

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

THE UNIVERSITY OF CHICAGO

and

**GRADUATE STUDENTS UNITED,
AFFILIATED WITH THE ILLINOIS
FEDERATION OF TEACHERS, THE
AMERICAN FEDERATION OF TEACHERS
AND THE AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS, AFL-CIO**

Case No. 13-RC-198325

**THE UNIVERSITY OF CHICAGO’S OPPOSITION TO
GWC-UAW’S MOTION TO INTERVENE AND FOR RECUSAL**

Graduate Workers of Columbia-GWC, UAW (“GWC-UAW”) seeks permission to intervene in this proceeding at the eleventh hour, two business days prior to the scheduled election, solely for the purpose of seeking to require newly-appointed Member Marvin E. Kaplan to recuse himself from participating in the consideration of issues presently before the Board on the Request for Review and related Motion to Stay and for other extraordinary relief filed by the University of Chicago (“Chicago”).

GWC-UAW’s play is unmistakably designed to preclude reconsideration by the full Board of its controversial decision in *The Trustees of Columbia University in the City of New York*, 364 NLRB No. 90 (2016). Intervention for this purpose, especially at this very late stage of the proceeding, is not authorized under the Board’s Rules and Regulations and, as demonstrated below, there is no requirement that Member Kaplan recuse himself in this case under the authorities cited, or otherwise.

Contrary to GWC-UAW's motion, the outcome of this case, involving Chicago and Graduate Students United, *etc.*, is "[un]likely to have a direct and predictable effect on the financial interest of a member of [Member Kaplan's] household," nor would any "reasonable person with knowledge of the relevant facts . . . question [Member Kaplan's] impartiality in the matter" based on the fact that his wife is employed by The Trustees of Columbia University ("Columbia University").¹ The absurdity of the motion could not be more self-evident.

Moreover, the assumption that the outcome of this case could impact the continued viability of the Board's *Columbia University* decision does not itself provide a basis for recusal, because there is no claim that Member Kaplan's wife has a relationship to Chicago or that any ruling in this case could directly and predictably affect his wife's financial interests. Indeed, if recusal is warranted here, then Member Kaplan would be required to recuse himself from participation in any case coming before the Board that could impact Columbia University and other institutions of higher education, *e.g.*, reconsideration of the Board's *Pacific Lutheran* test of managerial status for college and university faculty. The Board should promptly reject this indisputably unacceptable basis for recusal.²

ARGUMENT

I. Intervention in This Proceeding Is Not Authorized by the Board's Rules and Regulations.

There is no basis for GWC-UAW's motion to intervene in this proceeding. The only intervention permitted in representation proceedings conducted pursuant to Section 9(c) of the Act is that provided for in Section 102.65(b) of the Board's Rules and Regulations (and

¹ GWC-UAW's motion does not disclose the position held by Member Kaplan's wife with Columbia University, but internet searches reveal that she is on the faculty of the Columbia University Medical Center.

² Due to the urgency of the matter, Chicago is submitting this brief opposition to GWC-UAW's motion. Chicago reserves its right to submit a more detailed response, if needed.

explained in Sections 11020-11023 of the *NLRB Casehandling Manual, Part 2*, and Section 3-840 of the *Outline of Law and Procedure in Representation Cases*), *i.e.*, when another labor organization claims an interest in representing the petitioned-for employees and seeks placement on the ballot.

Under the Regulations, such a motion is made to the Regional Director or Hearing Officer, plainly indicating that it must be made at the outset of the proceedings on a petition, and most certainly before a Direction of Election. Here, the “question concerning representation” raised by the petition is presently before the Board. The Regulations do not authorize or even contemplate intervention at this late date, which is not to say that intervention for this purpose would have been allowed earlier on.

No provision is made anywhere in the Regulations that even arguably supports the motion to intervene here, where the goal is to force a Board member’s recusal for the blatantly tactical purpose of avoiding a ruling by the full Board on a matter of national importance to countless private colleges and universities. Rather, the procedure for intervention is designed to allow other labor organizations claiming an interest in representation to appear on the ballot.

