



COALITION FOR A
DEMOCRATIC WORKPLACE

January 14, 2022

Honorable Lauren McFerran, Chair
John F. Ring, Member
Marvin E. Kaplan, Member
Gwynne A. Wilcox, Member
David M. Prouty, Member

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

To the Chair and Members of the National Labor Relations Board:

This letter is submitted on behalf of the Coalition for a Democratic Workplace (“CDW”). For the reasons outlined below, CDW objects to the involvement of National Labor Relations Board (“Board”) Members David M. Prouty and Gwynne A. Wilcox in certain matters before the Board. Specifically, under governing law discussed herein, these Members should be disqualified from participating in (1) the lawsuit styled *Service Employees International Union v. National Labor Relations Board*, No. 21-2443 (D.D.C) (“SEIU Suit”), (2) any other legal proceeding involving the SEIU (or its National Fast Food Workers Union) or the joint-employer rule, and (3) any rulemaking on the joint-employer standard.

CDW consists of nearly 500 organizations nationwide.¹ CDW’s members are or represent the interests of “employers” as defined by the National Labor Relations Act (“Act”), and they are therefore affected by the SEIU Suit, other suits involving the SEIU (or its National Fast Food Workers Union), and proceedings on the joint-employer standard. CDW advocates for its members on numerous issues of significance related to Board policy and interpretation of the Act. CDW has an abiding interest not only in the proper development of the law under the Act, but also in the efficient operation of the Board, unhindered by conflicts and bias, or the appearance of the same, that only serve to undermine confidence in the Board’s decisions in matters of national importance.

I. Background.

Until his appointment, Member Prouty served as general counsel to SEIU Local 32BJ, advising and representing the union on legal and strategic matters that included the Board’s adjudicatory and rulemaking proceedings relating to the joint-employer standard. Indeed, when the Board

¹ A full list of CDW’s members is available at <https://myprivateballot.com/about/>.



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instituted rulemaking proceedings in 2018 (*see* 83 Fed. Reg. 46681), Member Prouty, on behalf of SEIU Local 32BJ, authored lengthy comments opposing that proposed rule.²

Until her appointment, Member Wilcox, a partner at Levy Ratner, P.C., served as Associate General Counsel to 1199SEIU United Healthcare Workers East (“1199SEIU”). She also represented the Fast Food Workers Committee in the “Fight for \$15” litigation against McDonald’s USA, LLC, seeking to hold McDonald’s responsible as a joint employer.³ Member Wilcox’s partner, Daniel J. Ratner, filed lengthy and pointed comments against the Board’s joint-employer rule on behalf of Wilcox’s client, 1199SEIU.⁴

II. Members Prouty and Wilcox Must Be Disqualified from Matters Involving the SEIU (or its National Fast Food Workers Union) and Lawsuits and Rulemaking on the Joint-Employer Rule.

Members Prouty and Wilcox should recuse or be disqualified from participating in (1) the SEIU Suit, (2) any other legal proceeding involving the SEIU (or its National Fast Food Workers Union) and/or the joint-employer rule, and (3) any rulemaking on the joint-employer rule. No reasonable person with knowledge of the Members’ past activities, writings, and affiliations would believe that these Members are capable of acting impartially in these matters.

As the Board has acknowledged, Members’ obligations to recuse or be disqualified are governed in part by the provisions of the Code of Federal Regulations on Standards of Ethical Conduct for Employees of the Executive Branch and by the Ethics Pledge that the Members make upon their appointment. NLRB, Ethics Recusal Report (Nov. 19, 2019, as revised) (“NLRB Recusal Report”) at 16.⁵ The C.F.R. and the Ethics Pledge provide clear guidance on the concerns that drive the recusal decision.

Both the C.F.R. and the Ethics Pledge recognize the impediments to fair decision making that result when Members’ judgments are clouded by past activities or affiliations. For example, the Ethics Pledge that Members Prouty and Wilcox affirmed contains a “Revolving Door Ban.” Executive Order 13989, 86 Fed. Reg. 7029, 7029 (2021). They agreed that, for two years after the date of appointment, neither would participate in any particular matter involving specific parties directly and substantially related to the Members’ former employer or former clients. *Id.*

² SEIU Local 32BJ Comments, Comment ID NLRB-2018-0001-27524 (Jan. 28, 2019), available at <https://www.regulations.gov/comment/NLRB-2018-0001-27524>.

³ *See* Docket for McDonald’s USA, LLC, a joint employer, et al., NLRB Case No. 02-CA-093893, available at <https://www.nlr.gov/case/02-CA-093893>.

