UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Kenny Compton, an individual;	)	HPA Docket No. 17-0041
Rick Compton, an individual;	)	HPA Docket No. 17-0042
	)	
Respondents.	)	

ORDER DENYING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AND/OR TO DISMISS AND/OR TO VACATE; TO DISQUALIFY ADMINISTRATIVE LAW JUDGE AND JUDICIAL OFFICER; AND TO STAY

Appearances:

Colleen A. Carroll Esq., with the Office of General Counsel, United States Department of Agriculture, Washington D.C., for Complainant, the Administrator of the Animal and Plant Health Inspection Service;

Thomas Kakassy, Esq., Gastonia, North Carolina, Counsel for Respondents Kenny Compton and Rick Compton.

Before Chief Administrative Law Judge, Channing D. Strother.

INTRODUCTION AND BACKGROUND

These administrative enforcement proceedings were initiated by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), Complainant,[1] via Complaint filed December 23, 2016, alleging that Respondents violated section 5 of the Horse Protection Act, as amended (15 U.S.C. §§ 1821 *et seq.*) ("HPA"). Respondents Kenny Compton and Rick Compton timely filed an Answer on February 21, 2017.

Respondents Kenny Compton and Rick Compton filed a Motion for Summary Judgment and/or Motion to Dismiss and/or Motion to Vacate; Motion to Disqualify Administrative Judge

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[1] While I recognize the Administrator is a person, herein I will use the pronoun "it" when referring to the "Complainant."

and Judicial Officer with Supporting Memorandum; and Motion to Stay ("Motions") on December 27, 2017. Complainant responded to the Motions on February 6, 2018 ("Response to Motions").

An "Order On 'Stay'" was issued on March 15, 2018 ("March 15, 2018 Order"). The March 15, 2018 Order discussed the then pending case before the Supreme Court, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) ("*Lucia*"), and postponed substantive activities by me, the presiding Administrative Law Judge ("ALJ"), until July 2, 2018. The Supreme Court issued its decision regarding *Lucia* on June 21, 2018.

On September 7, 2018, counsel for the parties and I participated in a teleconference, setting dates for hearing of these dockets for March 25 through March 29, 2019. During a follow up teleconference on September 17, 2018, it was agreed that Respondents would submit any revisions to their pending Motions in consideration of *Lucia*, and Complainant would thereafter have an opportunity to file a response. Respondents filed their Supplement to Motion for Summary Judgment and/or Motion to Dismiss and/or Motion to Vacate; Motion to Disqualify Administrative Law Judge and Judicial Officer with Supporting Memorandum ("Supplement to Motions") on October 1, 2018. Complainant filed its Response to Supplement to Motions (1) for Summary Judgment/to Dismiss/Vacate; (2) to Disqualify ALJ and Judicial Officer; and (3) to Stay ("Response to Supplement") on October 19, 2018.

For the reasons detailed herein, Respondents' motions for summary judgment, to dismiss, to vacate, to disqualify, and all other requests therein, are DENIED. These cases will proceed to hearing as scheduled.

JURISDICTION

Congress provided for enforcement of the HPA, legislation promulgated to prevent the cruel and inhumane soring of horses, by the Secretary of Agriculture, USDA.[2] Regulations promulgated under the HPA are in the Code of Federal Regulations, Part 9, Section 11. The HPA provides persons alleged to have violated the act with the right to be given notice and the opportunity for a "hearing before the Secretary."[3] The Secretary delegates authority to Administrative Law Judges, pursuant to 5 U.S.C. § 556(b)(3), to hold hearings and perform related duties in proceedings under the HPA.[4]

DISCUSSION

In their Motions and Supplement to the Motions, Respondents advance a variety of arguments as to why these cases should be dismissed and all previous orders vacated or, in the alternative, that summary judgment be granted or that I withdraw as judge based on asserted disqualifying reasons. Alternatively, or possibly in addition to, Respondents request that a summary judgment on the issue of penalty be issued, declaring that the HPA only warrants a civil penalty and cannot also allow disqualification under the same proceeding. For the reasons discussed further herein, Respondents' motions are denied.

I. Motions to Disqualify Administrative Law Judge and Judicial Officer, Vacate Orders, and Dismiss

Respondents' motions are based on a United States Constitution Art. II, §2, cl. 2 ("Article II" or "Appointments Clause") challenge to USDA ALJ and Judicial Officer ("JO") authority.

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[2] 15 U.S.C. § 1822.

[3] 15 U.S.C. §§ 1825(b)(1), 1825(c).

[4] *See* 7 C.F.R. §§ 2.27(a)(1), 1.131(a).

