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By First Class Mail & E-Mail

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Sir:

On April 5, 2010, recently appointed National Labor Relations Board Member Craig Becker signed an enforceable Ethics Pledge (copy attached as Exhibit A), as required by President Barack Obama's January 21, 2009, Executive Order 13490, entitled "Ethics Commitments by Executive Branch Personnel." The Executive Order commits "all appointees entering Government" to the following pledge: "I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts."

By signing this pledge Member Becker has therefore committed to refrain from participating in any matter involving his former employer, the Service Employees International Union (SEIU), and former clients under certain conditions. (*See, e.g., Ethics Pledge, ¶ 2*).

On June 3, 2010, a panel of the NLRB that included Member Becker issued a decision in *St. Barnabas Hospital*, 355 N.L.R.B. No. 39, in which Committee of Interns and Residents, Local 1957, SEIU, was the Petitioner (Case 2-RC-23356). On June 8, 2010, another panel of the NLRB that included Member Becker issued a decision in *Service Employees International Union, Nurses Alliance, Local 121RN (Pomona Valley Hospital Medical Center) and Carole Jean Badertscher*, 355 N.L.R.B. No. 40, Case 21-CB-14428.

This letter requests that you or your designee conduct an independent investigation into whether Craig Becker's participation in these and other cases involving his former employer and/or his former clients violates his Ethics Pledge.

The Executive Order references 5 C.F.R. § 2635.402(b)(3) for the definition of the term "particular matter." Executive Order 13490, § 2(g). There "particular matter" is defined as follows:

The term particular matter encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter is covered by this subpart even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term particular matter, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. The particular matters covered by this subpart include a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.

5 C.F.R. § 2635.402(b)(3).

Section 2(l) of the Executive Order states: “‘Participate’ means to participate personally and substantially.” The Code of Federal Regulations defines “personal and substantial participation” as follows:

To participate personally means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate substantially means that the employee’s involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

5 C.F.R. § 2635.402(b)(4).

Member Becker’s participation in several particular matters – as those terms are defined in the Federal Code and incorporated into the Pledge – such as *St. Barnabas Hospital* and other cases involving SEIU must be investigated as a possible violation of his Ethics Pledge.

At the request of Congressman Darrell Issa, NLRB Inspector General David Berry undertook an investigation into Member Becker’s participation in *St. Barnabas Hospital* (only). The IG’s investigation focused on whether Becker ought to have recused himself in that case. The IG found that Becker’s participation in the *St. Barnabas Hospital* case did not violate any ethics rules because SEIU and SEIU subordinate locals “are considered separate legal entities.”

SEIU and its locals may be separate legal entities in a strict juridical sense for some contexts, *i.e.*, they may be individually constituted entities for purposes of liability. However, as we show below, in practice they function as one entity. Thus, their separate legal status for other purposes does nothing to eliminate the possibility of significant conflicts of interest when a former SEIU employee takes a government appointment.

The Foundation has formally requested that the NLRB IG expand his investigation of the recusal question to include Becker's participation in *Badertscher*, in which Foundation attorneys represent the Charging Party, and all other cases that involve SEIU or an SEIU subordinate affiliate. Member Becker earlier issued a supplemental opinion with the *Badertscher* decision, in which he addressed the recusal issues raised by motion in *Badertscher* and several other cases.

In his supplemental opinion, Becker ruled that he was not recusing himself in *Badertscher*, and that he also would also not recuse himself in yet another case involving an SEIU subordinate affiliate in which Foundation attorneys represent an individual employee: *Todd Allen Fields (Petitioner) and Aramark Apparel, LLC (Employer) and Service Workers United/SEIU (Union)*, Case No. 18-RD-2692. Member Becker's refusal to recuse himself in *St. Barnabas Hospital, Badertscher, Fields* and potentially other cases involving his former employer, SEIU, and/or an SEIU subordinate affiliate, is in apparent conflict with the ethical commitments binding on all executive branch employees.

