Comptroller General
of the United States

Washington, D.C. 20548

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May 4, 1988

The Honorable Strom Thurmond
Committee on Labor and
Human Resources
United States Senate

Dear Senator Thurmond:

This responds to your letter of April 8, 1988, also signed by Senator Hatch, concerning the nomination of Mr. John E. Higgins to be a member of the National Labor Relations Board. Mr. Higgins currently is the Deputy General Counsel to the Board and has served in this capacity since 1976.

Under the National Labor Relations Act, the General Counsel is the prosecutorial arm of the Board, while the Board itself, which consists of five members, is the adjudicatory body. According to your letter, it has been suggested that in order to avoid a potential conflict of interest Mr. Higgins should disqualify himself from any matter pending before the Board while he served as Deputy General Counsel. You state that this could significantly impair the work of the Board. Therefore, you request our views concerning the extent to which Mr. Higgins should disqualify himself from participation in cases before the Board and what standards and methods should be applied in making disqualification decisions.

In his letter to you dated March 17, 1988, Mr. Higgins refers to a section of the Administrative Procedure Act (APA), 5 U.S.C. § 554(d)(2), and a statute governing the disqualification of federal judges, 28 U.S.C. § 455(b)(3), as providing the standards relevant to disqualification in his case. Based on these provisions, he concludes that disqualification is only required with respect to cases in which he participated personally. He adds:

> "As Deputy General Counsel, I actually participate in only a very small fraction of the unfair labor practice cases that are later presented to the

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> Board for decision. Where I have actually participated, I would recuse myself. This is the practice followed by current Board Member Johansen who was Acting General Counsel for about six months in 1984."

We agree with Mr. Higgins that the statutes he cites, together with judicial decisions construing them, provide the guidance relevant to his situation.1/ We also agree that personal participation is the appropriate standard for disqualification.

The APA provision referred to by Mr. Higgins, 5 U.S.C. § 554(d)(2), states in relevant part:

> "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings."

The section 554(d)(2) restrictions generally have been viewed as extending only to instances of personal involvement in an investigation or prosecution. See, e.g., Edles & Nelson, Federal Regulatory Process: Agency Practices & Procedures at 261 (Supp. 1985):

> "To require disqualification, the prior involvement with the proceeding must ordinarily be personal. The courts have allowed an agency member to participate as a decision maker in a case handled by the staff component in which the member had been an employee where he had no personal connection with the case."

Likewise, in Grolier Inc. v. Federal Trade Commission, 615 F.2d 1215 (1980), the Court of Appeals for the Ninth Circuit observed:

> ". . . we can find no court that has adopted a per se approach to disqualification under 554(d). On the contrary, those courts which have considered the question have focused not upon the

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1/ The federal conflict-of-interest statutes and related authorities cited in your letter are not directly pertinent to the disqualification requirements for Mr. Higgins arising from his service as Deputy General Counsel.

former position of the challenged adjudicator, but upon his actual involvement, while in that former position, with the case he is now deciding." 615 F.2d at 1221.2/

Judicial decisions construing 5 U.S.C. § 554(d)(2) do not address a situation where, as in Mr. Higgins' case, the adjudicator's former position in the agency gave him formal administrative or supervisory responsibility over a broad range of cases that might later come before him for disposition. However, this specific situation is addressed by authorities construing the other statute referred to by Mr. Higgins, 28 U.S.C. § 455. While this section does not apply to Mr. Higgins as a matter of law, it provides a useful analogy. Section 455 provides in part:

"(a) Any justice, judge, or magistrate 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:

. . . . .

"(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concern ing the proceeding or expressed an opinion concerning the merits of the particular case in controversy . . . ."

As suggested by its language, section 455(b)(3) also has been held to require disqualification only in the case of personal participation. Thus, in Muench v. Israel, 524 F. Supp. 1115 (E. D. Wis. 1981), Federal District Judge Warren, a former Attorney General of Wisconsin, declined to disqualify himself from considering a habeas corpus petition challenging the petitioner's conviction in a case where the Attorney General's office had represented the State during the period Judge Warren was Attorney General. Judge Warren concluded that section 455(b)(3) was intended to "encompass situations in which a judge's prior contact with a case has been more than simply administrative," observing:

2/ The Ninth Circuit reiterated this position on appeal from remand in Grolier Inc. v. Federal Trade Commission, 699 F.2d 983, cert. denied, 464 U.S. 891 (1983).

"There is little case law addressing the applicability of section 455(b)(3) to the specific issue in the instant case. However, commentators on the federal judicial system have repeatedly recognized the absurdity of mandating recusal simply because a judge has had a strictly formal relationship with a case while serving in a governmental position such as Attorney General. Thus, in his law review article which was later cited with approval by Mr. Justice Rehnquist in Laird v. Tatum, 409 U.S. 824, 829, 93 S.Ct. 7, 10, 34 L.Ed.2d 50 (1972), John P. Frank observed that 'there is no impropriety where the judge's role as prosecutor has been largely formal, as in the case of Attorneys General, who have only theoretical responsibility for minor cases in their departments.' See also, Frank, Disqualification of Judges; In Support of the Bayh Bill, 35 Law & Contemp. Prob. 43 (1970).

"In addition, history is replete with examples of United States Supreme Court justices who had previously served in the Justice Department and later declined recusal in cases which had been handled by the Department during their tenure as government attorneys but with which their connections were purely formal." 524 F. Supp. at 1118.

This is the same view expressed in a letter to you from the Director of the Office of Government Ethics dated April 20, 1988:

"We understand that this provision [28 U.S.C. § 455(b)(3)] is consistent with Federal judicial practice which bars a judge with respect to matters in which he participated in a substantive sense, but not those where there had been mere administrative responsibility."

There is one decision that could be read to support a different standard of disqualification. In American General Insurance Company v. Federal Trade Commission, 589 F.2d 462 (1979), the Court of Appeals for the Ninth Circuit overturned an order issued by an FTC Commissioner on the basis that the Commissioner should have disqualified himself from the case. The Commissioner had served as General Counsel of the FTC and, in that capacity, had appeared as counsel and signed a brief in a related case. While it is clear that the Commissioner in fact participated personally in the

related case, the American General Insurance Company opinion suggests that mere responsibility for administrative supervision, regardless of the extent of a supervisor's knowledge and approval of the acts of his subordinates, might be sufficient to require disqualification. 589 F.2d at 465. This suggestion runs counter to the weight of authority and goes well beyond the facts of the case. Accordingly, we would be inclined to limit American General Insurance Company to its facts, rather than treating it as a departure from the general rule requiring disqualification only in cases of personal participation.3/

It is our opinion, therefore, that if Mr. Higgins is confirmed as a member of the National Labor Relations Board, he will be required to disqualify himself only from those cases in which he participated personally as Deputy General Counsel. This would cover any case in which he had direct involvement through consultation, review, discussion, or the signing of any pleading or brief.

We note that the April 20 letter to you from the Director of OGE includes a memorandum from the Board's Executive Secretary outlining the procedures followed by the Board to assure the recusal of Board members in appropriate cases. Under these procedures a new member coming from another office of the Board is required to supply a list of cases not to be assigned to that Board member. This list is then used by the Executive Secretary's office in making case assignments.

We hope that this analysis is responsive to your concerns.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

3/ Note also that 1 year after American General Insurance Company the Ninth Circuit decided Grolier Inc. v. Federal Trade Commission, discussed previously, which adopts the personal participation standard. Grolier did not refer to American General Insurance Company.