Interlocutory Orders, Etc.

LABMD, INC.

Docket No. 9357. Order, June 15, 2015.

Commission order denying respondent's motion to disqualify Chairwoman Ramirez based upon statements made to members of Congress regarding the matter during adjudication before the Administrative Law Judge.

COMMISSION ORDER DENYING MOTION TO DISQUALIFY CHAIRWOMAN EDITH G. RAMIREZ AND STATEMENT OF CHAIRWOMAN RAMIREZ

By Commissioner Joshua D. Wright, for a unanimous Commission:[1]

Respondent LabMD, Inc. has moved that the Commission, pursuant to 16 C.F.R. § 4.17, disqualify Chairwoman Ramirez from further participation in this administrative proceeding. *See* Motion to Disqualify Commissioner Edith Ramirez (Apr. 27, 2015). Having considered all arguments and exhibits in support of, and in opposition to, the Motion, we deny the Motion.[2] We have also considered Chairwoman Ramirez's May 20, 2015

[1] The Commission approved this Order and Opinion on June 15, 2015. Chairwoman Ramirez did not participate, in accordance with Rule 4.17(b)(3)(ii). Commissioner Brill did not take part in the consideration or decision herein.

[2] Complaint Counsel filed an opposition to the Motion on April 30, 2015. On May 6, 2015, LabMD filed a "Motion to Strike Complaint Counsel's Opposition to Respondent's Motion to Disqualify Chairwoman Edith Ramirez or, In the Alternative, Motion for Leave to File Reply in Support of Motion to Disqualify Commissioner Edith Ramirez." LabMD argues that the Commission's Rules of Practice do not permit Complaint Counsel to file the Opposition because Rule 4.17 does not contain an express provision allowing responses to a disqualification motion. However, the plain language of the Commission's Rules of Practice provides otherwise. Complaint Counsel's Opposition was properly filed pursuant to Rule 3.22(d), which governs responses to "any written motion" and operates in conjunction with Rule 4.17 and other rules relating to specific motions. *See* 16 C.F.R. § 3.22(d). Accordingly, LabMD's motion to strike is denied. Although Rule 3.22(d) does not provide the moving party with the right to reply, the Commission grants LabMD leave to file a reply and has reviewed its Reply. The Commission also grants LabMD's Motion for Leave to File a Notice of Supplemental Authority in Support of LabMD, Inc.'s Motion to Disqualify Commissioner Edith Ramirez (May 15, 2015) and has carefully considered the attachments therein.

statement declining to recuse herself from further participation in this administrative adjudication.[3] As explained below, Chairwoman Ramirez's limited involvement in the agency's responses to an inquiry from a congressional oversight committee has in no way compromised her ability to participate objectively in this proceeding.

LabMD bases its Motion on two grounds. First, LabMD alleges that Chairwoman Ramirez's involvement in responding to an inquiry from the U.S. House of Representatives Committee on Oversight and Government Reform ("Oversight Committee") has "irrevocably tainted and compromised" her decision-making process in this adjudication. Motion at 1, 7-8. Second, LabMD claims there is a "reasonable suspicion" that Chairwoman Ramirez has prejudged this case. *Id.* at 8-9.

I. INQUIRY FROM THE OVERSIGHT COMMITTEE

The Oversight Committee's former Chairman Darrell Issa sent letters to the agency regarding Tiversa, Inc., an evidentiary source in the Bureau of Consumer Protection's investigation of LabMD. Chairwoman Ramirez was involved in responding to certain of those letters. LabMD argues that both the Committee's letters and the Chairwoman's participation in the Commission's response to them require disqualification. *See* Motion at 7-8.

A congressional inquiry can taint an adjudicative proceeding when it "focuses directly and substantially upon the mental decisional processes" of the Commission in a pending case, subjecting a commissioner to a "searching examination as to how and why he reached his decision." *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966). Thus, when a party alleges that a congressional inquiry has tainted an adjudicative proceeding, courts examine not the mere fact of the inquiry, but whether there is a direct connection between the congressional involvement and the adjudicator's decision-making process. *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994); *see also Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011).

[3] Chairwoman Ramirez's statement is hereby placed on the public record as Attachment A to this opinion ("Statement").

