UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of **Axon Enterprise, Inc.,** **a corporation,** **and** **Safariland, LLC,** **a corporation.**	**DOCKET NO. 9389**

ORDER DENYING RESPONDENT'S MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE

Respondent Axon Enterprise, Inc. ("Axon") moves under Rule 3.42(g)(2) to disqualify and remove the Administrative Law Judge ("ALJ") in this proceeding on the basis that the ALJ's dual-for-cause tenure protection violates Article II of the United States Constitution and the separation of powers. Complaint Counsel urge us to dismiss the Motion[1] as procedurally improper and untimely. We deny the Motion on the merits.

A. PROCEDURAL REQUIREMENTS

Rule 3.42(g)(2) allows a party to move to disqualify and remove the ALJ "[w]henever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding. . . ." 16 C.F.R. § 3.42(g)(2). Complaint Counsel assert that this rule is not the appropriate vehicle for Axon's arguments about

[1] We use the following abbreviations for citations to the pleadings:

Motion: Respondent's Renewed Motion to Disqualify the Administrative Law Judge
Response: Complaint Counsel's Response to Respondent's Motion to Disqualify the Administrative Law Judge

constitutional authority because the rule applies to disqualify "a *particular* judge in a *particular* proceeding and Axon's arguments are not specific to this particular proceeding, or this particular judge." Response at 1. Nothing in Rule 3.42(g)(2), however, precludes disqualification based on constitutional infirmity. On the contrary, the rule provides for motions to disqualify "for any reason." 16 C.F.R. § 3.42(g)(2). Complaint Counsel have identified no other, more appropriate avenue for Axon to seek removal of the ALJ on constitutional grounds.[2] Accordingly, we regard the issue as properly before us on a motion under Rule 3.42(g)(2).

Complaint Counsel also argue that the Motion is untimely. Motions to disqualify an ALJ under Rule 3.42(g) must be filed "at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification." 16 C.F.R. § 3.42(g)(3). The Commission issued its administrative complaint on January 3, 2020. On January 6, an order designating the ALJ was issued. Axon filed an answer on January 21 and included, as a defense, the contention that constraints on removal of the ALJ violate Article II of the Constitution and the separation of powers.[3] On March 19, the Commission issued the first of a series of orders that stayed this proceeding through July 6, 2020, in light of the COVID-19 public health crisis. Axon filed this Motion to disqualify on July 8, 2020.[4] Axon has not adequately explained its failure to file during the nearly two months that elapsed between assertion of its defense and the stay of this proceeding. Nonetheless, in view of the public health exigencies that began to emerge during portions of that period, and given the details of the timing, we will not reject Axon's Motion as untimely and will consider it on the merits.

B. COMMISSION AUTHORITY TO RULE ON THE MOTION

Although Axon moves us to remove the ALJ on constitutional grounds, it simultaneously argues that we lack authority to rule on constitutional matters. This is not the first time Axon has made that argument. Axon previously argued in federal district court that the Commission cannot resolve constitutional questions, but the district court correctly rejected that argument. The court asked "whether Congress, by enacting the FTC Act, intended to require constitutional challenges to the FTC's structure and processes to be brought via the FTC Act's adjudicatory

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[2] Complaint Counsel cite our decision in *North Carolina Board of Dental Examiners*, 151 F.T.C. 644 (Feb. 16, 2011), in asserting that jurisdictional arguments are not properly raised in a Rule 3.42(g) disqualification motion. *See* Response at 1-2. In *North Carolina Board of Dental Examiners*, the respondent moved the Commission to disqualify and remove itself as the adjudicator, arguing, among other things, that the Commission lacked the legal authority to rule on the constitutionality of its exercise of jurisdiction. *N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 644. The Commission explained that "[a]lthough crafted by Respondent as an argument to disqualify, lack of jurisdiction is not an argument for disqualification. Rather, jurisdiction regards the power of the Commission to entertain this dispute in the first instance." *Id.* at 645 n.3. That reasoning, however, does not apply here, because Axon's Motion seeks only to disqualify the ALJ; it does not implicate Commission jurisdiction but only the ALJ's role. Disqualification of the ALJ would not preclude proceeding under a different presiding official. *See* 16 C.F.R. § 3.42(a).