The requests to the Inspector General referenced above focused on the recusal issue. That issue is legally distinct and separate from that of Becker's compliance with the Ethics Pledge. According to Executive Order's terms, you are authorized "to request any appropriate Federal investigative authority to conduct" an investigation as to whether Becker has breached any commitment of his Pledge. Executive Order 13490, § 5(c)(1). An investigation should be initiated into whether Becker has kept his Pledge, whether he ought to have requested a waiver from the Pledge, or whether his special side agreement with the NLRB regarding his potential ethical conflicts was a consideration in his decision to sign the Pledge. In short, the Foundation is not seeking a review of Becker's decisions concerning recusal. Rather, your office should direct investigation into Becker's compliance with commitments he made in his Ethics Pledge.

In the *Badertscher* supplemental decision on the recusal motions, Becker stated:

As an employee of the executive branch of government, I am bound by two sets of ethical standards. First, I am bound by the Standards of Ethical Conduct for Employees of the Executive Branch set forth in Title 5 of the Code of Federal Regulations Second, I am bound by the standards set forth in Executive Order 13,490 (January 21, 2009).

Becker argued against his recusal from case law and administrative agency precedents. In stark contrast to NLRB Chairman Wilma Liebman's recusal analysis in *Overnite Transportation Co.*,¹ Becker concluded that NLRB members are not bound by the statutory standards governing federal judges. He reasoned that any perceived bias stemming from his academic writings and other pronouncements concerning the issues in the cases and the Foundation that provides counsel to the workers involved was unfounded and did not warrant recusal.

With respect to his participation in SEIU cases before him, Becker, like the NLRB IG, determined that his participation in those cases would not violate his Pledge unless SEIU International itself is a party, because SEIU's locals and SEIU International, his former employer, are separate legal entities. According to Becker and the IG, therefore, Becker's participation in particular matters involving an SEIU local does not constitute a violation of the Pledge unless he actually represented that particular local. Becker's opinion in *Badertscher* also prejudicially mischaracterized the moving party's argument, stating that the key provision of the Pledge had not been raised. In fact, it had been, in Petitioner Joe Simpson's Second Supplement to His Motion to Recuse Member Craig Becker.²

In the footnote in which he dispensed with arguments about the Pledge, Becker stated:

The Moving Parties in *AT&T Mobility* and *Aramark* argue that, under the terms of Executive Order 13490, my signing of the brief in the earlier *Dana* representation case necessitates my recusal from those two pending cases in which parties have asked the Board to revisit the legal question addressed in *Dana*. But while the Moving Parties quote sec. 1(2) of the Order, which requires that, for a period of 2 years after assuming office, I recuse myself from participation "in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients," the Moving Parties do not quote (or acknowledge in any way) sec. 2(k) of the Order, which defines the term "directly and substantially related" to encompass only "matters in which the appointee's former employer or a former client is a party or represents a party." Neither of my former employers is a party or represents a party in *AT&T Mobility*

¹ See *Overnite Trans. Co.*, 329 N.L.R.B. 990, 998 (1999):

The Respondent is correct that, as a party to this proceeding, it is "entitled as a matter of fundamental due process to a fair hearing." Citing 28 U.S.C. § 455, defining the circumstances that mandate the disqualification of Federal judges, the Respondent contends that these standards should apply as well to officials of administrative agencies, such as Members of the National Labor Relations Board. I agree.

² Contrary to Becker's assertion, the party seeking Becker's recusal in *AT&T Mobility* did quote and "acknowledge" Section 2(k) of the Executive Order. See Petitioner Joe Simpson's 2d Supp. to His Mot. to Recuse Member Craig Becker at 2 (on file in *Joe Simpson (Petitioner) and AT&T Mobility (Employer) and CWA/CWA Local 37083 (Unions)*, NLRB Case No. 19-RD-3854).

or *Aramark*. Moreover, my former employer and client, the AFL–CIO, was not a party to the original *Dana* case, but rather an amicus curiae. Thus, my signing of the brief in the earlier *Dana* case is appropriately analyzed under the principles set forth in the text that follows.

Badertscher, slip op. at 7 n.3.