⁴ 1199SEIU United Healthcare Workers East Comments, Comment ID NLRB-2018-0001-26864, available at <https://www.regulations.gov/comment/NLRB-2018-0001-26864>.

⁵ The Board issued the Recusal Report as a “comprehensive review of [the Board’s] policies and procedures regarding ethics and recusal requirements for Board members.” NLRB Recusal Report at 1. It did so after “significant recusal and ethics issues” were raised in 2017 after the decision in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (December 14, 2017). *Id.*



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This is similar to, and even more stringent than, the one-year restriction in the Standards of Ethical Conduct. 5 C.F.R. § 2635.502(a). Importantly, the Ethics Pledge’s limitation on taking official action includes “regulations and contracts.” 86 Fed. Reg. at 7029. This ban with respect to matters involving former employers and former clients very clearly embodies the danger that a Member’s decision will be guided not by the concerns of the office and the national interest but by the concerns of those whom the Member so recently served. Here, Members Prouty and Wilcox were, until just months ago, advocating vociferously on behalf of their employer and client—the SEIU—and *against* the joint-employer rule that the Board had promulgated.

Nor can these two Members take refuge in a hyper-technical construction of the Ethics Pledge or Standards of Ethical Conduct to argue that their employment by and/or representation of subsidiaries of the SEIU exonerates them from their ethical quandary. *First*, the SEIU is no distant parent organization, but one with extensive and apparently total control over its local and affiliated unions. Under SEIU International’s 2020 Constitution:

- SEIU International “shall be composed of and have jurisdiction over its affiliated bodies and all Local Unions”;⁶
- SEIU International’s President “is authorized to require and direct coordinated bargaining among Local Unions”;⁷
- SEIU International’s President has the authority to appoint a Trustee “to take charge and control of the affairs of a Local Union or of an affiliated body and such appointment shall have the effect of removing the officers of the Local Union or affiliated body”;⁸ and
- “the Constitution and Bylaws of all Local Unions and affiliated bodies shall at all times be subordinate to the Constitution and Bylaws of the International Union as it may be amended from time to time.”⁹

In 2020 alone, SEIU Local 32BJ engaged in more than \$10 million in transactions with SEIU International, most of which are cryptically called “subsidy” and “reimbursement.”¹⁰ The Fast Food Workers Committee merged with the SEIU National Fast Food Workers Union in 2017.¹¹

⁶ SEIU 2020 Constitution, Article III, Section 1, available at <https://www.seiu.org/cards/what-you-should-know-about-our-constitution-and-leaders/you-can-read-it-yourself/p3>.

⁷ *Id.*, Article VIII, Section 1(f).

⁸ *Id.*, Article VIII, Section 7(a).

⁹ *Id.*, Article XV, Section 3.

¹⁰ See Form LM-2 of SEIU 32BJ at Schedule 14, available at <https://olmsapps.dol.gov/query/orgReport.do?rptId=751005&rptForm=LM2Form>.

¹¹ See Form LM-2 of Fast Food Workers Committee, Item 69, available at <https://olmsapps.dol.gov/query/orgReport.do?rptId=659960&rptForm=LM2Form>.



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The SEIU has invested millions of dollars in the SEIU National Fast Food Workers Union.¹² The SEIU paid more than \$100,000 to Member Wilcox’s firm, Levy Ratner, for “support for organizing” in 2020 alone.¹³ Thus, Members Prouty and Wilcox’s representation of and (in the case of Member Prouty) employment by subsidiaries of the SEIU is, for the purposes of the recusals requested herein, a meaningless distinction.

Second, the law guards against not just actual conflicts of interest but the *appearance* of conflicts and demands recusal in *both* instances. The C.F.R.’s Standards of Ethical Conduct require Members “to avoid any actions *creating the appearance* that they are violating the law or the ethical standards set forth in this part.” 5 C.F.R. § 2635.101(b)(14) (emphasis added). “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.* The Ethics Pledge that binds both Members similarly requires them to conduct themselves so as not to not raise the appearance of a conflict of interest. *See* 86 Fed. Reg. at 7029.

These standards are not new. Indeed, more than 80 years ago the Third Circuit underscored the importance that decisions of the NLRB be made by an “impartial and disinterested tribunal.” *Berkshire Emps. Ass’n of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 238 (3d Cir. 1941). The appearance of impropriety is inconsistent with the requirement that Members “with the responsibility for decisions affecting other people’s lives and property [] be as objective as humanly possible.” *Id.* Where a Member acts already having “thrown his [or her] weight on” one side, he or she has gone “beyond the line of fair dealing.” *Id.* at 239 (remanding because member’s correspondence went beyond a general predilection either for or against labor organizations in general or one organization in particular).

