

**Statement of Chairwoman Edith Ramirez  
In the Matter of LabMD, Inc.  
Docket No. 9357  
August 6, 2015**

Respondent LabMD, Inc. once again seeks my recusal from this administrative proceeding.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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."<sup>4</sup> 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 considered."<sup>5</sup> They are "common-sense guidelines" to ensure fair decision-making, not "woodenly applied rules."<sup>6</sup> 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.<sup>7</sup> Indeed, LabMD concedes the correspondence in question has been placed in the administrative record.<sup>8</sup>

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

<sup>2</sup> 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").

<sup>3</sup> Amended Second Motion to Disqualify at 2, 4.

<sup>4</sup> *Id.* at 2.

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

<sup>6</sup> *Id.*

<sup>7</sup> 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).

<sup>8</sup> See Amended Second Motion to Disqualify at 5 n.13.

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.<sup>9</sup> 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.<sup>10</sup> 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 communications.<sup>11</sup> 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.<sup>12</sup>

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

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<sup>9</sup> See Opinion and Order at 2-3.

<sup>10</sup> See Statement of Chairwoman Ramirez.

<sup>11</sup> Amended Second Motion to Disqualify at 6-7.

<sup>12</sup> Opinion and Order at 4; Statement of Chairwoman Ramirez at 2.