It is true that “[n]either of [Becker’s] former employers is a party or represents a party in *AT&T Mobility* or *Aramark*,” and that his “former employer and client, the AFL–CIO, was not a party to the original *Dana* case, but rather an amicus curiae,” *id.* (emphasis added). However, Becker’s distinction between “party” and “amicus curiae” is pure sophistry. Becker’s participation in any case in which the Board will reconsider and possibly overturn *Dana*, in which he opposed the *Dana* Board’s position, will necessarily constitute participation in a “particular matter involving specific parties that is directly and substantially related to [his] former employer [and] former clients,” Executive Order 13490, § 1, ¶ 2. Becker’s participation in cases which seek reconsideration of *Dana*, in which he filed a brief for a former employer and client, would be determinative of matters involving his former employers, *i.e.*, SEIU and AFL–CIO, and therefore prohibited by his Pledge.

Yet, even if all Becker’s arguments determining his own compliance with the Pledge were valid and legally sound, which they are not, the simple fact is that such a determination *cannot be his to make*. Nor can a response to the recusal motions be the correct place to settle the Pledge question. Nowhere in the Executive Order or the compliance guidance prepared by Robert I. Cusick, Director of the U.S. Office of Government Ethics (March 31, 2010), is it stated that appointees can determine for themselves whether they need a waiver or whether or not they are in compliance with their Pledge. Initiating an investigation into a potential violation of the Pledge rests exclusively with the Attorney General, or appropriate designees, according to the Executive Order itself. Executive Order 13490, § 5(c)(1). Therefore, Becker’s arguments, even if valid, are not dispositive. An investigation by your office in response to this request must be undertaken independently of Becker’s legal conclusions regarding his recusal and Pledge compliance.

In addition, during his confirmation hearings, Member Becker referred to “an ethics agreement with the NLRB which has been approved by the Office of Government Ethics.” (See Sen. Comm. on Health, Educ., Lab. & Pensions, Craig Becker written answers to Questions from Senator Orrin Hatch, July 30, 2009).³ Member Becker did not allude to this special agreement when ruling on the recusal motions in the *Badertscher* case mentioned above. In *Badertscher*, Becker referred only to his commitments under the regulations governing all executive branch employees and commitments arising out of the Ethics Pledge.

³ The Foundation obtained a copy of that Agreement, attached as Exhibit B, through a FOIA request.

That Becker made no mention of any special ethics agreement when ruling on the recusal motions raises several questions which your office should investigate. Is Becker's Ethics Pledge properly considered as a stand-alone legal commitment, as stated in the Executive Order? As such, did his decision to participate in the SEIU cases, as well as his refusal to recuse from most upcoming SEIU cases, violate the Ethics Pledge? Did Becker's "special agreement" somehow make it possible for him to sign the Ethics Pledge despite the obvious conflict arising from his former employment and the terms of the Pledge? Was the "special agreement" an element in Becker's refusal to recuse himself when SEIU or an SEIU subordinate affiliate is a party? If so, why is it not mentioned in his ruling on the motions to recuse? Did the special agreement override the need for a waiver from the Ethics Pledge?

Member Becker claimed in his *Badertscher* ruling that his Pledge "does not require me to recuse myself from all cases in which local unions affiliated with the SEIU are parties," because "SEIU is a separate and distinct legal entity from the many local labor organizations affiliated with SEIU." *Badertscher*, slip op. at 9. However, none of the cases Becker cited involved SEIU and none concerned a recusal issue.

Moreover, Becker's argument simply ignored the deep and interconnected constitutional, administrative, and financial ties between SEIU and its locals, evidence of which to our knowledge was not considered by the NLRB IG in his ruling concerning *St. Barnabas Hospital*. Again, even if Becker's legal analysis regarding the legal separateness of SEIU locals and SEIU International is accepted, for purposes of determining compliance with the Ethics Pledge, his findings are self-serving and irrelevant. It is for the investigator appointed by your office, not the affected appointee, to make any finding that SEIU locals are legally separate from SEIU and therefore not implicated by the Pledge's restrictions on matters involving former employers..

For the following reasons, your office should direct an independent investigation of Becker's assertion that SEIU International is a "separate and distinct legal entity." That assertion conflicts with several provisions of SEIU's constitution that show the opposite, *i.e.*, that SEIU is not separate from its locals and that SEIU exerts significant if not total control over all aspects of its locals. By explicit constitutional provision and in practice, SEIU exerts near total control over and is financially tied to its locals. SEIU's control over and financial dependence upon its locals gives rise to a conflict of interest for Becker in all cases involving SEIU locals.

