

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of

LAURIE BEBO, and
JOHN BUONO, CPA,

Respondents.

THE DIVISION OF ENFORCEMENT'S
RESPONSE TO RESPONDENT LAURIE
BEBO'S BRIEF IN RESPONSE TO THE
COMMISSION'S NOVEMBER 30, 2017
ORDER

The Division submits this response to Respondent Laurie Bebo's January 25, 2018 submission. In that filing, Bebo did not submit any new evidence or make any substantive arguments challenging the merits of the Court's prior rulings or initial decision. Rather, Bebo challenges the validity and efficacy of the Commission's November 30, 2017 Order ratifying the appointments of its administrative law judges (ALJs) and remanding the initial decision in this matter to allow the Court to review the record and reconsider its prior rulings and initial decision. As shown below, Bebo's contentions are without merit. Accordingly, as outlined in the Division's January 5, 2018 letter, the Court should ratify its prior actions and its initial decision in this matter.

I. The Commission's November 30 Order forecloses Bebo's challenge to the Commission's ratification of its ALJs' appointments.

It is undisputed that the Commission, acting in its capacity as head of a department, has the constitutional authority both to appoint ALJs as inferior officers and to ratify any such appointments after the fact. *See* U.S. Const. Art. II, § 2, Cl. 2; 15 U.S.C. § 78d(b)(1); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 512 (2010); *Wilkes-Barre Hospital Company, LLC v. National Labor Relations Board*, 857 F.3d 364, 370–71 (D.C. Cir. 2017). Moreover, the

Commission's order exercising that authority and ratifying the appointment of its ALJs is binding on its ALJs. The scope of the inquiry before *this* Court is therefore limited to whether—having had his appointment ratified by the Commission—the presiding ALJ should affirm or revise in any respect his prior actions and initial decision in this proceeding.

But even if this Court could consider the validity of the Commission's ratification of its ALJs' appointments, Bebo's challenge still fails. Bebo's argument (Br. 8-9) appears to be premised on the incorrect assumption that the act being ratified is the Commission's *delegation* of hiring authority. Bebo insists (*id.*) that the Commission's attempt to ratify its ALJs' appointments was "unsuccessful" because, Bebo asserts, the Commission lacks the authority to delegate this function to others. But the Commission's order does not purport to ratify a prior *delegation*; rather, it ratifies the original decision to *appoint* the ALJs in the first instance. Whether the Commission may delegate certain hiring decisions is beside the point; the only relevant question is whether the Commission is constitutionally authorized to appoint its ALJs—which it indisputably is.

Bebo's argument to the contrary arises from a misconception of the nature of ratification. Bebo's suggestion (Br. 8-9) that the Commission cannot ratify prior appointments made by its agents runs counter to the doctrine's very purpose: to allow a principal to subsequently authorize the actions taken by an agent acting outside the scope of his or her authority. *Restatement (Third) of Agency*, ch. 4, intro. note (2006); *id.* § 4.01 cmt. b; 1 Floyd R. Mechem, *Treatise on the Law of Public Offices and Officers* § 536 (1890). Ratification "operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally." *Marsh v. Fulton County*, 77 U.S. 676, 684 (1871).

It is undisputed that agency staff both approved the initial hiring of the Commission's ALJs and lacked the authority under the Constitution to appoint the ALJs as inferior officers. Assuming that such an appointment was necessary, it was supplied in the November 30 Order when the Commission, acting as head of a department, ratified the ALJs' original appointments. 1 Mechem § 533 (ratification of an act "render[s] it good from the beginning and the same as though he had originally authorized or made it"); accord *United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907) (ratification "retroactively give[s]" an agent's acts "validity"). Since any defect in the original appointment of the presiding ALJ has been cured, Bebo's challenge necessarily fails.

II. The procedures outlined in the Commission's November 30 Order are more than adequate to allow this Court to issue a valid decision ratifying its prior rulings.

Bebo errs in insisting (Br. 3-4) that any harm to her resulting from a defect in the presiding ALJ's initial appointment can be remedied only through outright dismissal of the administrative proceeding over which this Court initially presided. Court decisions reviewing agency attempts to remedy a defective appointment firmly "support the validity of a subsequent determination when . . . a properly appointed official has the power to conduct an independent evaluation of the merits and does so." *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117 (D.C. Cir. 2015). That is the exact scenario here. The Commission made the considered decision to ratify the appointment of its ALJs and, having done so, remanded the proceeding to this Court with instructions to reconsider the entire existing record and determine whether to ratify its prior rulings. The Commission also specified that Bebo would have the opportunity to introduce new evidence and submit new briefing. Those procedures are more than sufficient to allow for a valid ratification decision by this Court.

Indeed, courts have routinely upheld ratification decisions made after far less rigorous procedures. *See CFPB v. Gordon*, 819 F.3d 1179, 1186, 1192 (9th Cir. 2016) (upholding ratification after CFPB Director issued a “Notice of Ratification” stating: “I believe that the actions I took during the period I was serving as a recess appointee were legally authorized and entirely proper. To avoid any possible uncertainty, however, I hereby affirm and ratify any and all actions I took during that period.”), *cert. denied*, 137 S. Ct. 2291 (2017); *FEC v. Legi-Tech*, 75 F.3d 704, 709 (D.C. Cir. 1996) (finding no basis to invalidate ratification despite noting that the respondent “may well be right in arguing that the Commission’s ‘review’” for purposes of ratification “was nothing more than a ‘rubberstamp’”). Courts have thus not hesitated to uphold ratification decisions made after a de novo review of the existing administrative record. *See, e.g., Intercollegiate Broadcasting*, 796 F.3d at 118-19 (De novo review of the record allows for a valid ratification decision, which does not require “a new hearing.”); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602-03 (3d Cir. 2016) (holding ratification valid where the ratifying authority acted with “full knowledge of the decision to be ratified” and made “a detached and considered affirmation of the earlier decision”).

