

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:)
)
 Philip Trimble,)
)
 Respondent.)

HPA Docket No. 15-0097

**Order Granting Respondent's Petition
For Appeal To Judicial Officer For A New Hearing**

Appearances:

Thomas N. Bolick, Esq. and Lauren C. Axley, Esq. of the Office of the General Counsel, United States, Department of Agriculture, Washington, D.C., for Complainant, the Administrator of the Animal and Plant Health Inspection Service; and

Jan Rochester, Esq., Magnolia, Kentucky, for Respondent, Philip Trimble.¹

On Appeal to the Judicial Officer, Bobbie J. McCartney

Summary Of Relevant Procedural History

The Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), Complainant, instituted this administrative enforcement proceeding under the Horse Protection Act, as amended (HPA or Act)² by Complaint filed on April 9, 2015, alleging that on or about March 30, 2013 the Respondent, Philip Trimble, violated Section 5(2)(B) of the HPA by entering for the purpose of showing or exhibiting the horse known as "Main Sweetie" at the 2013 Mississippi Charity Horse Show (Horse Show) in Jackson, Mississippi while the horse was sore. On April 23, 2015, Respondent filed an answer, admitting

¹ On May 8, 2015, Jan Rochester, Esquire, filed a Notice of Appearance on behalf of the Respondent.

² 15 U.S.C. §§ 1821-1831.

that he entered the Horse Show on March 30, 2013, to show or exhibit, but strongly denying that Main Sweetie was entered into the Horse Show while sore.

Following a lengthy discovery exchange and a pre-hearing process, the matter was set for hearing on March 21, 2017 in Nashville, Tennessee, before United States Administrative Law Judge Channing D. Strother (ALJ Strother).

On March 9, 2017, Respondent filed a Motion to Dismiss; or in the alternative, Motion to Stay Proceedings (Motion to Dismiss), arguing that a USDA ALJ could not adjudicate the proceeding because "...USDA's ALJs are not duly appointed as required by U.S. Constitution, art. 2, §2, cl. 2."³ Respondent's requested relief was that the HPA enforcement action be dismissed.

On March 10, 2017, ALJ Strother issued an Order Holding in Abeyance on Motion to Dismiss or in the Alternative Motion to Stay Proceedings holding that:

"Because Respondent is raising novel issues of law which USDA has not been provided an opportunity to address, and which may not be properly before me to rule upon, Respondent's motions will be held in abeyance and both parties will be provided a full opportunity to brief the issues after the scheduled hearing."⁴

While ALJ Strother held in abeyance his ruling on Respondent's motion to dismiss, he denied the request to stay the proceedings, finding that moving forward with the hearing would be appropriate to ensure exhaustion of administrative remedies.

As noted, neither party briefed any Article II issues in post hearing briefs; however, on June 29, 2018, Respondent filed Respondent's Petition for Appeal to Judicial Officer, or

³ Citing *Freitag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), *PHH Corp. v. CFPB*, 839 F. 3d 1, 6 (D.C. Cir. 2016) (vacated and en banc hearing granted, Feb. 16, 2017); and *Lucia v. SEC*, 832 F. 3d 277 (D.C. Cir. 2016) (vacated and en banc hearing granted, Feb. 16, 2017. Oral Argument scheduled for May 24, 2017).

⁴ See Order Holding in Abeyance Ruling on Motion to Dismiss or in the Alternative Motion to Stay Proceedings at 2.

Alternatively, Motion for Extension of Time (Petition) which again raised the Appointments Clause issue. On July 27, 2018, Complainant filed a timely response to the motion (Response). Complainant does not oppose Respondent's request for a new hearing pursuant to *Lucia*, 138 S. Ct. at 2055.

For the reasons discussed more fully below, Respondent's Petition is granted. Complainant agrees that, under *Lucia*'s analysis, USDA ALJs are Officers of the United States and must be appointed consistent with the Appointments Clause. Because the ALJ in this case was not so appointed at the time of the subject hearing, *Lucia* holds that Respondent is entitled to a new hearing. *Lucia*, 138 S. Ct. at 2055.