[3] Although Axon subsequently amended its Answer, the amendments changed only the numbering of the defense regarding constraints on removal of the ALJ, not its wording. *Compare* Amended Answer and Defenses of Respondent Axon Enterprise, Inc., Defense 15 (Mar. 2, 2020) *with* Answer and Defenses of Respondent Axon Enterprise, Inc., Defense 14 (Jan. 21, 2020).

[4] Axon states that it initially attempted to file its motion on April 24, 2020, but the FTC's Secretary refused to accept it while the proceeding was stayed. *See* Motion at 2 n.3.

framework," and it answered in the affirmative. *Axon Enter. Inc. v. Fed. Trade Comm'n*, No. CV-20-00014-PHX-DWL, 2020 WL 1703624, at *1, *3 (D. Ariz. Apr. 8, 2020), *pet. for review pending*, No. 20-15662 (9th Cir.). Similarly in *North Carolina Board of Dental Examiners*, 151 F.T.C. at 648, the Commission explained that it had authority to entertain what was allegedly a constitutional question, when its ruling would be fully reviewable by a court of appeals.[5] We will therefore address Axon's arguments that the ALJ's dual-for-cause tenure protection is unconstitutional.

C. CONSTITUTIONALITY OF ALJ TENURE PROTECTIONS

The Administrative Procedure Act provides that "[a]n action may be taken against an administrative law judge . . . by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a). Merit System Protection Board ("MSPB") members, in turn, may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Axon argues this statutory structure shields the ALJ from the President with two layers of good-cause protection in violation of Article II of the Constitution, which vests the President with "[t]he executive Power" and charges him with the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* § 3.

The Supreme Court addressed dual-for-cause removal protections in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477. In that case, the Court considered a separation-of-powers challenge to the Sarbanes-Oxley Act of 2002, which established the Public Company Accounting Oversight Board ("PCAOB" or "Board"), on grounds that it "conferr[ed] wide-ranging executive power on Board members without subjecting them to Presidential control." *Id.* at 487. The Board, comprising five members appointed by the Securities and Exchange Commission, possessed "expansive powers to govern an entire industry," including registering and routinely inspecting all accounting firms that audit public companies, promulgating auditing and ethics standards, initiating formal investigations, and issuing "severe sanctions" in disciplinary matters. *Id.* at 484-85.[6] Although the Board's issuance

[5] Axon also asserts, with little elaboration or support, that any Commission ruling on this Motion would be invalid because, like the constraints on removal of the ALJ, the constraints on removal of the Commissioners violate Article II and the separation of powers. The Supreme Court has already considered and upheld the limitations on the President's authority to remove FTC Commissioners. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 629-32 (1935); *cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501, 508-09 (2010) (explaining that the Court does not take issue with one-layer for-cause removal limitations and adopting a remedy that leaves the President separated from the at-issue officers by a single level of good-cause tenure); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2206 (2020) ("[W]e do not revisit *Humphrey's Executor*[.]"). But we need not rule on Axon's arguments regarding constraints on removal of Commissioners, as these arguments are not the basis of a motion.

[6] As the Court explained, "[T]he Board may regulate every detail of an accounting firm's practice . . . ." *Free Enter. Fund*, 561 U.S. at 485. It "promulgates auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceedings. The willful violation of any Board rule is . . . a federal crime punishable by up to 20 years' imprisonment or $25 million in fines ($5 million for a natural person). And the Board itself can issue severe sanctions in its disciplinary

