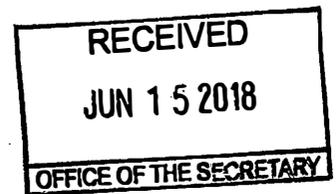


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**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING
File No. 3-16293**

In the Matter of

**LAURIE BEBO, and
JOHN BUONO, CPA,**

Respondents.

**THE DIVISION OF ENFORCEMENT'S RESPONSE
IN OPPOSITION TO RESPONDENT LAURIE BEBO'S BRIEF
IN RESPONSE TO THE COMMISSION'S MAY 1, 2018 ORDER**

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Pursuant to the Commission's May 1, 2018 Supplemental Briefing Order, the Division of Enforcement submits this response brief addressing arguments offered by Respondent Laurie Bebo in her May 30 brief.

I. The Commission's Two-Tiered Ratification Process Complies with the Law

In its November 30, 2017 Order, the Commission ratified the prior appointment of its ALJs and remanded the matter to ALJ Elliot, who, after providing the parties with the opportunity to submit any new evidence and brief any issues they deemed relevant, decided to ratify all prior actions taken by an ALJ in this proceeding. Respondent's challenge to that process misinterprets precedent and misconstrues the facts of this case. Respondent's attempt to avoid liability by challenging the Commission's ratification process should be rejected.

A. Respondent Misapprehends the ALJ Appointment Process

Respondent erroneously asserts (Br. 11) that "there is no appointment to ratify" and that "the Commission attempts to convert the former selection and hiring of ALJs, which, importantly, was done by the Chief ALJ and its human resources department as opposed to the Commission itself, into an appointment through ratification." The Commission decides whether to hire an ALJ, and that hiring, by statute, is referred to as an "appointment." *See* 5 U.S.C. § 3105 (agencies "shall appoint as many administrative law judges as are necessary"); *id.* § 3318(a) ("The nominating or appointing authority shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a) of this title, unless objection to one or more of the individuals certified is made to, and sustained by, the Office of Personnel Management for proper and adequate reason under regulations prescribed by the Office."). The Commission thus did not convert hirings into appointments, because they are one and the same.

The Commission's stated purpose in the November 30 Order also demonstrates that there can be no serious question that the Commission intended to "adopt[] and sanction[]" the ALJs' prior ability to conduct hearings, issue initial decisions, and perform all the functions given to ALJs by statute and regulation. Floyd R. Mechem, *A Treatise on the Law of Agency* § 146 (1888). The Order (p. 1) intended "[t]o put to rest any claim that administrative proceedings pending before, or presided over by, Commission administrative law judges violate the Appointments Clause." That clear statement of Commission intent undermines Respondent's effort to dispute particular words the Commission used in the Order. As a leading historical treatise explains, "[t]he methods by which a ratification may be effected are as numerous and as various as the complex dealings of human life," and "[i]t is impossible to state them all." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 547 (1890).

B. Respondent Relies on Cases That Do Not Address Ratification

Respondent's contention (Br. 2-5) that prior proceedings before an improperly appointed adjudicator can never be "retroactively cured" ignores the entire purpose of the ratification doctrine. Ratification allows the "adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him." 1 Floyd R. Mechem, *A Treatise on the Law of Agency*, § 347 (2d ed. 1914). Ratifying what was once "an unauthorized act is deemed to be equivalent to a prior authority to perform it." *A Treatise on the Law of Public Offices and Officers, supra*, § 545. That is what happened here, both when the Commission ratified the appointment of its ALJs and when the ALJ ratified all prior actions taken by an administrative law judge in this proceeding.

The cases Respondent cites do not grapple with how ratification may cure prior process-based defects and, indeed, do not address ratification at all. In *Wong Yang Sung v. McGrath*, 339

U.S. 33 (1950), the Supreme Court ruled that administrative hearings in deportation cases must conform to statutory requirements of the Administrative Procedure Act. Because the proceedings in that case did not comply with those requirements, the Court “sustain[ed] the writ of habeas corpus and direct[ed] release of the prisoner.” *Id.* at 53. And given the government’s arguments there that the APA did not apply to deportation proceedings, the government had not attempted to cure the APA violation in the proceedings themselves, let alone taken the additional step of curing any error in the decision through any process—including ratification.

In *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952), the Court stated that a “defect” in a hearing examiner’s “appointment [is] an irregularity which would invalidate a resulting order if the Commission had overruled” an appropriate and timely objection to the lawfulness of the examiner. *Id.* at 38. Again, there is no indication that the Court was considering whether an attempt to cure the infirmity in the appointment or the resulting decision had occurred. Nor was ratification at issue in *Ryder v. United States*, 515 U.S. 177 (1995), where the Court invalidated a service member’s conviction initially affirmed by a military court that included two members who had not been appointed in conformance with the Appointments Clause. *Cf. Edmond v. United States*, 520 U.S. 651, 654, 666 (1997) (rejecting a challenge from petitioners seeking to overturn convictions that had been affirmed by military judges whose appointments had been deemed invalid in *Ryder*, while noting that an appropriate official had cured the constitutional error by “adopting” the judges’ appointments “as judicial appointments of [his] own” before the judges had affirmed the convictions). Likewise, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), the Court did not address ratification and, in any event, the Court rejected a constitutional challenge to the ability of judges from the Court of Customs and Patent Appeals and the Court of Claims to sit by designation on Article III courts.

