UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
CRICKET HOLLOW ZOO, INC., an Iowa corporation;	)	AWA Docket No. 15-0152
PAMELA J. SELLNER, an individual;	)	AWA Docket No. 15-0153
THOMAS J. SELLNER, an individual; and	)	AWA Docket No. 15-0154
PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO,	)	AWA Docket No. 15-0155
	)	
Respondents	)	

Order Granting Motion for Rehearing and Remanding to the Chief Judge for Further Proceedings

I. Summary of Relevant Procedural History

On July 30, 2015, Complainant, the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), filed a complaint alleging that Cricket Hollow Zoo, Inc., Pamela J. Sellner, Thomas J. Sellner, and Pamela J. Sellner Tom J. Sellner ("Sellner Partnership") (collectively, "Respondents") violated the Animal Welfare Act[1] and the Regulations[2] on multiple occasions between 2013 and 2015. The allegations were generally based on evidence derived from twelve inspections of respondents' facilities, animals, and records that APHIS conducted, or attempted to conduct, on twelve occasions between 2013 and 2015.

On August 20, 2015, Respondents filed an answer admitting the jurisdictional allegations and admitting and denying other of the material allegations of the Complaint. An oral hearing was held before Administrative Law Judge ("ALJ" or "Judge") Channing D. Strother on January 24 through January 27, 2017, in Davenport, Iowa.

On November 30, 2017, Judge Strother filed an initial decision and order ("IDO"), in

---

[1] 7 U.S.C. §§ 2131 *et seq.*

[2] 9 C.F.R. §§ 1.1 *et seq.*

which he found that APHIS had established a number of the violations alleged in the Complaint.[3] The Judge concluded that "[t]he violations are in such frequency and numbers that a fine is insufficient. Revocation of the license is necessary."[4] Consequently, he assessed a joint and several civil penalty of $10,000, ordered AWA license 42-C-0082 revoked, and ordered Respondents to cease and desist from further violations.[5]

On December 29, 2017, Respondents filed a petition for appeal ("Appeal"), in which they challenged some, but not all, of the Judge's findings. Respondents' petition for appeal did not mention the Appointments Clause or otherwise challenge the authority of Judge Strother. On February 9, 2018, Complainant filed a response to the petition for appeal.

On July 17, 2018, Respondents filed the instant two-page "motion for rehearing." The stated basis for the motion is that "[t]he United States Supreme Court issued a Decision on June 21, 2018, in the case of *Lucia et al. v. Securities and Exchange Commission*," 585 U.S. ___, 138 S. Ct. 2044 (2018)[.]"[6] Respondents assert that they are entitled to a new hearing before another administrative law judge, and they "are raising this matter in a timely manner . . . because this matter is still on review before the Judicial Officer."[7]

On August 10, 2018, Complainant filed its response in opposition to Respondents' motion for hearing, raising several meritorious points including, among others, that Respondents

---

[3] IDO at 1 (". . . [APHIS], although it did not prove every alleged violation, demonstrated in the record the zoo had numerous violations over time, requiring repeated visits by APHIS inspection personnel.").

[4] *Id.* at 2.

[5] *Id.* at 180.

[6] Motion at 1.

[7] Motion at 2 (citing *Lucia*, 138 S. Ct. 2044 (2018); *Ryder v. United States*, 515 U.S. 177, 182 (1995)).

have waived their Appointments Clause argument by failing to raise it before the Administrative Law Judge.

For the reasons discussed more fully herein below, Respondents' motion for hearing is GRANTED, and this proceeding is REMANDED back to the Chief ALJ for further proceedings consistent with *Lucia*.

II. 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 under U.S. Const. art. II, § 2, cl. 2. and *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018) ("*Lucia*") and therefore must be appointed consistent with the Appointments Clause. 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 the 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 November 30, 2017, well after the July 24, 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 oral hearing held before Judge Strother on January 24 through January 27, 2017 in Davenport, Iowa. As of the dates of the hearing, Judge Strother's authority to conduct the hearing had not yet been addressed in the manner required by the Supreme Court's ruling in *Lucia*.

III. Respondents Are Entitled to a New Hearing Consistent with the Supreme Court's Ruling in *Lucia*.

The following language from the Supreme Court's decision in *Lucia* provides specific language as to the remedy:

> 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)." *Id.*

Complainant's contention that Respondents have waived their Appointments Clause argument by failing to raise it before the Administrative Law Judge is understandable. It is well settled that arguments raised for the first time on appeal are untimely under both the Rules of Practice[8] and case law.[9] Here, Respondents did not raise their constitutional argument as an assignment of error in their petition for appeal, filed December 29, 2017, but rather some six months later while the case was pending on appeal before the Judicial Officer. However, for reasons of equity given the flux of the law on this issue prior to the Supreme Court's ruling in *Lucia*, Respondents' Appointments Clause challenge will be deemed timely raised for purposes of this proceeding.

IV. The Hearing Process on Remand Must Respect the Integrity of the Written Record.

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. Judge Strother's November 30, 2017 Initial Decision and Order is hereby ***Vacated,*** and this proceeding is ***Remanded*** to the Chief Judge for further proceedings consistent with *Lucia,* including a new hearing by another ALJ.

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

---

[8] *See* 7 C.F.R. §§ 1.130-1.151.

[9] *See, e.g., Burnette Foods, Inc.*, 74 Agric. Dec. 413, 424 (U.S.D.A. 2015); *Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (U.S.D.A. 1998).

of practice and procedure. In the hearing held before Judge Strother on January 24 through January 27, 2017, in Davenport, Iowa, neither side was prevented from calling and fully examining all witnesses, from presenting all relevant documentary and other forms of evidence, and fully developing a true and accurate record. 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. However, 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 as may be supported by a showing of good cause.

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 while respecting the integrity of the record regarding the raw evidence already produced and testimony already taken at the hearing.

ORDER

For the reasons set forth herein above, Judge Strother's November 30, 2017 Initial Decision and Order is hereby ***Vacated,*** and this proceeding is ***Remanded*** to the Chief Judge for further proceedings consistent with *Lucia,* including a new hearing by another ALJ and a ***de novo*** review of the written record which has already been made by the parties in this proceeding 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 as may be supported by a showing of good cause.

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 22nd day of February 2019

[redacted]

Bobbie J. McCartney
Judicial Officer

Hearing Clerk's Office
U.S. Department of Agriculture
Stop 9203, South Building Room 1031
Washington, DC 20250-9203
Phone: 202-720-4443
Fax: 202-720-9776
SM.OHA.HearingClerks@oha.usda.gov