of rules and imposition of sanctions were subject to Commission approval and alteration, *id.* at 486, the Commission could not start, stop, or alter Board investigations. *Id.* at 504. Further, Board members could be removed only upon a Commission finding that the member “willfully violated” the Sarbanes-Oxley Act, the securities law, or the Board’s rules; “willfully abused” his or her authority; or “without reasonable justification or excuse,” failed to enforce compliance with the statutes, rules, or Board standards. *Id.* at 486 (quoting 15 U.S.C. § 7217(d)(3)); *see also id.* at 503. The SEC Commissioners themselves, in turn, could not be removed by the President except for “inefficiency, neglect of duty, or malfeasance in office.” *Id.* at 487 (quotation omitted). The Court sought to resolve the following question: “May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?” *Id.* at 483–84. The Court held that two-layer removal protections were not permissible for officers who “exercise significant executive power.” *Id.* at 514.

In *Free Enterprise Fund*, the Court specifically carved ALJs, who are also subject to two-layer removal protections, out from its holding, distinguishing them because, “unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers.” *Id.* at 507 n.10 (citation omitted). Further, the Court asserted that such employees do not “enjoy the same significant and unusual protections from Presidential oversight as members of the Board.” *Id.* at 506.[7]

Despite the care the Court took to distinguish ALJs, Axon asks us to extend the Court’s holding to the ALJ here and to disqualify him on that basis. We decline to do so.

1. The ALJ Performs Adjudicative Functions

The ALJ’s removal protections do not inhibit the President in ensuring faithful execution of the laws because, as the Supreme Court suggested, the ALJ does not engage in enforcement or policymaking but rather performs adjudicative functions. *See Free Enter. Fund*, 561 U.S. at 507 n.10. The FTC’s ALJ does not bring enforcement matters or initiate investigations or cases. He does not establish agency policies or priorities. Instead, he presides over adjudicative proceedings in whatever cases may come before him after initiation by the Commission, and he applies the law to the facts. His position is “functionally comparable to that of a judge.” *Butz v. Economou*, 438 U.S. 478, 513 (1978) (internal quotation marks omitted). The ALJ’s function, therefore, differs from the executive functions within the President’s domain.

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proceedings, up to and including the permanent revocation of a firm's registration . . . and money penalties of $15 million ($750,000 for a natural person).” *Id.* (citations and quotation marks omitted).

[7] The Court also distinguished ALJs because it was disputed whether they were necessarily “Officers of the United States.” *Id.* In a subsequent decision, however, the Court addressed that dispute, holding that the SEC’s ALJs were in fact “Officers.” *See generally Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018). We do not rely on this distinction but focus on the other distinctions identified by the Court. *See id.* at 2061 (Breyer, J. concurring in judg’t in part and dissenting in part) (noting that the majority’s holding that the SEC’s ALJs are “Officers” removes that as a basis for distinction between ALJs and PCAOB members but that “[t]he other two distinctions remain.”).

Axon suggests that the FTC's ALJ does engage in policymaking because he "is also authorized 'to conduct rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act' and 'other rulemaking proceedings as directed,' and to serve as the 'Chief Presiding Officer.'" Motion at 5 (quoting 16 C.F.R. § 0.14). The ALJ's limited participation in Commission rulemakings–ensuring that the rulemaking proceeds in an orderly fashion and maintaining the rulemaking and public record–does not place him in the role of a policymaker; that role is reserved for the Commission. *See* 16 C.F.R. § 1.13. The ALJ cannot initiate a rulemaking proceeding, decide on its subject, determine whether a rule should issue, or establish the content of the rule. The Commission does all that. *See id.* §§ 1.9, 1.13(i), 1.14, 1.25, 1.26(d). The ALJ does provide the Commission with his "recommended decision" in trade regulation rule proceedings, *id.* § 1.13(g), but that is, by definition, an exercise of only "recommendatory powers." *Free Enter. Fund*, 561 U.S. at 507 n.10; *see also infra* Section C.2. In any case, any purported insufficiency in the President's oversight of the ALJ's role in rulemaking proceedings is not a basis to disqualify him from presiding over the adjudication of a matter involving an alleged statutory violation.

