

Interlocutory Orders, Etc.

IN THE MATTER OF

LABMD, INC.

Docket No. 9357. Order, August 14, 2015.

Commission order denying respondent's motion to disqualify Chairwoman Ramirez from participating as an adjudicator in the proceeding.

**OPINION AND ORDER DENYING RESPONDENT LABMD, INC.'S
AMENDED SECOND MOTION TO DISQUALIFY CHAIRWOMAN EDITH
RAMIREZ**

By WRIGHT, for a unanimous Commission:¹

On June 15, 2015, the Commission denied LabMD's motion to disqualify Chairwoman Ramirez from participation in this proceeding, finding that LabMD's claims had no merit.² LabMD has now filed a second and very similar motion to disqualify Chairwoman Ramirez from this matter.³ This second Motion rests on essentially the same factual assertions and merely reformulates LabMD's already-rejected claims. Having considered the Motion and Complaint Counsel's July 23, 2015 opposition, we deny the Motion. We have also considered and agree with the Chairwoman's August 6, 2015 statement declining to recuse herself from participation in this administrative adjudication.⁴ In addition, we hereby incorporate the analysis of our June 15, 2015 Opinion and Order.

¹ The Commission approved this Opinion and Order on August 14, 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 Opinion and Order Denying Respondent LabMD, Inc.'s Motion to Disqualify Chairwoman Edith Ramirez (June 15, 2015).

³ Amended Second Motion to Disqualify Commissioner Edith Ramirez – Violation of the Administrative Procedure Act (July 15, 2015).

⁴ Chairwoman Ramirez's Statement is available on the public record accompanying this Opinion and Order.

Interlocutory Orders, Etc.

The Motion first alleges that Chairwoman Ramirez engaged in *ex parte* communications with the Oversight Committee and failed to disclose them in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 557(d). The crux of the allegation is that the Oversight Committee’s inquiry has “improperly shaped” the Chairwoman’s judgment and thereby “compromised” her ability to participate in this adjudicative proceeding.⁵ The Commission rejected this very claim when it ruled against LabMD’s previous motion to disqualify Chairwoman Ramirez. As we discussed in the Opinion and Order on that motion, the Oversight Committee’s correspondence did not focus upon – or even address – Chairwoman Ramirez’s decisionmaking process on the merits of the adjudication. Further, as we concluded before, no evidence shows that the Chairwoman took part in addressing the questions raised by the Oversight Committee or that she engaged in *ex parte* communications regarding the merits of this case.⁶

The APA’s provisions governing *ex parte* communications are designed to enable an administrative litigant to “know[] the arguments presented to a decisionmaker,” so it can “respond effectively and ensure that its position is fairly considered.”⁷ Here, the correspondence from the Oversight Committee did not prejudice LabMD or compromise Chairwoman Ramirez’s ability to participate in this administrative adjudication. To the contrary, LabMD had timely knowledge of the Oversight Committee’s letters and filed motions with the Administrative Law Judge to admit them into evidence.⁸ In fact, as noted in the Chairwoman’s

⁵ See Amended Second Motion to Disqualify at 2, 4.

⁶ Opinion and Order at 2-3.

⁷ *Prof’l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 563 (D.C. Cir. 1982).

⁸ See Respondent’s Motion to Admit RX-542 (June 16, 2014) (moving to admit the June 11, 2014 letter into evidence); Respondent LabMD, Inc.’s Motion to Admit RX-543–RX-548 (Dec. 23, 2014) (Public Version) (moving to admit the December 1, 2014 letter into evidence, among other documents); Respondent LabMD, Inc.’s Motion to Admit Select Exhibits (June 12, 2015) (moving to admit into evidence various exhibits, including the July 18, 2014 letter).

Interlocutory Orders, Etc.

Statement, LabMD acknowledges that the Oversight Committee's letters have been "submitted into the record."⁹

LabMD next argues that Chairwoman Ramirez must be disqualified because the agency "improperly created a discrete body of secret law" when, in response to a Freedom of Information Act request, it invoked the deliberative process privilege to withhold certain agency communications.¹⁰ The claim has no basis in fact or law. Contrary to LabMD's repeated assertions, the agency's reliance on the deliberative process privilege to withhold certain communications does not establish, or even imply, that Chairwoman Ramirez addressed the merits of this case. As the Commission previously explained, 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.¹¹

In conclusion, we find no merit to LabMD's claims that Chairwoman Ramirez should be disqualified.

Accordingly,

IT IS ORDERED THAT LabMD's Amended Second Motion to Disqualify Commissioner Edith Ramirez – Violation of the Administrative Procedure Act is **DENIED**.

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

⁹ See Amended Second Motion to Disqualify at 5 n.13.

¹⁰ *Id.* at 6-7.

¹¹ Opinion and Order at 4.

Concurring Statement

STATEMENT OF CHAIRWOMAN EDITH RAMIREZ

Respondent LabMD, Inc. once again seeks my recusal from this administrative proceeding.¹ On June 15, 2015, the Commission denied LabMD's first motion to disqualify me, concluding, as I did, that there is no merit to LabMD's claim that my limited involvement in the agency's response to correspondence relating to this matter from the U.S. House of Representatives Committee on Oversight and Government Reform ("Oversight Committee") disqualifies me from participating.² LabMD's current motion is predicated on the same essential factual assertions and is just as baseless.