Further, allowing GWC-UAW to intervene on this basis would unsustainably expand the Board’s representation machinery by permitting any party, union or employer, to intervene in a proceeding merely upon a showing that it could conceivably implicate an issue of law in which the would-be intervenor has some interest. By GWC-UAW’s logic, it – or any university, for that matter – would be permitted to intervene in any current or future representation proceeding involving graduate students, wherever filed. The potentially exponential increase in intervention in representation cases that could result, with the attendant burden on the Board’s resources, is obvious, totally unacceptable, and has no basis in the law.

II. Member Kaplan's Recusal Is Neither Warranted Nor Required.

The premise of GWC-UAW's motion is that because Member Kaplan chose to recuse himself from any decisionmaking in *Columbia University*, he is required to recuse himself from consideration of any issues and cases involving any institution of higher education that could benefit Columbia University, his wife's employer. GWC-UAW's argument has no basis in the law.³

Under the regulations promulgated by the Office of Government Ethics ("OGE") pursuant to 18 U.S.C. § 208(d)(2), interpreting the general prohibition on financial conflicts of interest:

An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, ***if the particular matter will have a direct and predictable effect on that interest.***

5 C.F.R. § 2635.402 ("Disqualifying financial interests") (emphasis added). The regulations define "direct and predictable effect" as follows:

(i) A particular matter will have a direct effect on a financial interest if there is a ***close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest.*** An effect may be direct even though it does not occur immediately. ***A particular matter will not have a direct effect on a financial interest,*** however, ***if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter.*** A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this subpart.

(ii) A particular matter will have a predictable effect if there is a ***real, as opposed to a speculative possibility that the matter will affect the financial interest.*** It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

5 C.F.R. § 2635.402(b)(1) (emphases added).

³ Notably, no motion for recusal has been made by Petitioner in this proceeding. Were such a motion to be made, it, too, should be denied for the same reasons.

In addition to explaining financial conflicts of interest, the OGE regulations also address “appearance” conflicts, the specific provision on which GWC-UAW relies in its motion. *See* 5 C.F.R. § 2635.501-502. An appearance conflict exists “[w]here 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 . . . 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.” 5 C.F.R. § 2635.502(a) (emphasis added).

GWC-UAW fails to establish how a ruling in *Columbia*, let alone here, would have a “***direct and predictable effect on the financial interest***” of Member Kaplan or his wife. Simply because Member Kaplan recused himself from matters involving Columbia University does not establish the existence, in fact, of “direct and predictable” effect of graduate students’ unionization efforts on the finances of Member Kaplan or his wife. Indeed, such an effect appears highly dubious.

GWC-UAW’s novel motion argues for a new ground for recusal – “issue recusal” – contending that it is warranted because there is a “close relationship between the pending requests for review and the *Columbia* case.” Mot. at 5. The overlap of the issues in two unrelated proceedings is irrelevant. What the regulations require is a “direct and predictable effect” – *i.e.*, a “close causal link” between Member Kaplan’s participation in a decision on Chicago’s Motion to Stay and Request for Review and “any expected effect of the matter on the financial interest” of his wife, an employee of Columbia University. 5 C.F.R. § 2635.402(b)(1)(i). No such showing has been made here, none whatsoever. Indeed, none can be made.

GWU-UAW concedes as much. As per its own argument, there are at least *four* unsubstantiated links in its conjectured chain of causal connection that must occur before the necessary “close causal link” could even be considered. *First*, “***If review is granted*** in either the University of Chicago or Boston College with respect to the question of whether student employees are protected by the [A]ct.” Mot. at 4 (emphasis added). *Second*, “***If the Board were to overrule the Columbia decision***” before the Board’s decision regarding Columbia’s exceptions. *Id.* (emphasis added). *Third*, “***Columbia can be expected*** to ask the Board to find that it lacks jurisdiction.” *Id.* (emphasis added). *Fourth*, “***If the Board finds merit*** to the objections filed in the *Columbia* case,” the employee status issue “would be relevant.” *Id.* (emphasis added). This uber-attenuated string of speculative “what-ifs” demonstrates that no “close causal link” is present here.

