

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	:	
CRISTAL USA, INC.,	:	
	:	
Respondent,	:	
	:	
And	:	Case No. 08-CA-200330
	:	
INTERNATIONAL CHEMICAL	:	
WORKERS UNION COUNCIL OF	:	
THE UNITED FOOD AND	:	
COMMERCIAL WORKERS	:	
INTERNATIONAL UNION, AFL-CIO-	:	
CLC,	:	
	:	
Charging Party.	:	

**RESPONDENT CRISTAL USA, INC.’S REPLY MEMORANDUM IN
RESPONSE TO THE UNION’S OPPOSITION TO THE COMPANY’S
CROSS MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

This Memorandum responds to the memorandum that the International Chemical Workers Union Council of the United Food & Commercial Workers International Union (the “Union”) filed on March 8, 2018, in opposition to the Cross Motion for Summary Judgment of Respondent Cristal USA, Inc. (“Cristal” or the “Company”). It demonstrates that none of the arguments the Union makes overcomes Cristal’s showing that under the traditional community of interest standard to which the Board returned in *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), no genuine issue of material fact exists precluding a finding the unit of warehouse employees in which the Regional Director directed the election won by the Union in Case 08-RC-184947 (the TiCl4 R-Case) is inappropriate and, as such, Cristal is entitled to

summary judgment in this case.¹

Seemingly recognizing that, when analyzed under the traditional community of interest test, the TiCl4 R-Case was wrongly decided, the Union devotes only two sentences and a footnote at the end of its Memorandum attempting to defend the unit determination, relying upon now misplaced arguments it advanced earlier under the defunct test from *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), and in the process misstating certain facts. Those arguments do not require a reply to conclude they lack merit. Most of the Union's efforts are devoted to a groundless attack on the process by which *PCC Structural*s was decided, including a fallacious and frivolous assault on Member Emanuel over his participation in the case, and legally vacuous assertions the decision should not be applied here. As the discussion that follows demonstrates, each of the arguments is easily dismissed.

II. ARGUMENT

A. **Member Emanuel Had The Right To Participate In *PCC Structural*s and His Participation Comported With His Ethical Obligations**

Assuming but without demonstrating it has grounds to raise the argument here, the Union contends Member Emanuel should have recused himself from participating in *PCC Structural*s because he was one of five attorneys from his prior law firm, Littler Mendelson, that represented Members of Congress who filed an amicus brief in the Sixth Circuit Court of Appeals that supported the petition for review in *Specialty Healthcare*. The brief was filed almost six years ago. Offering nothing as support but the conclusion itself, the Union asserts that Member Emanuel's signing that brief "raises at a minimum an appearance of a conflict of interest and/or

¹ Cristal has filed a Cross Motion for Summary Judgment in the companion case to this one, Case 08-CA-200737, which the Company has moved the Board to consolidate with this case.

an appearance of bias” with respect to his participation in *PCC Structuralists*. (Union Mem. p.4). The Union goes on to incongruously equate Member Emanuel’s participation in *PCC Structuralists* with his participation in *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (Dec. 14, 2017), and submit *PCC Structuralists* should be vacated or reversed, presumably in this case. As support for its position, the Union seeks help from the test for disqualification articulated in *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), which asks whether a disinterested observer would conclude the agency had, in advance of a hearing, adjudged in some measure the facts as well as the law of a particular case. The test, however, is of no help to the Union because all the Union has to offer in attempting to apply it are conclusions born from uninformed speculation.

The Union does not cite any authority that the Board can revisit in this case whether Member Emanuel should have recused himself in *PCC Structuralists*. Recusal decisions are, in the first instance, the responsibility of a Board Member. Any claim that Board Member Emanuel should have recused himself in *PCC Structuralists* would have to come in that case. The issue cannot be addressed in this case and, even if it were otherwise, Member Emanuel is currently precluded from participating in this case based upon his commitment under Executive Order 13770 not to participate for a period of two years from the date of his appointment in any cases in which Littler Mendelson represents a party.

