

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950
FAX: 202-434-9949

September 2, 2022

In the Matter of

LEACHCO, INC.,

CPSC Docket No. 22-1

Respondent.

ORDER DENYING MOTION TO DISQUALIFY

The proceeding commenced on February 9, 2022, and I was appointed on March 17, 2022, under a February 25 interagency agreement. The initial prehearing conference occurred on April 22, 2022, and I agreed to a prehearing schedule including discovery deadlines. The parties have since challenged the others' discovery requests and notices of deposition. New counsel for Respondent subsequently submitted the motion at issue. *See* Leachco, Inc.'s, Mot. to Disqualify the Presiding Officer and Stay the Proc. or, In the Alternative, Mot. to Stay Disc. (Aug. 17, 2022) ("Resp't Mot.").

Respondent alleges:

(1) ALJ Young lacks constitutional authority to proceed with this matter, (2) the Commission itself is unconstitutionally structured, and (3) this unconstitutional proceeding inflicts an ongoing, irreparable injury upon Leachco

Id. at 2. Complaint Counsel moved in opposition, arguing: (1) the motion is procedurally defective, failing to request relief permitted under the APA and CPSC rules; (2) the "rule of necessity" prevents the motion from prevailing; (3) Respondent's declaration is inadequate; (4) the motion is untimely; (5) a stay is not warranted because of delay in addressing a public-safety issue; and (6) that discovery need not be stayed because Complaint Counsel has volunteered to continue the depositions and close of discovery is not imminent. Compl. Counsel's Opp. to Leachco, Inc.'s Mot. to Disqualify the Presiding Officer and Stay the Proc. or, In the Alternative, Mot. to Stay Disc. at 2 (Aug. 29, 2022) ("Compl. Counsel Mot.").

Respondent makes this motion because it filed a collateral action in the United States District Court for the Eastern District of Oklahoma. Resp't Mot. at 1. It cites a favorable decision to its constitutional challenge in a Texas District Court. *See id.* at 12; *Consumers' Rsch. v. CPSC*, No. 6:21-cv-256-JDK, 2022 WL 1577222 (E.D. Tex. Mar. 18, 2022). That court granted summary judgment against the CPSC regarding whether it fell under the *Humphrey's Executor* exception for commission structure. 2022 WL 1577222, at *8, *10.

Respondent's motion requires analysis of only two issues. First, whether I lack constitutional authority specifically as an appointed ALJ. Second, whether a District Court decision adverse to the constitutionality of CPSC's structure requires this proceeding to be stayed. CPSC's constitutionality need not be evaluated here, only the cited decisions' procedural impact on this proceeding.

For the reasons set forth below, the Motion to Disqualify the Presiding Officer and Stay the Proceeding is **DENIED**. I reserve judgment on the Motion to Stay Discovery for the conference scheduled for September 7, 2022. *See* Order Scheduling Conference (Aug. 16, 2022).¹

I. My Appointment is Not Constitutionally Defective Under Either FMSHRC or the CPSC Because Both Comply with *Lucia* Requirements.

It is important to bear in mind the limited nature of Respondent's motion. The motion challenges my appointment as an exercise of the CPSC's executive power. To grant the motion, I would be required to find either that my general appointment as an administrative law judge is contrary to the Constitution; or that the CPSC's decision to appoint me is constitutionally defective. I hold that neither premise requires my disqualification.²

There are two exceptions to the President's unrestricted removal power. First, for "expert agencies led by a group of principal officers removable by the President only for good cause." *Seila L. L.L.C. v. CFPB*, 140 S. Ct. 2183, 2199–200 (2020) (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935)). Second, for "tenure protections for certain inferior officers with narrowly defined duties." *Id.* at 2192 (citing *Morrison v. Olson*, 487 U.S. 654, 679 (1988)).

¹ Respondent's motion presented a novel basis for disqualification not found in the CPSC's procedural rules. As it brings a constitutional challenge, supported by non-binding precedent awaiting circuit court review, I have taken additional time to research and consider a response. I consider non-conformance with the stated response period, *see* 16 C.F.R. § 1025.42(e)(2), an immaterial, procedural error.