Because those cases did not involve ratification at all, the Court had no reason to address that longstanding doctrine. Selectively quoting from those opinions and transplanting those quotes into different contexts—as Respondent does in her brief—violates the “canon of unquestionable vitality” that “‘general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.’” *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994) (quoting *Cohens v. Virginia*, 19 U.S. 264, 399 (1821)). As those cases do not question the continued vitality of ratification, they provide no basis for the Commission to do so here.

Nor is Respondent correct (Br. 5 n.2) that the de facto officer doctrine “is equally applicable here and warrants dismissal of these proceedings.” The two doctrines are different. “The de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person’s appointment or election to office is deficient.” *Ryder*, 515 U.S. at 180. The Commission did not rely on that doctrine to confer validity on prior acts taken by its ALJs. Rather, the Commission set up new procedures that, among other things, provided Respondent with another opportunity to offer evidence and arguments; the November 30 Order instituted a two-tier process by which the Commission ratified the prior hiring of its ALJs and then ordered the ALJs themselves to make an independent determination regarding whether to ratify prior actions.

Respondent compounds her error by stating (Br. 5) that “any new, and potentially valid OIP (from an Article II perspective) would be barred by the five-year statute of limitations governing the Division’s claims under 28 U.S.C. § 2462,” so “the only legally viable option for the Commission is to dismiss the case with prejudice.” But the OIP issued by *the Commission* did not violate any statute of limitations, regardless of whether the Commission assigned the

matter to ALJs who were not initially appointed in conformance with the Appointments Clause. Because the constitutionality of the Commissioners' appointments is undisputed, the OIP was and remains valid regardless of any initial—and since cured—defect in the appointments of the Commission's ALJs.¹

C. Respondent Fails To Distinguish Cases That Do Address Ratification

A long line of cases supports the Commission's choice to ratify the prior appointment of its ALJs, remand pending cases to ALJs, and have ALJs decide whether to ratify prior ALJ actions. *E.g.*, *CFPB v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2291 (2017) (Director's "Notice of Ratification" simply "affirm[ed] and ratif[ied]" his own prior actions and the challenger offered no evidence that the Director failed to make a detached and considered judgment concerning matters he ratified); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 115-16, 118-19 (D.C. Cir. 2015) (de novo record review sufficient for valid ratification; "new hearing" not required); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602-03 (3d Cir. 2016) (ratification valid where action taken with "full knowledge of the decision to be ratified" and reflected "a detached and considered affirmation of the earlier decision"). At the outset, those cases refute Respondent's contention (Br. 2) that "proceedings that took place before an improperly appointed or otherwise unlawful judge require

¹ Nor is there any merit to Respondent's contention (Br. 5 n.3) that the deadline requiring an ALJ to issue an initial decision within 300 days of the filing of the OIP mandates dismissal because the ALJ's ratification occurred after that deadline. The ALJ's order is a ratification decision, not an initial decision. The Commission, moreover, may adopt "alternative procedure[s]" under Rule 100(c), which it did in the November 30 Order establishing its two-tier ratification procedures. Besides, even if an ALJ violated the then-governing 300-day deadline, the remedy would not be dismissal of the Commission's OIP; a respondent would instead file a petition with the Commission seeking an order compelling the ALJ to issue an initial decision. *See* 17 C.F.R. § 201.360(a)(2) (2006) ("These deadlines confer no substantive rights on respondents.").

a fresh adjudication before a properly appointed judge.” Respondent’s other attempts to distinguish those cases likewise fail.

Respondent contends (Br. 6) that none of the cases cited by the Division “involve[s] the improper appointment of a judge overseeing the principal legal and fact-finding stage of proceedings,” but that is incorrect. In *Intercollegiate Broadcasting System*, for example, an improperly constituted Copyright Royalty Board adopted a copyright royalty ratemaking determination that would affect how much money college and high school radio stations would have to pay to broadcast content over the Internet. After the D.C. Circuit found an Appointments Clause violation because Copyright Royalty Judges (a tribunal within the Library of Congress) were unconstitutionally insulated from presidential control at the time they issued a final copyright royalty ratemaking determination, the Librarian of Congress appointed new members, rendering the Board properly constituted. 796 F.3d at 115-16. The new Board decided to “conduct an independent, de novo review of the entire written record of the proceeding” and then adopted certain fee rules that the improperly constituted Board had previously adopted. *Id.* at 116-17. When those rules were challenged, the D.C. Circuit rejected the claim that the fee rules were “tainted by the Appointments Clause violation” that affected the initial Board decision. *Id.* at 117. The court held that the “independent, de novo decision” by a “properly appointed panel” satisfied the requirements of the Constitution. *Id.* at 124.