2. The Commission is Responsible for All Final Decisions

The Supreme Court also distinguished ALJs from officers whose two-layer removal protections are unconstitutional because ALJs may have only "recommendatory powers." *Free Enter. Fund*, 561 U.S. at 507 n.10. Removal protections for persons who only make recommendations do not impede the President's ability to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, because the President can fulfill that duty by overseeing the officers who actually make the final decisions. Axon argues that the FTC's ALJ does not exercise "purely recommendatory" powers because he issues not "recommendations" but "initial decisions." Motion at 5. For present purposes, however, that is a distinction without a difference. The ALJ's decisions do not become final agency action in the absence of Commission approval, either tacit or express, and the Commission can modify or set aside any aspect of the ALJ's decision with which it disagrees. *See* 16 C.F.R. §§ 3.51(a), (b), 3.54(a), (b). The Commission is thus responsible for all final agency decisions, so the ALJ's removal protections do not interfere with the President's constitutional duties.

This is in contrast to *Free Enterprise Fund*, where the Court took issue with the PCAOB's removal protections because the President could not "hold the [Securities and Exchange] Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions." *Free Enter. Fund*, 561 U.S. at 496. Here, because all of the ALJ's findings, rulings, and conclusions are subject to review and modification by the Commission, the Commission can be held accountable for any ALJ decision that becomes final to the same extent as if the Commission had authored it.

Unlike in *Free Enterprise Fund*, the Commission maintains controls over the case from beginning to end. The Commission authorizes all use of compulsory process in investigations. 16 C.F.R. § 2.7. The Commission itself issues the complaint. *Id.* § 3.11(a). The ALJ has no authority to initiate investigations or issue complaints. *See id.* §§ 2.1, 3.11(a). By contrast, the PCAOB initiated its own investigations, and the SEC had no power "to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within the Executive Branch. . . . The Board thus ha[d] significant independence in determining the priorities and intervening in the affairs of regulated firms . . . without Commission preapproval or direction." *Id.* at 504-05.

As for the administrative hearing, the Commission typically delegates to the ALJ responsibility for "the initial performance of statutory fact-finding functions and initial rulings on conclusions of law, to be exercised in conformity with Commission decisions and policy directives and with its Rules of Practice." 16 C.F.R. § 0.14.[8] The Commission, however, generally directly decides motions to dismiss filed before the evidentiary hearing, motions for summary decision, and motions to strike portions of the pleadings. *See id.* § 3.22(a).

In cases where the ALJ issues an initial decision, the Commission can overturn or modify that decision as it finds appropriate. The Commission reviews the ALJ's factual findings, legal conclusions, and discretionary decisions *de novo*; it "exercise[s] all the powers which it could have exercised if it had made the initial decision." *Id.* § 3.54(a); *see also* 5 U.S.C. § 557(b). The Commission can "adopt, modify, or set aside" the ALJ's findings, conclusions, rules or orders in the initial decision. 16 C.F.R. § 3.54(b). The Commission can also request additional information. *Id.* § 3.54(c). Commission review of the initial decision is mandatory if either party requests it. *Id.* § 3.52(b). But even when no party requests review of the initial decision, the Commission may review and modify it or set it aside on its own accord. *Id.* §§ 3.51(a), 3.53. The initial decision only becomes "the decision of the Commission" if the Commission so chooses. *See id.* § 3.51(a).[9]

Axon also contends that the ALJ's authority is not recommendatory because the ALJ can issue sanctions for failure to comply with discovery obligations. Motion at 5. But unlike the "severe sanctions" that could be issued by the Board in *Free Enterprise Fund*, 561 U.S. at 485, none of the sanctions available to the ALJ are monetary. Instead, such "sanctions" generally take the form of evidentiary rulings–*e.g.*, orders that a matter be admitted, evidence be excluded, or a pleading be stricken. 16 C.F.R. § 3.38(b). And, as with other ALJ determinations, these rulings are subject to *de novo* Commission review. *Id.* § 3.54(a).

