UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Philip Trimble,	)	HPA Docket No. 15-0097
	)	
Respondent.	)	

ORDER REMANDING TO THE CHIEF JUDGE FOR FURTHER PROCEEDINGS

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 ("APHIS"); and

Jan Rochester, Esq., of Magnolia, Kentucky, for the Respondent, Philip Trimble.[1]

On Appeal to the Judicial Officer, Bobbie J. McCartney.

On November 29, 2018, I issued an "Order Granting Respondent's Petition For Appeal To Judicial Officer For a New Hearing" ("Order"), which vacated Administrative Law Judge ("ALJ") Strother's Decision and Order dated June 8, 2018 and granted Respondent's request for a new hearing. I ordered the parties, within twenty days of the date of the Order, "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 [in the Order]." Proposals were due on December 19, 2018. On December 10, 2018, Respondent filed a Motion to Modify Judicial Officer's Order Granting Respondent's Petition to Appeal to the Judicial Officer for a New Hearing ("Motion to Modify"). On December 19, 2018, Complainant filed a motion for a two-day extension of time to respond, which I granted, and filed its response on December 21, 2018.

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

In his Motion to Modify, Respondent objects to the Order in several ways, including the process for a new hearing provided for in the Order, as well as my proposal to hold the new hearing myself in my capacity as the duly appointed Judicial Officer of the Secretary of Agriculture. For the reasons discussed more fully below, my November 29, 2018 Order is modified to grant Respondent's request to have this case remanded to the Chief Judge for further proceedings. The Order is affirmed as to all other rulings, including the process for a new hearing provided for in the Order.

1. The Secretary of Agriculture has properly appointed his ALJs as required by *Lucia*.

In *Lucia*, the Supreme Court held that the appropriate remedy "for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official. . . . To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing" to which Lucia is entitled. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018). Respondent continues to assert that none of the USDA ALJs have been properly appointed as required by *Lucia*, but this argument has been considered and rejected for the reasons discussed more fully in my November 29, 2018 Order. Accordingly, my ruling that 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. II, § 2, cl. 2, and the Supreme Court's ruling in *Lucia* is affirmed.[2]

2. The hearing process on remand is consistent with *Lucia*.

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[2] As explained in my November 29, 2018 Order, 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 and are clearly consistent with the Supreme Court's ruling in *Lucia*.

The Supreme Court did not specify the type of hearing required to remedy an Appointments clause violation, thereby leaving it to judges' discretion to determine how to comply with its ruling and how to conduct new hearings. The process outlined in my November 29, 2018 Order is consistent with *Lucia* and is affirmed. ALJ Strother's Decision and Order dated June 8, 2018 has been vacated, and the written record which has already been made by the parties in this proceeding shall 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 is 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 that have already been admitted into evidence as part of that written record. However, the parties will be given an opportunity to show good cause for the submission of any new evidence not previously submitted in the prior proceeding.

As Complainant points out, this process addresses any argument that Judge Strother's prior opinions, orders, and rulings may have been tainted from the Appointments Clause violation by removing any influence of Judge Strother on the record. Doing so does not in any way undermine the integrity of the record regarding the raw evidence produced and testimony taken at the hearing. In the hearing before Judge Strother, neither side was prevented from calling and fully examining all witnesses, from presenting all relevant documentary and other forms of evidence, or from fully developing a true and accurate record.

3. Respondent's Motion does not support modification of the hearing process on remand.

My November 29, 2018 Order permitted the parties an opportunity to show good cause for the submission of any new evidence not previously submitted in the proceeding during the three-day hearing in March 2017.[3] Complainant's Response averred that Complainant has reviewed the record and believes that the witnesses were fully examined and cross-examined, that all of the issues were fully fleshed out at the hearing, that the record was fully developed and complete, and that there is no need for any new evidence or testimony. Respondent elected not to file a response on the merits of this issue but rather filed a motion to modify the Order, which argues: (1) that the Rules of Practice do not authorize limiting a hearing to new evidence;[4] (2) that "limiting Respondent to only submitting new evidence not previously submitted does not satisfy *Lucia*";[5] and (3) that it is impossible "to make credibility assessments of witness from a cold written transcript."[6] These arguments are not persuasive for the following reasons.