Respondents first raised the issue of ALJ and JO authority in their Motions while *Lucia*[5] was pending before the United States Supreme Court.[6] Specifically, Respondents contended that "USDA employees who have been delegated authority to adjudicate a complaint and enter an order have not been assigned those duties as the Constitution requires" and thus "the USDA ALJs are not lawfully authorized to assert jurisdiction over the allegations in the complaint."[7] Respondents argue that "[t]he ALJ is not appointed as the Constitution requires"[8] because, rather than being appointed directly by a "head of the department," the "Secretary delegated to the Assistant Secretary of Agriculture for Administration limited authority relating to the Office of Administrative Law Judges . . . The Assistant Secretary certifies that a position to which an ALJ is appointed is necessary . . . [and a] Personnel Management Specialist makes the same certification for a person being appointed as an ALJ. The Secretary does not make, authorize or approve the ALJs [sic] appointment."[9]

Although arguing that neither ALJs nor the JO have authority to preside over nor adjudicate any matter due to improper appointment, Respondents assert that the ALJ or JO can and should rule on the authority issue under the doctrine of necessity.[10] Respondents move that I "enter an order disqualifying any ALJ assigned to this proceeding" and, "because there is no

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[5] *Lucia,* 138 S. Ct. 2044 (2018).

[6] *See* Respondents' Motions at 27-82.

[7] Respondents' Motions at 28 (citing *Butler v. Dexter*, 425 U.S. 262 (1976)). *See also id.* at 36 (citing *Freytag v. C.I.R.*, 501 U.S. 868 (1991)); Respondents' Supplement to Motions at 1-2.

[8] Respondents' Motions at 36 (citing *Freytag,* 501 U.S. 868).

[9] *Id.* at 38.

[10] Respondents' Motions at 34-35.

lawfully qualified USDA ALJ who can preside over and decide this case, and there are no lawful alternative procedures," that I dismiss these cases and vacate any and all previous orders.[11]

Further, Respondents contend that

> Congress has not established by a law a position that authorizes the appointment of a Judicial Officer as either a principal or inferior officer of the United States. The position of Judicial Officer was established solely by the Secretary through Department regulations. Pursuant to these regulations, the Secretary's functions and authority to make final decisions in HPA enforcement proceedings has been delegated by the Secretary to an employee, who has been given the title of Judicial Officer. See 7 C.F.R. §2.35.
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> Respondents' Motions at 56. [12]

Respondents argue that the statutory and regulatory delegation of authority to the USDA JO is insufficient under the Appointments Clause and request "that the ALJ and any JO disqualify themselves from this case and that each withdraw from further action in this case."[13]

In their Supplement to Motions, Respondents renew their motions to disqualify the ALJ and JO, to vacate orders, and to dismiss the cases; and maintain their position that USDA ALJs and the JO have no authority to preside over these cases because "they have not been constitutionally 'appointed' by the Secretary of Agriculture, nor appointed by the President of the United States, nor appointed upon the advice and consent of the Senate."[14] Respondents add to their contentions that "USDA's 'ratification' strategies to date have been inconsistent and

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[11] Respondents' Motions at 53, 80.

[12] *See also id.* at 57 (citing 7 U.S.C. §§ 450c-450g). I note that 7 C.F.R. §2.35 was promulgated pursuant to the 1940 Schwellanbach Act, 7 U.S.C. §§ 2204-1 - 2204-5 (formerly cited as 7 U.S.C. 450c-450g).

[13] *See* Respondents' Motions at 59 (quoting *Edmond v. U.S.*, 520 U.S. 651, 657-58); at 79 (thereafter citing 7 C.F.R. 1.144(b)).

[14] Respondents' Supplement to Motions at 2.

ineffective,"[15] thus leaving no properly appointed ALJ to preside over the case.[16] Further, Respondents argue that a new proceeding is "at minimum" necessary under *Freytag v. Commissioner*, 501 U.S. 868, at 880; *Ryder v. U.S.*, 515 U.S. 177, at 188; and *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, at 38; but "the recent strategies followed by the USDA" call for a remedy of dismissal.[17]

A) USDA ALJ Authority

In *Lucia*, the Supreme Court held that ALJs are Officers of the United States within the meaning of Article II of the United States Constitution and are subject to the Appointments Clause.[18] The Court also held that, where a case was heard and decided by an ALJ who was not constitutionally appointed, appropriate relief is a new hearing before a properly appointed official.[19]

In a ceremony on July 24, 2017, almost a year before the Supreme Court's opinion in *Lucia*, the Secretary of the United States Department of Agriculture, Sonny Perdue, personally ratified the prior appointments of USDA's ALJs and personally administered and renewed their Oaths of Office. On December 5, 2017, Secretary Perdue issued a statement affirming that action. The USDA JO, Bobbie J. McCartney, who was appointed to that office by Secretary Perdue on November 16, 2018, held in her recent November 28, 2018 "Order Granting Respondent's Petition for Appeal to Judicial Officer for A New Hearing" in *Trimble*, Docket No. 15-0097, that as a result of the Secretary's actions to ratify the appointments of USDA ALJs, as

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[15] *Id.* at 3.