Here, on remand from the Commission after his prior appointment was ratified, the ALJ afforded Respondent every opportunity to submit new evidence and argument. The ALJ then, after a detached reconsideration of the record, made the independent decision to ratify all prior actions taken by an ALJ in this proceeding. And that decision will be reviewed de novo by the Commission. Those procedures amply satisfied the Commission’s obligation to provide

Respondent with an independent decision on the administrative record by a validly appointed adjudicator.

Respondent tries (Br. 6) to distinguish between the rates at issue in *Intercollegiate Broadcasting System* and the issues being adjudicated in these proceedings, but offers no reason why such a distinction should matter. In both scenarios, an individual's rights were adjudicated by a properly appointed adjudicator making an independent, de novo decision. Respondent thus errs (Br. 7) in arguing that the court in *Intercollegiate Broadcasting System* did not find "that a ratification scheme like the one the Commission attempts to use here cures an Appointments Clause violation." If anything, Respondent received more process than the parties in *Intercollegiate Broadcasting System*, because the ALJ's de novo review of prior ALJ actions will be reviewed de novo by the Commission as well.

Respondent's effort to distinguish other ratification cases fares no better. In *Doolin Security Savings Bank v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), an invalidly appointed Director of the Office of Thrift Supervision filed a notice of charges against a bank. The resulting administrative enforcement action proceeded for several years before a validly appointed director issued a final order based on an ALJ's findings and recommendation. *Id.* at 204, 213. The D.C. Circuit concluded that the final order "was necessarily an affirmation of the validity of the charges, and hence a 'ratification,' even though [the director] did not formally invoke the term." *Id.* at 213. The court affirmed the validity of the final order and noted that, to require another Director to "sign a new notice containing charges already found to be supported, not merely by probable cause, but by substantial evidence would do nothing but give the Bank the benefit of delay." *Id.* at 214; *see also Federal Election Commission v. Legi-Tech, Inc.*, 75 F.3d 704, 707-09 (D.C. Cir. 1996) (FEC not required to restart enforcement proceeding that had

begun before a judicial conclusion that the agency's structure violated the separation of powers because the constitutional error had been remedied through ratification). While the case did not involve the specific issue of an ALJ ratifying prior actions, *Doolin* supports the proposition that constitutional infirmities in proceedings may be cured by a subsequent ratification—which is precisely what the Commission did here when it ratified the prior appointment of its ALJs.

Advanced Disposal supports that proposition as well. There, a company sought review of a National Labor Relations Board decision holding that it violated the law by refusing to bargain collectively with leaders of a unionization vote because the company viewed the vote as invalid. 820 F.3d at 596-97. The company argued that the agency official who had run the election was appointed when the Board lacked a quorum, rendering all of his decisions ultra vires. *Id.* After the election, the members of a properly constituted Board ratified the selection of the agency official, who in turn ratified all of his own actions taken before the Board ratified his selection. *Id.* at 602. The court concluded that “ratification by the Board and [the agency official] was sufficient to cure the quorum violation which stripped the Board, and by extension [the agency official], of the authority to oversee the Union election.” *Id.* In doing so, the court explained that “ratification has been applied flexibly and has often been adapted to deal with unique and unusual circumstances.” *Id.* at 603. And it noted that, because of the “presumption of regularity,” the burden is on a challenger “to produce evidence that casts doubt on the agency’s claim” that its officials “properly ratified their earlier actions.” *Id.* at 604. Because the company failed to meet that burden, the Court rejected the company’s challenge to the tainted election. *Id.* The same result should follow here.

II. The ALJs' Removal Protections Do Not Violate the Constitution

Respondent asserts (Br. 11-13) that these proceedings must be dismissed because the statutory removal protections for the Commission's ALJs violate the Constitution, but that argument is based on a misunderstanding of Supreme Court precedent. The Division's opening brief (pp. 3-8) explained why the ALJs' removal protections do not violate the Constitution, and we do not repeat arguments demonstrating that Respondent's discussion of for-cause removal provisions and her interpretation of *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010), are both incorrect.

Respondent incorrectly asserts (Br. 12-13) that the Commission's decision in *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520 (Sept. 17, 2015), is inconsistent with Supreme Court precedent. That position cannot be reconciled with decisions such as *Wiener v. United States*, 357 U.S. 349, 353-54 (1958), which upheld statutory removal restrictions of officers performing quasijudicial functions, or *Free Enterprise Fund*, which also drew a distinction between executive and quasijudicial functions, *see* 561 U.S. at 507 n.10. *Timbervest* followed rather than departed from Supreme Court precedent when it recognized that ALJs perform quasijudicial functions.

Dated: June 14, 2018

Respectfully submitted,



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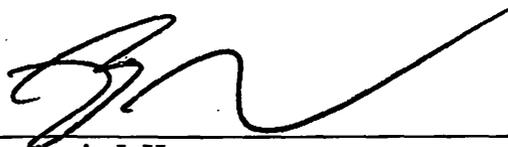
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CERTIFICATE OF SERVICE

Benjamin J. Hanauer, an attorney, certifies that on June 14, 2018, he caused a true and correct copy of the foregoing *The Division of Enforcement's Response in Opposition to Respondent Laurie Bebo's Brief in Response to the Commission's May 1, 2018 Order* to be served on the following by email:

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