Because the Commission is responsible for every final decision in this adjudication, the ALJ's removal protections are constitutionally sound and provide no basis for his disqualification.

[8] The Commission or one of the Commissions can preside in lieu of the ALJ. 16 C.F.R. § 3.42(a); 5 U.S.C. § 556(b).

[9] The Commission's role in considering Axon's Motion exemplifies its comprehensive oversight. Under Commission Rule 3.42(g)(2), if an ALJ fails to disqualify himself in response to a motion, the Commission is responsible for determining the validity of the grounds alleged. 16 C.F.R. § 3,42(g)(2).

3. The "Good Cause" Removal Standard Allows for Adequate Oversight of the ALJ

The Court in *Free Enterprise Fund* responded to concerns about applying the holding to ALJs by stating that they do not "enjoy the same significant and unusual protections from Presidential oversight as members of the Board." *Free Enter. Fund*, 561 U.S. at 506. The ALJ here is subject to much more oversight, not only because, as discussed above, the Commission can at its option modify or reverse the ALJ's findings, rulings, and conclusions, but also because the "good cause" removal protections at issue here do not provide the type of insulation that the Court found problematic in *Free Enterprise Fund.*

ALJs are much less shielded from removal than PCAOB members in *Free Enterprise Fund*. PCAOB members could be removed only upon a finding by the SEC that the member "willfully violated" the Sarbanes-Oxley Act, the securities law, or the PCAOB's rules; "willfully abused" his or her authority; or "without reasonable justification or excuse," failed to enforce compliance with the statutes, rules, or PCAOB standards. *Free Enter. Fund*, 561 U.S. at 486 (quoting 15 U.S.C. § 7217(d)(3)); *see also id.* at 503. The Court regarded these bases as "an unusually high standard" for removal and, consequently, a "more serious threat to executive control than an 'ordinary' dual for-cause standard." *Id.* at 502-03. The bases for removal were found to be too confining, as they could not be read to allow the SEC to remove Board members over disagreements on "policies or priorities." *Id.* at 502. ALJ removal, however, is governed by a more flexible "good cause" standard. *See* 5 U.S.C. § 7521 (an agency may take action against an ALJ "for good cause established and determined" by the MSPB).[10] This is far more permissive than willful violation or abuse and can include an ALJ's failure to perform adequately or to follow agency policies, procedures, or instructions.[11] When the "good cause" standard is so construed and the MSPB's role is limited to determining whether a factual basis exists for the agency's proffered grounds for removal, the President wields a constitutionally adequate degree of control over ALJs, to the extent Presidential oversight over persons with adjudicative functions is necessary. *See Otto Bock HealthCare N. Am., Inc.*, 2019 FTC LEXIS 79, *150-51 (F.T.C. Nov. 1, 2019), *pet. for review pending*, No. 19-1265 (D.C. Cir.); *1-800 Contacts, Inc.*, 2018 WL 6078349, at *54 (F.T.C. Nov. 7, 2018), *pet. for review pending*, No. 18-3848 (2d Cir.); *see also United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (a statute must be construed, if fairly possible, so as to avoid the conclusion that it is unconstitutional).

For all these reasons, we deny Axon's Motion.

Accordingly,

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[10] "Good cause" is also broader than the "inefficiency, neglect of duty, or malfeasance" standard, discussed in *Humphrey's Executor*, that did not allow for removal based on disagreements on policy and agency administration. *Humphrey's Ex'r*, 295 U.S. at 619, 625-26.

[11] Indeed, the MSPB already construes "good cause" as "including all matters which affect the ability and fitness of the ALJ to perform the duties of office." *Abrams v. Soc. Sec. Admin.*, 703 F.3d 538, 543 (Fed. Cir. 2012) (quotation omitted).

IT IS ORDERED THAT Respondent's Renewed Motion to Disqualify the Administrative Law Judge is **DENIED**.

By the Commission, Commissioner Slaughter not participating.

April Tabor
Acting Secretary

SEAL:
ISSUED: September 3, 2020