First, Article I of SEIU's constitution (emphasis added) establishes that SEIU and its subordinate locals are one and the same organization: "This organization shall be known as the Service Employees International Union . . . and shall consist of an unlimited number of Local Unions chartered by it" ⁴ In short, SEIU *is* the locals.

⁴ Available at <http://www.seiu.org/images/pdfs/Con.BylawsFinal3.4.9.pdf> (last reviewed, July 6, 2010).

Second, Article XI, Section 6 – “Duties of the International Board” – establishes SEIU’s Executive Board’s power and final authority over its locals with respect to every aspect of the locals’ existence (emphasis added):⁵

Section 6. The International Executive Board shall, subject to action of an International Convention, be the final authority and the highest governing body of this International Union. The Board is hereby authorized and empowered to take any and all lawful action not inconsistent with this Constitution to safeguard and protect this International Union, the rights, duties and privileges of the officers and members of this International Union *and its Local Unions or any of its affiliated bodies*; to guide, manage, conduct and direct the activities, affairs, and functions of this International Union and to, in every way, including but not limited to expenditure, investment, and management, utilize the property and funds of this International Union towards the fulfillment of the purposes and objects of this organization. In addition to the general and specific powers conferred upon the Board elsewhere in this Constitution, and in addition to any lawful powers appertaining thereto, the Board is specifically authorized to:

A. Establish, adopt, prescribe and order such procedures, rules and regulations, consistent with this Constitution, as are required for the direction and management of the affairs of this International Union *and its constituent subordinate bodies* and to repeal or amend the same;

.....

D. Take such legal action as it deems necessary to protect the interests of this International Union, its officers, representatives, agents, employees, members, *or constituent Local Unions or its affiliated bodies*, including the initiation, prosecution, and defense of lawsuits and arbitrations, the settlement or compromising of any claim whether defended or prosecuted, and the payment of expenses and costs of all such proceedings and actions; or abstain from enforcing any claim.

Third, SEIU’s constitution grants the International power to impose a trusteeship on any local or other affiliate. Article VIII of SEIU’s constitution provides for the imposition of trusteeships on local affiliates under the heading “International President – Duties and Powers.”⁶

Section 7(a). Whenever the International President has reason to believe that, in order to protect the interests of the membership, it is necessary to appoint a Trustee for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of this International Union, he or she may appoint such Trustee to take charge and control of the

⁵ *Id.* at 18.

⁶ *See supra* note 4.

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.

(b). The Trustee shall be authorized and empowered to take full charge of the affairs of the Local Union or affiliated body and its related benefit funds, to remove any of its employees, agents and/or trustees of any funds selected by the Local Union or affiliated body and appoint such agents, employees or fund trustees during his or her trusteeship, and to take such other action as in his or her judgment is necessary for the preservation of the Local Union or affiliated body and for the protection of the interests of the membership. The Trustee shall report on the affairs/transactions of the Local Union or affiliated body to the International President. The Trustee and all of the acts of the Trustee shall be subject to the supervision and direction of the International President.

This absolute and ultimate power over its locals has been exercised by the International in recent large-scale takeovers. On January 29, 2009, SEIU Official Eliseo Medina issued a statement outlining the reasons for one such trusteeship imposed by SEIU International on the parent and local affiliates of United Healthcare Workers West. The reasons given for the assumption of total control over the affiliates included alleged financial wrongdoing and

- Refusal to cooperate with the Union's democratic decision on the jurisdiction of long-term care workers in California; that is, its decision to unify these workers from 3 separate locals into one strong new local union; and
- Putting collective bargaining relationships at serious risk by fostering or failing to counteract efforts to decertify bargaining units and deauthorize dues deductions, among other matters.

See Statement by Eliseo Medina, January 28, 2009.