Courts typically engage in this analysis only after an agency has reached a merits decision in an adjudication and a party seeks to invalidate it for improper congressional interference. However, the same standard also provides a useful guidepost for assessing a claim that a congressional inquiry threatens to taint a decision an agency may render in the future. In both circumstances, the underlying principles are the same. *See Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 714 F.2d 163, 169-71(D.C. Cir. 1983) (holding that lower court erred in enjoining a pending adjudicative proceeding because congressional communications did not clearly taint the proceeding). Thus, recusal would be required only if the congressional communications posed a serious likelihood of affecting the agency decision maker's ability to act fairly and impartially in the matter before it.

LabMD's allegation does not meet this standard. Unlike *Pillsbury*, the Oversight Committee's letters did not "directly and substantially" focus upon—or even address—Chairwoman Ramirez's decisionmaking process on the merits of the adjudication. Rather, the letters concerned an evidentiary source in the Bureau of Consumer Protection's investigation of LabMD. LabMD infers a connection between the two by speculating that because the Oversight Committee has "questioned [the] FTC's competence . . . only a judgment against LabMD will rescue [the] FTC's reputation[.]" Motion at 8. If that were the case, however, no agency adjudication could ever proceed if there were any congressional involvement that arguably could be seen as calling agency action into question.

LabMD's reliance on *Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978), is unavailing. In that case, the court found that a congressional letter criticizing the agency's initial determination and urging the Secretary of the Interior to postpone a final decision in the adjudication had "compromised the appearance of the Secretary's impartiality." *Id.* at 610 (quoting *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971)). There, however, the letter from Congress requested specific action by the Secretary of the Interior, and the Secretary rendered a decision on the merits consistent with the congressional request a mere two days after receiving the letter. *Id.* No such facts are present here.

Indeed, Chairwoman Ramirez has taken appropriate steps to limit her involvement in responding to the Oversight Committee. As the Chairwoman notes in her Statement, her only role (and that of the staff in her office) was to ensure that the Oversight Committee received full and prompt cooperation from the agency. As her Statement and the exhibits attached to LabMD's Motion and supplemental filings demonstrate, no evidence shows that she took part in addressing the substantive questions raised by the Oversight Committee or the merits of this case. To the contrary, she carefully restricted her role to the appropriate one of ensuring agency cooperation with Congress. The circumstances provide no basis to believe that the Oversight Committee's inquiry has impaired Chairwoman Ramirez's (or the Commission's) ability to render a fair and impartial decision in this case. *See ATX*, 41 F.3d at 1529 (finding that congressional involvement did not taint an adjudication where agency officials were "non-committal in their reactions to the congressional contacts" and did not "discuss the merits of the case with the congressmen").

Furthermore, the FTC has followed, and will continue to follow, its rules of practice in this administrative adjudication. The Administrative Law Judge is conducting an evidentiary hearing in this adjudicative proceeding and will issue an Initial Decision. Any appeal from that decision will be determined by the Commission based on its consideration of the administrative record in this matter.

II. PREJUDGMENT

LabMD also argues that disqualification is required because there is a "reasonable suspicion" that Chairwoman Ramirez has prejudged this case. Motion at 8-9. In particular, LabMD asserts that the agency's use of the deliberative process privilege to withhold certain documents in response to a Freedom of Information Act ("FOIA") request regarding the Oversight Committee's inquiry creates a "presumption" of prejudgment. *Id.* at 8.

Agency officials are "presumed to be objective and 'capable of judging a particular controversy fairly on the basis of

its own circumstances.'" *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). Even if LabMD could show a "reasonable suspicion of unfairness," Motion at 8, which it has not, that would not overcome the presumption of decision-maker objectivity. "Reasonable suspicion" is not enough. A party asserting prejudgment must show that the agency official has "*demonstrably* made up [her] mind about important and specific factual questions and [is] impervious to contrary evidence." *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (emphasis added) (internal quotation marks omitted). Disqualification based on prejudgment is required only where "'a disinterested observer may conclude that [the decision maker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Id*. at 1164-65 (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

LabMD's Motion does not meet this standard. The agency's reliance on the deliberative process privilege in a FOIA response does not raise a "reasonable suspicion," let alone a "demonstrable" showing of prejudgment. The deliberative process privilege applies to many types of agency deliberations from officials at various levels within the agency, including recommendations for responding to congressional inquiries. *Judicial Watch Inc. v. U.S. Dep't of Homeland Sec.*, 736 F. Supp. 2d 202, 208-09 (D.D.C. 2010) (holding that the privilege applies to deliberative documents used for responding to congressional inquiries); *see also Odland v. FERC*, 34 F. Supp. 3d 3, 16-18 (D.D.C. 2014) (affirming use of the privilege to withhold "emails among lower level agency staff"). Therefore, the agency's invocation of the deliberative process privilege provides no basis for a finding of prejudgment.

