

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright
 Terrell McSweeney

In the Matter of)	
)	
)	DOCKET NO. 9357
LabMD, Inc.,)	
a corporation.)	PUBLIC
)	

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

By Commissioner Joshua D. 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.

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

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.

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

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 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.

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).

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

¹⁰ *Id.* at 6-7.

¹¹ Opinion and Order at 4.

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.

April J. Tabor
Acting Secretary

ISSUED: August 14, 2015