Fourth, SEIU and its subordinate local affiliates are inextricably intertwined financially. On the one hand, SEIU is dependent upon its local unions' financial contributions. Article XIII of SEIU's constitution requires locals to pay the International a per capita tax from the dues that they collect from members. A review of SEIU's financial disclosure documents shows that the majority of the money SEIU collects comes from the per capita taxes paid to it by locals.⁷ For 2009 the International received over 85 percent of its receipts from the locals' membership dues and fees. Simply stated, SEIU International cannot function without the dues paid by its locals.

On the other hand, as the Supreme Court recognized in *Locke v. Karass*, 129 S. Ct. 798 (2009), a local's "payment of its affiliation fee gives locals in general access to the national's financial resources—compelled via contributions from various locals— . . . includ[ing] resources

⁷ See SEIU's 2009 annual LM-2 report, available at www.dol.gov, File No. 00137.

related to litigation.” *Id.* at 807. In other words, SEIU International subsidizes its local unions’ litigation costs through a “pooling” scheme.

Yet, Member Becker persists in participating in cases involving those SEIU locals, even though his former employer has a vested interest in seeing those locals win the cases and continue to maintain and increase their dues-paying membership.

Fifth, any case before Becker which involves an SEIU local operating in the healthcare industry, such as those in *Badertscher* and *St. Barnabas Hospital*, may also raise ethical conflicts for Becker due to Becker’s close involvement in SEIU’s national legal strategy for organizing healthcare workers. Concerning this involvement, Wade Rathke, former head of SEIU Local 100 and “founder and Chief Organizer” of Community Organizations International, popularly known as “ACORN,” said:

For my money Craig’s signal contribution has been his work in crafting and executing the legal strategies and protections which have allowed the effective organization of informal workers, and by this I mean home health care workers, under the protection of the National Labor Relations Act.... Craig was the key lawyer from the beginning in the early 1980’s who was able to piece together the arguments and representation that allowed those of us involved in trying to organize home health care workers in Illinois, Massachusetts, and elsewhere to beat back the arguments that such workers should be denied NLRA coverage because they were either self-employed or tainted by a co-employer situation where they might be quasi-public employees because they were directly reimbursed. His role was often behind the scenes devising the strategy with the organizer and lawyers, writing the briefs for others to file, and putting all of the pieces together, but he was the go-to-guy on all of this.⁸

Becker’s participation in cases involving any SEIU locals or other labor organizations in the healthcare industry may constitute a violation of his Pledge, and should be investigated. Becker’s “behind the scenes [role] devising the strategy with the organizer and lawyers, writing briefs for others to file, and putting all of the pieces together” is precisely the type of conduct not addressed by Becker’s “separate legal entity” analysis in *Badertscher*.

Thus, SEIU’s own constitution, its practice and other evidence contradict Becker’s assertion regarding the legal separateness of the International and its local affiliates. The International *is* the locals, and holds *de jure* and *de facto* control over its locals, including the power to take them over if they do not conform to International policies. Moreover, the International depends for its very existence on per capita taxes paid to it by the locals. Finally, Becker’s service to locals extended to particulars such as formulation of legal strategy and drafting of legal documents in actual cases even though he did not actually enter an appearance

⁸ <http://chieforganizer.org/2009/04/30/becker-to-the-nlrb/> (last reviewed, July 18, 2010).

Attorney General Eric Holder
August 9, 2010
Page 10

in all such cases. To the extent that Becker's determination that he is not disqualified from participation in deciding SEIU cases is based on the assertion that SEIU International is a separate and distinct legal entity from its locals and other subordinate affiliates, and/or that he was not an attorney of record for a specific local involved in a given case, at the least further investigation is required.

In conclusion, we strongly urge your office to direct the appropriate Federal authorities to investigate whether Member Becker's involvement in any and all SEIU cases constitutes a violation of his Ethics Pledge, notwithstanding his exoneration of himself in this regard. Employees working under the NLRB's jurisdiction need to be assured of the integrity of its adjudicatory processes. And, all citizens need to be assured that President Obama's Executive Order concerning the integrity and impartiality of government appointees is more than symbolic. Member Becker's serious conflicts of interest undermine that integrity and impartiality.

Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in black ink that reads "Raymond J. LaJeunesse, Jr." The signature is written in a cursive style and is positioned above the typed name.

Raymond J. LaJeunesse, Jr.

Enclosures (2)