² Whether the CPSC's structure is generally unconstitutional is not before me and need not be evaluated here. Deciding such an issue in this context is unnecessary. Further, Respondent has argued that I lack the power to decide constitutional questions. *See* Resp't Mot. at 17. I question that as a general matter. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214–15 (1994) (holding that administrative agencies may decide constitutional claims that germinate from an issue within the agency's statutory grant of authority). But I do find it would be improper for me to arrogate to myself the power to decide a question the Supreme Court appears to have reserved for itself. *See Seila L. L.L.C. v. CFPB*, 140 S. Ct. 2183, 2192 (2020) (declining to revisit *Humphrey's Executor* and *Morrison* and limiting decision to an independent agency wielding significant executive power and run by a single individual who cannot be removed by the President except for cause). And I note that Respondent has raised its constitutional claims in a collateral action in another forum. I therefore address only the cited decisions' procedural impact on this proceeding and my ability to conduct it.

Respondent correctly notes that, under *Lucia v. SEC*, as an administrative law judge, I am an executive officer of the United States. Resp't Mot. at 9; see 138 S. Ct. 2044, 2058 (2018). However, it is likely that if the *Humphrey's Executor* exception is preserved, FMSHRC would fall within its scope. The Commission's function is almost wholly adjudicatory. See 30 U.S.C. § 823(d) (describing general functions of the Commission and conferring power to establish rules of procedure); *Sec'y of Lab. v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006) (citing *Martin v. OSHRC*, 499 U.S. 144, 154 (1991)). While the Commission does have the power to issue subpoenas, and while such power has been held to be an executive function, *Collins v. Yellen*, 141 S. Ct. 1761, 1786, (2021), context is crucial. FMSHRC's subpoena power is exercised to compel the attendance of witnesses at quasi-judicial proceedings.

A. The FMSHRC Commissioners who Unanimously Appointed Me Were the “Head of the Agency” and are Within the *Humphrey's Executive* Exception to the General Presumption in Favor of Removability

The Supreme Court has held that the *Humphrey's Executor* exception applies to multi-member adjudicatory bodies who exercise little executive power. See *Wiener v. United States*, 357 U.S. 349, 354–55 (1958) (“The [War Claims] Commission was established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof.”). Like the War Claims Commission, FMSHRC is a multimember expert board with no policymaking authority. *Twentymile Coal Co.*, 456 F.3d at 161. The Mine Act delegates to the Commission responsibility for adjudication of contests under the Act, and the Commission has no independent executive or rulemaking powers save those incidental to the ordinary administration of the agency and the power to develop its own procedural rules. 30 U.S.C. § 823 (b)(2), (c), (d)(2).

In holding that review by FMSRC is “nearly identical” to that provided by the SEC, the Sixth Circuit Court of Appeals held that FMSHRC ALJ's must be appointed by the President, a court of law, or the head of the agency. *Jones Bros., Inc. v. Sec'y of Lab.*, 898 F.3d 669, 679 (6th Cir. 2018). It then held that the “head” of FMSHRC is the Commission, acting as a body. *Id.* Following *Jones Bros.*, FMSHRC developed a process for appointment of ALJs and ratified the appointment of incumbent ALJs. I was hired as an ALJ under this policy in February 2021.

B. As a Duly-Appointed ALJ, I am an “Inferior Officer” as Defined by the Supreme Court, and thus Within the Court's *Morrison v. Olson* Exception

Neither *Lucia* nor *Seila Law* abrogated the Court's protection against unrestricted removal of “inferior officers” recognized in *Morrison v. Olson*. To the contrary, *Lucia* expressly recognized ALJs as such inferior officers, and *Seila Law* expressly declined to revisit the precedent.

FMSHRC ALJs are inferior officers rather than employees because they exercise significant discretion as adjudicators. However, the Court has not held that ALJs who have been properly appointed are outside of the exceptional protection against discharge recognized for such officers under *Morrison*. As the law currently stands, ALJs should fall within the exception because they have only adjudicatory—not substantial executive—authority.