Recasting its previous arguments, LabMD first claims that I engaged in *ex parte* communications with the Oversight Committee and failed to disclose them in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(d). Underlying LabMD's contention is the suggestion that the Oversight Committee's inquiry has "improperly shaped" my judgment and "compromised" my ability to participate in this matter.³ LabMD argues further that the failure to make the Oversight Committee's correspondence part of the public record of this proceeding itself "creates a presumption of bias."⁴ These assertions are without foundation.

The provisions of the APA governing *ex parte* communications in agency adjudications are designed to protect an administrative litigant's right to "know[] the arguments presented to a decisionmaker" in order that the litigant can "respond effectively and ensure that its position is fairly

¹ See Amended Second Motion to Disqualify Commissioner Edith Ramirez – Violation of the Administrative Procedure Act (July 15, 2015).

² Opinion and Order Denying Respondent LabMD, Inc.'s Motion to Disqualify Chairwoman Edith Ramirez (June 15, 2015) (hereafter "Opinion and Order") at 1-2; Statement of Chairwoman Edith Ramirez In the Matter of LabMD, Inc. (May 20, 2015) (published June 15, 2015) (hereafter "Statement of Chairwoman Ramirez").

³ Amended Second Motion to Disqualify at 2, 4.

⁴ *Id.* at 2.

Concurring Statement

considered.”⁵ They are “common-sense guidelines” to ensure fair decision-making, not “woodenly applied rules.”⁶ Even putting aside that I have not engaged in any *ex parte* communications concerning the merits of this proceeding, LabMD had timely knowledge of the Oversight Committee’s letters and asked the Administrative Law Judge to admit them into evidence.⁷ Indeed, LabMD concedes the correspondence in question has been placed in the administrative record.⁸

Moreover, the Commission previously concluded when it denied LabMD’s prior disqualification motion that the communications from the Oversight Committee have not prejudiced LabMD or compromised my ability to participate in this administrative proceeding.⁹ As I have previously made clear, I did not take any part in addressing the substantive questions raised by the Oversight Committee. To the contrary, I carefully limited my role and that of the staff in my office, ensuring only that the Oversight Committee received full and prompt cooperation from the agency.¹⁰ LabMD’s appeal to the APA notwithstanding, the fact remains that there is no evidence supporting its claim of supposed bias.

LabMD next argues that I should be disqualified because the agency “improperly created a discrete body of secret law” when, in response to a Freedom of Information Act request, it invoked the deliberative process privilege to withhold certain internal

⁵ *Prof’l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 563 (D.C. Cir. 1982).

⁶ *Id.*

⁷ See Respondent’s Motion to Admit RX-542 (June 16, 2014) (moving to admit the June 11, 2014 letter into evidence); Respondent LabMD, Inc.’s Motion to Admit RX-543–RX-548 (Dec. 23, 2014) (Public Version) (moving to admit the December 1, 2014 letter into evidence, among other documents); Respondent LabMD, Inc.’s Motion to Admit Select Exhibits (June 12, 2015) (moving to admit into evidence various exhibits, including the July 18, 2014 letter).

⁸ See Amended Second Motion to Disqualify at 5 n.13.

⁹ See Opinion and Order at 2-3.

¹⁰ See Statement of Chairwoman Ramirez.

Concurring Statement

communications.¹¹ Here too LabMD is wrong. The agency's reliance on the deliberative process privilege to withhold certain privileged communications does not establish, or even remotely suggest, that I addressed the merits of this case in any way. Rather, as has been previously explained, the deliberative process privilege applies to different types of agency deliberations involving officials at various levels within the agency, including deliberations regarding congressional inquiries.¹²

In sum, LabMD's latest disqualification motion, like its predecessor, is without merit. Accordingly, I decline to recuse myself from participation in this matter.

¹¹ Amended Second Motion to Disqualify at 6-7.

¹² Opinion and Order at 4; Statement of Chairwoman Ramirez at 2.

Interlocutory Orders, Etc.

IN THE MATTER OF

ZF FRIEDRICHSHAFEN AG
AND
TRW AUTOMOTIVE HOLDINGS CORP.

Docket No. C-4520. Order, August 21, 2015

Letter approving the divestiture of the TRW L&S Business to THK Co., Ltd.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Peter C. Thomas, Esquire
Simpson Thacher & Bartlett LLP

*Re: In the Matter of ZF Friedrichshafen AG and TRW
Automotive Holdings Corp., Docket No. C-4520*

Dear Mr. Thomas:

This letter responds to the Application for Approval of Divestiture of the TRW L&S Business (“Divestiture Application”) filed by TRW Automotive Holdings Corp. (“TRW”) on May 29, 2015. The Divestiture Application requests that the Federal Trade Commission approve, pursuant to the Order in this matter, TRW’s proposed divestiture of the TRW L&S Business to THK Co., Ltd. The Application was placed on the public record for comments until July 6, 2015. No comments were received.

After consideration of the proposed divestiture as set forth in TRW’s Divestiture Application, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and representations made in connection with TRW’s Divestiture Application and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Wright dissenting.