Firstly, my November 29, 2018 Order does not limit the hearing to new evidence because in addition to considering the need for new evidence, the newly assigned ALJ will be conducting a *de novo* review of the existing written record, and the parties will be allowed to rely on the written record. This process is not specifically contemplated by the Rules of Practice for the simple reason that the Rules of Practice did not anticipate *Lucia*. This process, which preserves the integrity of the existing written record while providing the parties an opportunity to address *Lucia*, concerns moving aligns with the Rules of Practice because the Rules of Practice consider the need for some

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[3] Order at 6.

[4] Respondent's Motion ¶ 8.

[5] *Id.*

[6] *Id.* at ¶ 12.

level of efficiency in agency proceedings by requiring the exclusion of unduly repetitious evidence. 7 C.F.R. § 1.141(h)(iv).

Allowing Respondent to resubmit evidence and re-call witnesses to testify without good cause shown would be unduly repetitious and contrary to 7 C.F.R. § 1.141(h)(iv) and would provide Respondent with a procedural advantage not contemplated by *Lucia* to the extent that witnesses may no longer be available or may not have the same level of independent recollection of the facts and circumstances due to the passage of time.

Secondly, Respondent does not explain why the written record is inadequate, incomplete, or otherwise unreliable. My November 29, 2018 Order invited the parties to demonstrate how Judge Strother's rulings may have constrained the record, but as of the filing of this proposal, Respondent has not demonstrated that. Respondent has neither suggested that he has any new evidence to submit nor shown good cause for the submission of such evidence.

Thirdly, Respondent has suggested that an entirely new hearing is necessary to allow the new judge to make a credibility assessment. Respondent's Motion ¶ 12. As a general rule the trier of fact is best situated to assess credibility; however, credibility assessments can be made on the record. *See Lion Raisins, Inc.*, Docket No. 01-0001, 2010 WL 2020178, at *8 (U.S.D.A. May 12, 2010) (the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility); *Saulsbury Enterprises*, 58 Agric. Dec. 19, 38 (U.S.D.A. 1999) ("Where the JO disagrees with the credibility determinations of the ALJ, his disagreement is based on inferences drawn from documents and testimony in the record. . . . These are derivative inferences drawn from not discredited testimony."). In addition, as Complainant's Response points out, arguments can be made regarding credibility based on the

record; both parties in this case did so in their post-hearing briefs. *See, e.g.*, Complainant's PHB, June 2, 2017, at 15-18; Respondent's PHB, June 1, 2017, at 131-32.

Respondent has not shown good cause why an entirely new hearing is necessary in this instance, nor has the Respondent pointed to any specific evidence or testimony that he believes is necessary to supplement the written record. The process outlined in my November 29, 2018 Order is consistent with *Lucia* and is affirmed. ALJ Strother's Decision and Order dated June 8, 2018 has been vacated, and the written record which has already been made by the parties in this proceeding shall be reviewed *de novo* by a newly appointed ALJ 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.

4. This case will be remanded to the Chief Judge for further proceedings.

In Respondent's Motion, he argues that the USDA's Rules of Practice and Procedure do not authorize a Judicial Officer to perform the duties of an Administrative Law Judge. Respondent's Motion ¶ 6. The Judicial Officer has been lawfully delegated the authority to act as the final deciding officer in various USDA adjudicatory proceedings (7 C.F.R. § 2.35) and therefore acts as the Secretary. However, in light of Respondent's objection to the Judicial Officer serving as the presiding officer over the new hearing and the point raised by the Complainant that doing so may adversely affect the Respondent's ability to appeal pursuant to 7 C.F.R. § 1.145, Respondent's request to have the proceedings remanded to the Chief Judge for assignment to a newly appointed ALJ in accordance with *Lucia* is granted.

ORDER

For the reasons discussed above, my November 29, 2018 Order is modified to grant Respondent's request to have this case remanded to the Chief Judge for further proceedings.

Respondent's Motion to Modify is denied as to all other arguments, and my November 29, 2018 Order is affirmed as to all other rulings, including the process for a new hearing on remand provided for in the Order.

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 19th day of February 2019

[redacted]

Bobbie J. McCartney
Judicial Officer

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