I was appointed by FMSHRC under procedures specifically enacted to conform with the requirements in *Lucia*—i.e., my appointment was made by an affirmative vote of the Commissioners. *See* 138 S. Ct. at 2058 (noting that remedy for ALJs who were not appointed by head of agency, court, or President is a new hearing). Therefore, a general attack on my appointment on constitutional grounds is inconsistent with precedent.

C. I Have Been Properly Appointed by the CPSC to Hear This Case

Having decided that my appointment as an ALJ by FMSHRC was proper under *Lucia* and affords Respondent no grounds for my removal from this case, I turn to the question of the CPSC's appointment of me to act as an ALJ in this case. It is my alleged double removal protection *under appointment by the CPSC* that is challenged. The CPSC has similarly utilized procedures conforming with *Lucia* to appoint me. *See* Case Assignment Letter for OPM Loan No. 2022-20, In the Matter of Leachco, Inc., CPSC Docket No. 22-1, at 1 (Mar. 17, 2022) (“CPSC voted unanimously for your appointment to serve as presiding officer in Docket 22-1.”). Further, I am not protected from removal in a constitutionally invalid manner. I am accountable to the CPSC's members, under an annual contract that must be extended.

My individual constitutional validity as an ALJ is therefore not in question. Complaint Counsel correctly notes that “*any* Presiding Officer should be disqualified” under Respondent's challenge to the constitutionality of CPSC's structure—the challenge is with CPSC itself, not the validity of the judge. Compl. Counsel. Mot. at 5; *see also* Resp't Mot. at 5 (“[A]ny ALJ who could replace Presiding Officer Young would enjoy the same unconstitutional removal limitation; and, in any event, because the Commission is itself unconstitutionally structured, it lacks authority to appointment [sic] a replacement.”).

Respondent's comparison of the executive authorities exercised by CPSC Presiding Officers to those of the SEC ALJs found to violate the separation of powers in *Lucia* is irrelevant. *See* Resp't Mot. at 6–7 (citing 138 S. Ct. at 2053). The duties of the Presiding Officer are not at issue here. Rather, Respondent challenges the CPSC's ability to appoint judges, period. That was not the problem in *Lucia*. Rather, the Court faulted the SEC's process for appointing ALJ's, and the remedy was a new hearing before a judge that had been properly appointed. *Lucia*, 138 S. Ct. at 2055. Respondent has not identified any defect in that appointment, except for the CPSC's allegedly unconstitutional structure. The crucial issue for discussion then is whether the adverse District Court decision challenging the CPSC's structure requires staying this proceeding because of alleged injury to Respondent. I hold that it does not.

As I have noted, the issue before me is not whether Respondent has been harmed or has suffered prejudice because of the CPSC's general exercise of its claimed authority to regulate Respondent's products and commercial activity, but whether Respondent has been harmed by the CPSC's exercise of its power to assign this matter to me for adjudication. In deciding to do so, the CPSC has delegated to an independent adjudicator part of its decision-making authority. This is an inversion of the concentration of powers problem courts have found troubling. *See Jarkesy v. SEC*, No. 20-61007, 2022 WL 1563613, at *10–11 (5th Cir. May 18, 2022) (finding fault with SEC's exercise, in the same proceeding, of legislative, executive, and adjudicatory power); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 485–86

(2010) (noting the same problem with PCAOB). To the extent these precedents are relevant to the CPSC's decision to appoint me, they amplify the distinction between actions which aggregate government functions in a single agency or office and those that disperse them.

II. The Cited District Court Decision in *Consumer's Research v. CPSC* Does Not Require Staying These Proceedings Because Respondent's Parallel Challenge in Another Forum is Not Ripe for Adjudication.

Respondent urges that I disqualify myself because the U.S. District Court for the Eastern District of Texas has held the CPSC's structure to be invalid. *Consumers Rsch.*, 2022 WL 1577222, at *10. The court's decision in that case does not require my disqualification.