III. CONCLUSION

Accordingly,

IT IS ORDERED THAT LabMD's Motion to Disqualify Chairwoman Edith Ramirez is **DENIED.**

By the Commission, Chairwoman Ramirez and Commissioner Brill not participating.

ATTACHMENT A

Statement of Chairwoman Edith Ramirez

The administrative proceeding regarding the complaint against respondent LabMD, Inc. has been pending before Administrative Law Judge D. Michael Chappell since August 2013. In June 2014, the U.S. House of Representatives Committee on Oversight and Government Reform ("Oversight Committee") began an inquiry regarding Tiversa, Inc., an evidentiary source in the Bureau of Consumer Protection's investigation of LabMD. By motion filed on April 27 and supplemented on May 15, LabMD seeks to disqualify me from further participation in this matter, arguing that I have been "irrevocably tainted and compromised by" my involvement in the Federal Trade Commission's response to the Oversight Committee's requests for information.[1] The charge is without merit. As I explain below, nothing transpired during the course of the Oversight Committee's inquiry that would warrant my recusal.

The Oversight Committee's review of the role Tiversa played in the Bureau of Consumer Protection's investigation has not compromised in any way my ability to participate objectively in this matter. To the contrary, because the Oversight Committee's requests for information bore some relationship to issues that are being adjudicated in the administrative proceeding before the ALJ and may come before the Commission on any appeal of the ALJ's decision, I was very careful to limit my involvement in the FTC's response to the Oversight Committee's inquiry. My only role (and that of the staff in my office) was to ensure that the Oversight Committee received full and prompt cooperation from the agency. As part of that effort, I was involved in responding to correspondence from the Oversight Committee's then-Chairman Darrell Issa. However, I took no part in addressing the substantive

[1] *See* Respondent LabMD, Inc.'s Motion to Disqualify Commissioner Edith Ramirez (Apr. 27, 2015) at 1; *see also* Motion to Strike Complaint Counsel's Opposition to Respondent's Motion to Disqualify Chairwoman Edith Ramirez, or, In the Alternative, Motion for Leave to File Reply in Support of Motion to Disqualify Commissioner Edith Ramirez (May 6, 2015); Motion for Leave to File a Notice of Supplemental Authority in Support of LabMD, Inc.'s Motion to Disqualify Commissioner Edith Ramirez (May 15, 2015).

questions raised by the Oversight Committee, as the exhibits LabMD submitted in support of its motion demonstrate.

In the absence of any evidence that I have been influenced by the Oversight Committee's inquiry or have prejudged this matter, LabMD first suggests that the very fact of the Oversight Committee's inquiry has served to taint my ability to render an objective decision. Specifically, LabMD argues that because the Oversight Committee has "questioned [the] FTC's competence," "only a judgment against LabMD will rescue [the] FTC's reputation."[2] But if that were the case, no administrative adjudication could proceed in the face of congressional involvement in any issue that could arguably be seen as calling into question agency action. That is too thin a reed on which to base recusal, and not surprisingly, there is no legal authority supporting LabMD's position.

LabMD next argues that there is a "reasonable suspicion" that I have prejudged this matter because the FTC withheld certain documents on the basis of the deliberative process privilege in responding to a Freedom of Information Act request about the Oversight Committee's requests for information. This assertion is equally unfounded. Recusal is required only where "'a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'"[3] A party seeking disqualification must show that the official has "demonstrably made up [her] mind about important and specific factual questions and [is] impervious to contrary evidence."[4] LabMD's claim of prejudgment falls far short of this standard. The deliberative process privilege applies to many types of agency determinations reached by officials at various levels within the agency, including recommendations for responding to Congressional inquiries.[5]

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[2] Motion to Disqualify at 8.

[3] *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995) (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

[4] *Id.* at 1165 (internal quotation omitted).

[5] *Judicial Watch Inc. v. United States Dep't of Homeland Security*, 736 F. Supp. 2d 202, 208-09 (D.D.C. 2010).

Accordingly, the FTC's invocation of that privilege provides no basis whatsoever for any claim of prejudgment.

The facts indicate nothing more than that I properly oversaw the FTC's response to the Oversight Committee's requests for information. I therefore decline to recuse myself from participation in this matter.