Furthermore, it cannot be said whether the Board will grant Chicago’s Request for Review and Motion to Stay at all, or if it does so, on what grounds. While Chicago argued that *Columbia* was wrongly decided, it also raised three other issues warranting review, none of which necessarily impacts Columbia. Specifically, Chicago argued that its teaching and research assistants are distinguishable from graduate students found to be employees in *Columbia*; that there is an absence of controlling Board precedent with respect to devising an eligibility formula among graduate student assistants; and, that the Regional Director erred in ordering Chicago to produce a list that is inherently incomplete and inaccurate for reasons beyond Chicago’s control. The Board may grant review based on one or more of these issues.⁴

⁴ GWC-UAW’s reliance on *Shell Oil Co. v. United States*, 672 F.3d 1283 (Fed. Cir. 2012) is misplaced. That case considered whether a federal judge presiding over a single multi-plaintiff case should have recused himself from an entire proceeding involving four plaintiffs instead of severing two plaintiffs in which he had a financial interest. GWC-UAW asserts that *Shell Oil* stands for the proposition that if an adjudicator has a financial interest in a party to a case, causing her to be recused from that case, she must also be recused from any other case the disposition of which is “likely to be controlling” with respect to the original case. Mot. at 6-7. *Shell Oil*’s holding, however, does not extend nearly so far. There, the Federal Circuit held that recusal was required because “the matters had been

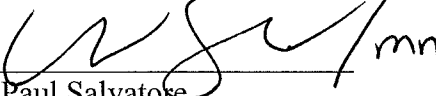
Plainly, the requirements for recusal have not been – and cannot be – demonstrated here.

CONCLUSION

For all the foregoing reasons, the Board should deny GWC-UAW's motion to intervene and for recusal in all respects.

Dated: October 16, 2017
New York, New York

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considered jointly throughout the proceedings,” and because “the facts relating to [the controversy] are nearly identical as to all four [plaintiffs],” meaning “the judgment here could have a preclusive . . . effect in the severed case.” 672 F.3d at 1291, 1293.

The nexus between the *Columbia* case and the instant proceeding is not comparable. The two cases have entirely separate sets of facts and issues and two different unions asserting representation rights. The issues of law and fact in the respective cases have never “been considered jointly,” as was the case in *Shell Oil*. Therefore, *Shell Oil* is inapposite and is of no persuasive value to the issue of Member Kaplan’s recusal.

Indeed, the facts of this case more closely resemble those in *Sensley v. Albritton*, 385 F.3d 591 (5th Cir. 2004) and *In re Placid Oil Co.*, 802 F.2d 783 (5th Cir. 1986). In *Sensley*, a class of plaintiffs argued that a trial judge should have recused himself from a petition challenging proposed redistricting being defended by the local district attorney’s office, because the judge’s wife worked as an assistant district attorney. 385 F.3d at 599. According to plaintiffs, although the wife was not involved in the matter, the trial judge could “benefit from the outcome” because she was at-will employee and the matter could affect her employment status. *Id.* at 600. The Court of Appeals upheld the district court’s refusal to recuse, concluding that the alleged interest was “remote, contingent, and speculative” and that the “edifice of conjecture [does] not support an objective conclusion that [the judge] has a financial interest in the outcome of the case.” *Id.* at 600-01.

In *Placid Oil Co.*, plaintiffs’ argued that a trial judge who had a large investment in a non-party bank was required to recuse himself from an antitrust suit that plaintiffs brought against twenty three (other) banks. 802 F.2d at 786. Specifically, plaintiff contended that “any rulings adverse to the [23 banks] will have a dramatic impact on the entire banking industry and thus on [the Judge’s] investment as well.” *Id.* The court denied the writ of mandamus, holding that “[a] remote, contingent, and speculative interest is not a financial interest within the meaning of the recusal statute, nor does it create a situation in which a judge’s impartiality might reasonably be questioned.” *Id.* at 786-87.

Here, too, GWC-UAW’s speculative premises tacked on to other speculative premises resulting in an argument that the outcome of this proceeding *may* affect Member Kaplan’s wife’s employer are too attenuated and do not support recusal.