The Union likewise offers no authority under which a member of an agency, on facts like those presented here, i.e., an agency member’s prior advocacy as an attorney in private practice on behalf of a client, was disqualified from participating in a decision in a litigated matter. Such facts fall well short of satisfying the test articulated in *Cinderella*. The *Cinderella* test requires evidence compelling a finding an agency member has “adjudged the facts as well as the law of a

particular case in advance of hearing it” and “made up her mind about important and specific factual questions and . . . [is] impervious to contrary evidence.” *Steelworkers v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980), cert. denied 453 U.S. 913(1981) (citations omitted). In *Association of Nat'l Adver. v. FTC*, 201 U.S. App. D.C. 165, 627 F.2d 1151, 1170 (D.C. Cir. 1979), the D.C. Circuit explained that the burden on a party that objects to an agency member’s participation in a matter is to make a “clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.” According to the Court in that case, “the ‘clear and convincing’ test is necessary to rebut the presumption of administrative regularity.” In *Steelworkers*, the Court described that presumption this way:

An administrative official is presumed to be objective and "capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421, 61 S. Ct. 999, 1004, 85 L. Ed. 1429 (1941). Whether the official is engaged in adjudication or rulemaking, mere proof that she has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome that presumption. *Hortonville Joint School District No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976); *United States v. Morgan*, supra, 313 U.S. at 421, 61 S. Ct. at 1004. Nor is that presumption overcome when the official's alleged predisposition derives from her participation in earlier proceedings on the same issue. *FTC v. Cement Institute*, 333 U.S. 683, 702-703, 68 S. Ct. 793, 804, 92 L. Ed. 1010 (1948). To disqualify administrators because of opinions they expressed or developed in earlier proceedings would mean that "experience acquired from their work * * * would be a handicap instead of an advantage." *Id.* at 702, 68 S. Ct. at 804.

647 F.2d at 1208-1209. More recently, the D.C. Circuit said this about the presumption of regularity in a case to which the NLRB was a party:

We presume "that agency officials and those who assist them have acted properly." *United Steelworkers v. Marshall*, 647 F.2d 1189, 1217, 208 U.S. App. D.C. 60 (D.C. Cir. 1980) (as amended Jan. 30, 1981) (citation omitted); see also *La. Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1119, 294 U.S. App. D.C. 243 (D.C. Cir. 1992) (per curiam) ("Under the well-settled

presumption of administrative regularity, courts assume administrative officials to be men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." (alteration in original) (citation omitted) (internal quotation marks omitted)); *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460, 126 U.S. App. D.C. 399 (D.C. Cir. 1967) ("A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues." (citations omitted)).

Allied Mech. Servs. v. NLRB, 668 F.3d 758, 770-771 (D.C. Cir. 2012). At the risk of overemphasizing these points, what the Court said about the presumption in the rule-making context in *LMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1002 (D.C. Cir. 1999), is also instructive:

In order to avoid trenching upon the agency's policy prerogatives, therefore, we presume that policymakers approach their quasi-legislative task of rulemaking with an open mind--but not an empty one. See *Lead Indus. Ass'n v. EPA*, 208 U.S. App. D.C. 1, 647 F.2d 1130, 1179 (D.C. Cir. 1980) ("Agency decisionmakers are appointed precisely to implement statutory programs, and so inevitably have some policy preconceptions"); *United Steelworkers of Am. v. Marshall*, 208 U.S. App. D.C. 60, 647 F.2d 1189, 1208 (D.C. Cir. 1980) HN6 ("An administrative official is presumed to be objective [and] mere proof that [he or] she has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome that presumption").