Bebo’s insistence (Br. 4) that this proceeding nonetheless should be dismissed is based on her erroneous assertion that the OIP is itself “legally invalid” because in that Order, the Commission “assign[ed] the matter to admittedly unconstitutional ALJs.” An OIP is issued by the Commission itself, not an ALJ, and Bebo does not question the validity of the Commissioners’ appointments. In the OIP in this matter, the Commission instituted proceedings to determine whether “the allegations set forth” by the Division of Enforcement are true and, if so, whether “remedial action is appropriate in the public interest.” OIP, at 12 (Dec. 3, 2014). The Commission also “ORDERED that a public hearing for the purpose of taking evidence on

th[ose] questions . . . be convened . . . at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110." *Id.* at 12-13. Rule 110 provides that "[a]ll proceedings shall be presided over by the Commission or, if the Commission so orders, by a hearing officer," and that "[w]hen the Commission designates that the hearing officer shall be an administrative law judge, the Chief Administrative Law Judge shall select . . . the law judge to preside." Designating an ALJ to preside over this proceeding is merely one of the OIP's directives; the act of doing so in no way compromises the validity of the Commission's decision to initiate the proceedings themselves—even if the designated ALJ was appointed improperly. Moreover, as noted above, the Commission's decision to ratify its ALJs' appointments cured any defect in their original appointments, and its decision to remand this matter to this Court for reconsideration remedies any defect in the initial proceedings before this Court. The OIP was valid when issued and remains so.

III. Bebo's separation-of-powers argument is foreclosed by binding precedent.

Bebo's separation-of-powers challenge also misses the mark. The Commission's decision in *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *26-28 (Sept. 17, 2015), forecloses her claim (Br. 9-10) that the manner of removing ALJs is unconstitutional. Any suggestion that the government's change of position in *Lucia v. SEC*, No. 17-130 (S. Ct.), compels a different result is also wrong. The Commission in *Timbervest* concluded that "*even if* the Commission's ALJs are considered officers," the method of their removal does not offend separation-of-powers principles because of the long-standing and circumscribed adjudicatory functions that ALJs exercise. *Id.* at *27 (emphasis added). Indeed, in *Free Enterprise Fund v. PCAOB*, the Court expressly declined to extend to ALJs its holding that the dual for-cause structure for removing Public Company Accounting Oversight Board

members was unconstitutional, explaining that, “unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions.” 561 U.S. 477, 507 n.10 (2010). *See also PHH Corp. v. CFPB*, No. 15-1177, Slip Op. 42 n.2 (D.C. Cir. Jan. 31, 2018) (“[T]he removal inquiry asks not whether an official exercised significant governmental authority, but whether a measure of independence in the exercise of such power interferes with the President’s constitutional duty and prerogative to oversee the executive branch and take care that the laws are faithfully executed.”); Concurring Op. of Judge Wilkins 5-6 (“The Article II inquiry is informed by the consistent recognition of the imperative to safeguard the adjudicatory officer from undue political pressure.”).

IV. Conclusion

For the foregoing reasons and those stated in its January 5, 2018 letter, the Division of Enforcement respectfully requests that the Court ratify its prior actions in this matter, including the initial decision issued on October 2, 2015.

Dated: February 15, 2018

Respectfully submitted,



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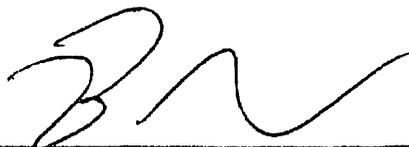
CERTIFICATE OF SERVICE

Benjamin Hanauer, an attorney, certifies that on February 15, 2018, he caused a true and correct copy of the foregoing The Division of Enforcement's Response to Respondent Laurie Bebo's Brief in Response to the Commission's November 30, 2017 Order to be served on the following by overnight delivery and email:

Honorable Cameron Elliot
Administrative Law Judge
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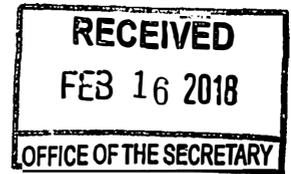
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February 15, 2018

VIA UPS NEXT DAY AIR

Brent J. Fields, Secretary
Office of the Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington D.C. 20549

Re: *In the Matter of Laurie Bebo and John Buono, CPA*
(AP File No. 3-16293)

Dear Mr. Fields:

Enclosed for filing in the above-referenced matter please find the original and three copies of *The Division of Enforcement's Response to Respondent Laurie Bebo's Brief in Response to the Commission's November 30, 2017 Order* and the related Certificate of Service.

Sincerely,

A handwritten signature in black ink, appearing to be "BH".

Benjamin J. Hanauer

Enclosures

Copies to: The Honorable Cameron Elliot
Mark Cameli, Esq.