USDA Administrative Law Judge Channing D. Strother Was Properly Appointed At The Time His Decision And Order Was Issued But Not At the Time Of The Hearing

In a ceremony on July 24, 2017, the Secretary of the United States Department of Agriculture, Sonny Perdue (Secretary Perdue), personally ratified the prior appointments of Chief ALJ Bobbie J. McCartney (retired from that position on 1/20/2018), ALJ Jill S. Clifton, and ALJ Channing D. Strother and personally administered and renewed their Oaths of Office. On December 5, 2017, Secretary Perdue issued a statement affirming that he "conducted a thorough review of the qualifications of this Department's administrative law judges," and "affirm[ing] that in a ceremony conducted on July 24, 2017, [he] ratified the agency's prior written appointments of the [USDA ALJs] before administering their oath of office ..."

On June 21, 2018, almost one year later, the U.S. Supreme Court held that the Securities and Exchange Commission's ALJs are inferior officers of the United States, U.S. Const. Art. II,

§2, cl. 2. *Raymond J. Lucia, et al. v. S.E.C.*, 138 S. Ct. 2044 (2018) (*Lucia*) and therefore must be appointed consistent with the Appointments Clause. The Supreme Court did not expressly address the issue of whether the SEC's November 30, 2017 order ratifying the prior appointments of its ALJs was sufficient to meet the constitutional requirements of the Appointments Clause. *Id.* at n. 6. However, courts have upheld ratifications following constitutional challenges, including under the Appointments Clause. See, e.g., *Edmond v. United States*, 520 U.S. 651, 659, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997); see also *CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016); *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996). Furthermore, and perhaps more importantly, the actions of the Secretary of Agriculture in reviewing the qualifications of his ALJs, personally ratifying their appointments, and personally administering their renewed Oaths of Office, go well beyond a simple recitation of ratification, are clearly consistent with the Supreme Court's ruling in *Lucia* and are therefore entitled to full deference. Accordingly, certainly as of July 24, 2017, the USDA's ALJs, as inferior officers of the United States subject to the Appointments Clause, were duly appointed by a "head of the department" as required by U.S. Constitution, Art. 2, §2, cl. 2 and the Supreme Court's ruling in *Lucia*.

ALJ Strother issued his Decision and Order in this matter on June 8, 2018, well after the July 24, 2017 and December 5, 2017 actions of the Secretary of Agriculture addressing the Appointments Clause requirements. However, the Decision and Order is, and of course must be, based on the record evidence adduced during the three-day hearing held before him on March 21 through 23, 2017, in Nashville, Tennessee. As of the dates of the hearing, Respondent's Counsel

had timely raised an Appointment's Clause challenge to ALJ Strother's authority to conduct the hearing which had not yet been cured.

Respondent Is Entitled To A New Hearing Consistent With The Supreme Court's Ruling In Lucia

Respondent's Motion correctly references the following language from the Supreme Court's decision in *Lucia*:

"This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. *Id.*, at 183, 188. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled."

Lucia, 138 S. Ct. at 2055

Consistent with the Supreme Court's ruling, Respondent will be granted a new hearing by "...another ALJ (or the Commission itself)." Complainant's position that the July 24, 2017, ratification cured any Appointments Clause defect in the prior appointments of USDA's ALJs is affirmed; however, in light of the fact that only one ALJ other than Judge Strother is currently serving as an ALJ at the USDA Office of Administrative Law Judges (OALJ), and in light of the fact that the limited judicial and administrative resources of OALJ have been strained by a number of remands in other cases raising Appointment's Clause issues, and to ensure that Respondent is provided the opportunity of a new hearing free of an Appointment's Clause issue as quickly as

possible,⁵ I will hold the new hearing to which Respondent is entitled in my capacity as the duly appointed Judicial Officer of the Secretary of Agriculture.⁶

The parties are advised that I shall exercise the full powers conferred by the USDA Rules of Practice and the Administrative Procedure Act and shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in this matter. Rather, the Decision and Order issued by ALJ Strother is hereby **vacated** and the written record which has already been made by the parties in this proceeding will be reviewed *de novo* to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any *new* testimony or other evidence. Testimony taken at USDA hearings are taken under oath and with a full opportunity for both direct and cross examination of witnesses. Further, exhibits offered and admitted into the record are done so with full regard and adherence to applicable administrative due process rules of practice and procedure. Accordingly, the parties may rely on the written record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits which have already been admitted into evidence as part of that written record.

The parties will be given an opportunity to show good cause for the submission of any *new* evidence not previously submitted in this proceeding during the three-day hearing held on March

⁵ This administrative enforcement action has been pending since April 9, 2015, and involves transactions occurring as early as March 30, 2013.