Suffice it to say that, even if it had standing to raise the issue here, the Union has offered nothing of substance to overcome the presumption that Member Emanuel performed his decision-making responsibilities in *PCC Structural*s objectively and with an open mind. Its naked accusation that Member Emanuel pre-judged the matter cuts no ice and frankly is an affront to him personally, as well as the Agency.²

² Although the Union does not mention it, Member Emanuel's participation in *PCC Structural*s also complied with the Standards of Conduct for Employees of the Executive Branch,

B. The Decision In *PCC Structural's* Controls This Case

The Union submits in its Memorandum that the test adopted in *PCC Structural's* should not be applied in this case, retroactively or otherwise, because NLRB Rule 102.67(g) precludes relitigation in this ULP case of the issues raised in the TiCl4 R-Case, and the Company failed to preserve a challenge to the application of *Specialty Healthcare* in the TiCl4 R-Case by failing to seek a reversal of *Specialty Healthcare*. Cristal demonstrates in its Memorandum in Support of its Cross Motion for Summary Judgement that those arguments are wholly without merit; however, because the Union devotes so much space in its Memorandum addressing them, the Company will revisit briefly why the Union's arguments that *PCC Structural's* cannot be applied here carry no weight.

First, the motion the Board filed with the District of Columbia Court of Appeals in

which are found at 5 CFR Part 2635. In particular, his participation complied with the subpart addressing impartiality in performing official duties. That subpart contains two sections intended to ensure federal employees take appropriate steps to avoid the appearance of a loss of impartiality in the performance of their official duties, one of which, 5 CFR §2635.502, is relevant here. Section 502(a) provides:

(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.

Two things stand out from a review of Section 502: (1) a Board member whose impartiality may be implicated as a result of the member's involvement in a matter falling within the section's reach is responsible, in the first instance, for determining if the section's provisions call for recusal and (2) Member Emanuel was under no obligation in *PCC Structural's* to make that assessment because his hand in preparing an amicus brief in *Specialty Healthcare* almost six years ago for Members of Congress did not implicate Section 502 in any respect.

Volkswagen Group of America v. NLRB, Case No. 16-1309, less than a week after the decision in *PCC Structural*s was issued, asking the Court to remand the case to the Board “for further consideration in light of the Board’s recent decision in *PCC Structural*s” (Exhibit A to Cristal’s Cross Motion for Summary Judgment) answers and eliminates the Union’s argument that *PCC Structural*s should not be applied retroactively – the Board told the Court that was precisely how it was going to apply the decision.

Second, the Board’s remand motion in *Volkswagen* also answers and eliminates the Union’s argument that the revisions to Section 102.67(g) that became effective on April 14, 2015, were intended to rescind the “special” circumstances exception to the rule’s prohibition on relitigating representation case issues in a subsequent unfair labor practice case. The underlying representation case from which *Volkswagen* arose, 10-RC-162530, was filed in October 2015, after Section 102.67(g), as revised, went into effect. Needless to say, if the revised rule precluded relitigation of representation case issues under a special circumstances exception, the Board would not have asked the D.C. Circuit to remand the case for reconsideration under *PCC Structural*s.

Third, the Union’s contention that, as revised, Rule 102.67(g) does not provide for a special circumstances exception overlooks that in virtually every, if not every test of certification case (Cristal has not canvassed all the cases) the Board has decided on summary judgment since the revised rule went into effect, the Board has made a statement like this:

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue that is

properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Duquesne Univ. of the Holy Spirit & United Steel, 366 N.L.R.B. No. 27 (Feb. 28, 2018). As the Board's citation to it signifies, the Supreme Court's decision in *Pittsburgh Plate Glass* is the source of the newly-discovered evidence and special circumstances exceptions and those exceptions survive the revision of Rule 102.67(g).

III. CONCLUSION

For all the foregoing reasons, and the reasons set forth in Memorandum in Support of its Cross Motion for Summary Judgment, Cristal respectfully requests that the Board grant the Company's Cross Motion for Summary Judgment and issue an Order dismissing the Complaint in this case with prejudice, revoking the Certification of Representative in the TiCl4 R-Case, and dismissing the Union's Petition in the TiCl4 R-Case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing *Reply Memorandum* was electronically filed on March 15, 2018, through the Board's website, is available for viewing and downloading from the Board's website, and will be sent by means allowed under the Board's Rules and Regulations to the following parties:

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