This Board has recognized the facileness of relying on pedantic distinctions between subsidiaries and their closely controlling parents. In the NLRB Recusal Report, the Board referred to what it calls a “catch-all provision” in the Standards of Ethical Conduct, 5 C.F.R. § 2635.502(a)(2). “This is called the catch-all provision because it captures conflicts not involving a covered relationship but based on *some nexus* to a party or representative in a matter.” NLRB Recusal Report at 6 n.3 (emphasis added).

There are ample grounds for a reasonable person, with knowledge of the intimate ties of Members Prouty and Wilcox to the SEIU and its and their vociferous attacks on the joint-employer rule, to question whether they are capable of acting impartially and disinterestedly in any matter involving the SEIU (or its National Fast Food Workers Union) or the joint-employer rule. Additionally, it is difficult to understand how either Member can impartially direct the Board’s position in the SEIU Suit when they were both apparently integral to the legal strategy

¹² *See* Form LM-2 of SEIU at Schedule 15, available at <https://olmsapps.dol.gov/query/orgReport.do?rptId=750976&rptForm=LM2Form>.

¹³ *Id.*



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that resulted in that suit's genesis. "It is comparable to the situation of a lawyer who has represented a client in an endeavor to get a settlement of a claim and, before the claim is settled, is appointed to the bench and sits in the very case as judge." *Berkshire Emps. Ass'n, supra*. So, too, as to any suit involving the SEIU (or its National Fast Food Workers Union) or the joint-employer rule for the same reasons. And their recusal should also extend to any rulemaking on the joint-employer rule. After all, the Administrative Procedure Act's requirement that proceedings be "conducted in an impartial manner" applies equally to both adjudication and rulemaking. 5 U.S.C. § 556(b). Moreover, the Ethics Pledge each Member took applies its "Revolving Door Ban" broadly, to regulations as well as adjudication. 86 Fed. Reg. at 7029.

Given the above, Members Prouty and Wilcox should be disqualified from any involvement in the SEIU Suit, and any other judicial or administrative case or matter, involving the SEIU (or its National Fast Food Workers Union) or the joint-employer rule, and any rulemaking on the joint-employer standard. At a minimum, these Members must satisfy the procedures that this Board set forth in the NLRB Recusal Report. To that end, we ask:

- Has either Member submitted the issue of their recusal for a determination by the agency's designated ethics official? 5 C.F.R. § 2635.502(a).
- If not, has the agency designee made an "independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question" the Members' participation in these matters? *Id.*, § 2635.502(c).
- If the Members have not done so and the agency designee has not acted independently, why not?
- If, on the other hand, the agency designee has made that determination, what was the result? Did the agency designee authorize the Members to proceed notwithstanding the fact that their participation reasonably raises questions about their partiality? 5 C.F.R. § 2635.502(d).
- If so, what was the basis for the agency designee's decision? Which factors, if any, under 5 C.F.R. § 2635.502(d) did the designee determine favored participation?
- Did the members request that any such determination be documented in writing? *Id.* Was the determination documented in writing regardless of any such request? Will you provide a copy of that determination?
- Please list all matters (including relevant case numbers) on which Member Prouty or Member Wilcox previously performed any work and which are still pending before the NLRB or remain on appeal.



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- Please list all entities for which Member Prouty or Member Wilcox provided any legal services since August 28, 2019. This includes without limitation any advice or counseling work even if Member Prouty or Member Wilcox did not appear as an attorney of record on behalf of the entity during litigation.
- Has Member Prouty or Member Wilcox ever provided legal advice to or participated in conversations which either member would consider to be protected by the attorney-client privilege with the Service Employees International Union, the National Fast Food Workers Union, or any other SEIU affiliate (other than Local 32BJ in the case of Member Prouty and 1199SEIU United Health Care Workers East in the case of Member Wilcox), or any agents thereof? If so, please provide: (i) the name of the entity and (ii) the most recent date Member Prouty or Member Wilcox provided such advice or participated in such conversations.
- Please provide any documents reviewed by Member Prouty or Member Wilcox in creating or considering their recusal lists.
- Please list all cases in which Levy Ratner represents or has represented a party (a) before the NLRB or its General Counsel (including all regional offices) or (b) in any courts in a proceeding in which the NLRB is or was also a party.

We respectfully request your prompt response on these important issues. We further request that in the interim, Members Wilcox and Prouty be recused from participating in any of the matters for which recusal is requested in this letter.

Sincerely,

Kristin Swearingen
Chair
Coalition for a Democratic Workplace

cc: Roxanne L. Rothschild, Executive Secretary
Jennifer A. Abruzzo, General Counsel