⁶ The Secretary of Agriculture has delegated authority to the Judicial Officer to act as the final deciding officer in various USDA adjudicatory proceedings. 7 C.F.R. § 2.35. The Judicial Officer has been appointed by the Secretary of Agriculture, consistent with the Appointments Clause. Doc. 1-2 at 13, *Blackburn v. U.S. Department of Agriculture*, No. 17-4102 (6th Cir. Oct. 19, 2017).

21 through 23, 2017, in Nashville, Tennessee. The current record includes, but may not be limited to, all sworn witness testimony⁷, all admitted exhibits⁸ as well as all accepted post-hearing filings.⁹

⁷ During the three-day hearing Complainant presented the following witnesses: Jennifer Wolf (Tr. 33-56), Animal Care inspector, USDA; Michael Pearson (Tr. 57-74.), Farm Loan Office, USDA (formerly Animal Care Inspector, USDA, APHIS); Dr. Ronald Johnson (Tr. 75-353.), VMO, USDA, APHIS, Animal Care, presented as examining VMO and an expert witness in equine veterinary care and detection of horse soring under the HPA; and Dr. Clement Dussault (Tr. 652-717.), Senior Staff Veterinarian, National Veterinary Accreditation Program (formerly Field Veterinary Officer, USDA), presented as a rebuttal witness and an expert witness in detection of horse soring under the HPA. Respondent presented the following witnesses: Rachel Reed (Tr. 355-67), employee, SHOW, Inc.; Clay Sanderson (Tr. 447-58.), Respondent's assistant horse trainer; Philip Trimble (Respondent) (Tr. 459-99.), Amy Trimble (Tr. 598-650.), wife of Respondent and the individual who presented the horse for inspection; Dr. Michael Harry (Tr. 368-446.), private treating veterinarian for Main Sweetie, and presented as an expert witness in equine veterinary medicine; and Dr. Stephen Mullins (Tr. 512-96), private veterinarian, and presented as an expert in equine veterinary medicine. Parties were allowed an opportunity to *voir dire* before expert witnesses were accepted to testify regarding expertise.

⁸ Admitted to the record were Complainant's exhibits identified as CX 1 through CX 7, and CX 10 through CX 13; and Respondent's exhibits, identified as RX 1, RX 2, RX 5, RX 6, RX 8 through RX 12, RX 20 through RX 23, RX 25, RX 30 through RX 32, RX 42, RX 43, RX 50, and RX 54 through RX 59. A Joint Notice of Errata and Proposed Corrections in relation to the hearing transcripts, signed by both parties, was filed on April 25, 2017. The corrections were accepted by a separate Order Approving Proposed Transcript Corrections, issued on June 8, 2018.

⁹ Respondent filed a Post Hearing Brief ("Respondent's PHB") on June 1, 2017. Complainant filed a proposed Findings of Fact, Conclusions of Law, Order, and Brief in support thereof ("Complainant's PHB") on June 2, 2017. Respondent filed a Post Hearing Reply Brief ("Respondent's PHRB") on June 21, 2017.⁹ Complainant filed a Brief in Reply to the Respondent's Post Hearing Brief ("Complainant's PHRB"), and an Addendum to Complainant's Post-Hearing Reply Brief ("Complainant's Addendum"), on June 22, 2017. Neither Respondent's nor Complainant's Post Hearing Briefs, nor Post Hearing Reply Briefs, addressed the issues in Respondent's March 10, 2017 Motion to Dismiss, or in the alternative, Motion to Stay Proceedings.

ORDER

THEREFORE ORDERED, within 20 days of the date of this Order, the parties are directed to submit proposals for the conduct of further proceedings consistent with the Supreme Court's *Lucia* decision, the USDA Rules of Practice and Procedure, and with the guidelines set forth herein above. Submissions are intended to aid me in my task to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any *new* testimony or other evidence and must specifically identify and address those issues. A pre-hearing conference call will be scheduled with the parties to provide an opportunity for oral argument regarding the submissions.

FURTHER ORDERED, copies of this Order shall be served by the Hearing Clerk upon each of the parties in all of the dockets identified herein above.

Done at Washington, D.C.
this 30th day of November 2018


Bobbie J. McCartney
Judicial Officer

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