First, this is a District Court decision and not a binding precedent. I have noted above the problem with rendering a general constitutional finding where it is unnecessary to do so. The decision is not controlling legal authority here, and I am therefore not required to conform my decision to its holding.

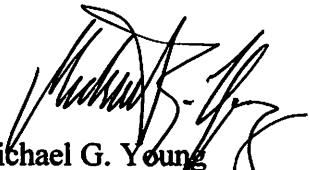
Second, I disagree that underlying logic in *Consumer's Research* is applicable to the disqualification question before me. While I agree with the Court that "there is ordinarily little question that a regulated individual or entity has standing to challenge an allegedly illegal statute or rule under which it is regulated," *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992)), that is not the question before me. The plaintiffs in *Consumer's Research* directly challenged an executive action—rulemaking—by the CPSC that they claimed would directly harm their interests. Here though, the challenged agency action is a decision to appoint a neutral adjudicator to develop a factual record and to rule on legal questions in rendering an administrative decision.

As Complaint Counsel's response observes, the objection raised in Respondent's Motion is a general objection that would bar any ALJ from hearing the claim. Compl. Counsel Mot. at 5. Thus, the objection is to the CPSC's exercise of the power to appoint an ALJ to hear disputes. Viewed discretely, this is essentially an adjudicatory function whose exercise has not been shown to exact any injury beyond the hypothetical—i.e., not imminent—harm that the delegation to any ALJ might pose to Respondent.

I agree with Complaint Counsel that the "Rule of Necessity" proscribes the "wholesale disqualification" sought by Respondent. Compl. Counsel Mot. at 6. The CPSC's duty to carry out its statutory mission, or my duty to conduct proceedings in furtherance of it, would be frustrated. Further, Respondent's objection is to the very constitutionality of the CPSC's structure under its organic statute. It is established to a point "beyond debate" that statutes must be construed to avoid serious constitutional problems unless the construction relied upon is "plainly contrary to the will of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Trades Council*, 485 U.S. 568, 575 (1988). Respondent would have me construe any exercise of any power by the CPSC to be unconstitutional. But "[a]n administrative agency may not invalidate the statute from which it derives its existence and that it is charged with implementing." *Jones Bros.*, 898 F3d at 674. It therefore would be an abuse of discretion and clear legal error for me to grant the relief sought in Respondent's Motion.

III. Conclusion

I find that Respondent has not demonstrated that it has suffered or will suffer a particularized harm from the specific agency action in question. To the extent that Respondent objects generally to the powers exercised by the CPSC, it has exercised its right to challenge those in another forum, and a parallel challenge in this proceeding is not ripe for adjudication at this stage. Respondent's Motion to Disqualify the Presiding Officer is **DENIED**. The motion to stay the discovery conference is also **DENIED**. I reserve decision on the motion to stay discovery, which will be fully considered and discussed during the scheduled conference on September 7.



Michael G. Young
Administrative Law Judge

Distribution:

Leah Ippolito, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, lippolito@cpsc.gov

Brett Ruff, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, bruff@cpsc.gov

Rosalee Thomas, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, rbthomas@cpsc.gov

Caitlin O'Donnell, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, codonnell@cpsc.gov

Michael J. Rogal, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, mrogal@cpsc.gov

Oliver J. Dunford, Pacific Legal Foundation, 4440 PGA Blvd., Suite 307, Palm Beach Gardens, FL 33410, ODunford@pacificlegal.org

John F. Kerkhoff, Pacific Legal Foundation, 3100 Clarendon Boulevard, Suite 610, Arlington, VA 22201, JKerkhoff@pacificlegal.org

Cheryl A. Falvey, Crowell & Moring LLP, 1001 Pennsylvania Avenue, NW, Washington, DC 20004, cfalvey@crowell.com

Bettina J. Strauss, Bryan Cave Leighton Paisner LLP, One Metropolitan Square, 211 North Broadway, Suite 3600, St. Louis, MO 63102, bjstrauss@bclplaw.com

Nina E. DiPadova, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, ndipadova@cpsc.gov

Alberta E. Mills, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, amills@cpsc.gov