Counsel with the AFL-CIO.” Member Schiffer also agreed that she would be bound by Exec. Order No. 13490, 74 Fed. Reg. 4673 (Jan. 21, 2009)—attached hereto as Exhibit 11—which, *inter alia*, acknowledged that her employment with the United States government is “a position invested with the public trust” and that she “will not for a period of 2 years from the date of [her] appointment participate in any particular matter involving specific parties that is directly and substantially related to [her] former employer....”

Here, the AFL-CIO did not simply file an amicus brief on behalf of Petitioner Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061, AFL-CIO, CLC. Its attorneys prepared and filed a **Joint Brief**, and it was the AFL-CIO that served that Joint Brief on the Board and the parties, not Petitioner. Additionally, not only did the AFL-CIO take the lead in the Joint Brief’s preparation evidenced by the fact that it was filed by AFL-CIO attorney James B. Coppess, but this Joint Brief was filed with the Board and on the parties by the AFL-CIO during the first week of July 2012. Member Schiffer, admittedly, was employed with the AFL-CIO from 2000 until July 2012 and, therefore, was the Associate General Counsel at the crucial time during this matter in controversy. Furthermore, the signatories of the Joint Brief—Lynn K. Rhinehart, James B. Coppess, Donna R. Euben, and Matthew J. Ginsburg—served with Member Schiffer concerning this matter as attorneys for the AFL-CIO immediately prior to her retirement. Thus, it cannot be credibly argued that the AFL-CIO’s preparation and filing of a Joint Brief with Petitioner during Member Schiffer’s tenure as AFL-CIO Associate General Counsel was not directly and substantially related to her former employment with the AFL-CIO.

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

Based on the foregoing, it is clear that Member Schiffer must recuse herself from the instant matter. In all the circumstances, failure of Member Schieffer to recuse herself would present, not only a potential ethics breach, but also a violation of the substantive due process rights of the Employer herein, rendering any adverse decision against the Employer null and void. John T. Nonan, Jr. & Richard W. Painter, *PERSONAL AND PROFESSIONAL RESPONSIBILITIES OF THE LAWYER*, pp. 704-39, 762-77 (Foundation Press, 3rd ed. 2011). Moreover, failure to recuse herself would violate the commitment made by Member Schiffer to the HELP Committee when she assured the Committee that she would “**fully comply**” with ethical standards applicable to executive branch officials. *See supra* Part III. However, should she decline to voluntarily recuse herself, Point Park University is entitled to, at least, an evidentiary hearing to determine whether she must do so. *See Amos Treat & Co. v. Sec. and Exch. Comm’n*, 306 F.2d 260, 267 (D.C. Cir. 1962) (ordering full evidentiary hearing for purpose of determining upon a complete record whether or not any Commissioner should have been disqualified); *Berkshire Employees Ass’n of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 238-39 (3rd Cir. 1941) (granting petition to adduce additional testimony concerning NLRB member’s impartiality where it was alleged that Member had advocated for boycott of respondent-employer’s goods during strike underlying case before the Board); *cf. Hurles v. Ryan*, 706 F.3d 1021, 1038-40 (9th Cir. 2013) (remanding for evidentiary hearing on habeas petitioner’s claim of judicial bias where state court deficiently made findings of fact without such a hearing).

### CONCLUSION

Based on the foregoing, Member Schiffer should recuse herself from participating in this matter. In the event she does not voluntarily recuse herself, Point Park University should have an opportunity to explore Member Schiffer’s involvement on behalf of the AFL-CIO in an

evidentiary hearing before she participates in adjudicating this case.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Employer's Motion for Recusal of Member Nancy Schiffer was served by email on this the 27th day of November 2013 upon the following:

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