[16] *Id.* at 5.

[17] *Id.* at 4-6.

[18] *Lucia,* 138 S. Ct. at 2051-55.

[19] *Id.* at 2055.

of July 24, 2017, USDA ALJs were duly appointed by a "head of the department" as required by Article II and the Supreme Court's ruling in *Lucia*.[20] I also note that Secretary Perdue appointed me USDA Chief ALJ on October 17, 2018.

As a USDA ALJ, I am bound by rulings of the JO. Moreover, I have been charged by the USDA Secretary to fulfill the role of an ALJ, including presiding over hearings. Although it is well settled that constitutional issues can and should be raised during administrative proceedings,[21] it is not within my jurisdiction to determine whether the Secretary has legally and effectively appointed me an ALJ, much less to make a ruling contrary to specific JO precedent.[22] By Respondents raising these issues herein, I recognize that they have timely raised and preserved them for appeal to the JO and/or the courts, should they at some point otherwise properly perfect such an appeal.[23]

I reject Respondents' contention that a "new proceeding is necessary."[24] Respondents' contention as to my authority, made before my appointment as Chief ALJ, is broadly that I had

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[20] *Trimble*, Docket No. 15-0097, "Order Granting Respondent's Petition for Appeal to Judicial Officer for A New Hearing," at 3-4 (Nov. 29, 2018) available at https://oalj.oha.usda.gov/sites/default/files/15-0097%20-%20JO%20Order_Redacted.pdf (last visited Jan. 31, 2019). *See also Trimble*, Docket No. 15-0097, "Order Remanding to the Chief Judge for Further Proceedings", at 2, (Feb. 19, 2019) (affirming USDA ALJ authority as of July 24, 2017) available at https://oalj.oha.usda.gov/sites/default/files/15-0097%20-%20JO%20Remand_Redacted_0.pdf (last visited on Feb. 20, 2019).

[21] *See Horne v. Dep't of Agric.*, 569 U.S. 513, 528 (2013) (stating "[a]llowing handlers to raise constitutional challenges in the course of enforcement proceedings would not diminish the incentive to file direct challenges to marketing orders under § 608c(15)(A) because a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if his constitutional challenge fails."); *Lesser*, 52 Agric. Dec. 155, 167-68 (U.S.D.A. 1993) (stating "Although an agency cannot declare a statute unconstitutional, constitutional issues can (and should) be raised before the ALJ.").

[22] *See supra* section "Jurisdiction", p. 3; 7 C.F.R. §§ 2.27(a)(1), 1.131.

[23] *See Lucia,* 138 S. Ct. at 2055 (citing *Ryder v. U.S.*, 515 U.S. 177, 182–183, (1995)).

[24] Respondents' Supplement to Motions at 4.

not been properly appointed by the Secretary prior to July 24, 2017, and that the Secretary's action on that date was insufficient under Article II to render me a properly appointed ALJ.[25] Complainant expressly states the position that if I was not properly appointed prior to July 24, 2017, the Secretary's actions on that date render me a properly appointed ALJ, and nothing that took place in the case prior to July 24, 2017 was a "substantive action" by me that would preclude me from presiding over the case at hearing.[26]

While the remedy under *Lucia* for a respondent who challenges a hearing and decision by an ALJ—a remedy that may be waived—is the opportunity to seek a supplemental hearing and a new decision by a new presiding judge,[27] Respondents have made no specific contention that any ruling, order, or decision by me, or anything that otherwise transpired in this case before July 24, 2017, would preclude me from presiding over the case for hearing and decision after July 24, 2017. This proceeding was initiated on December 23, 2016 and assigned to me on February 27, 2017.[28] As Complainant proffers in its Response to the Supplement, at 27, "there was no substantive action in this case before Secretary Perdue's [July 24, 2017] ratification of ALJ Strother's appointment." In the period February 27, 2017 through July 24, 2017, the only action I took as the assigned ALJ was the ministerial action of issuing a March 16, 2017 "Exchange

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[25] Respondents further advance an argument that "Respondent's counsel has located no statute authorizing the secretary to appoint ALJs as inferior officers of the agency" (Respondents' Motions at 14). Respondents overlook 5 U.S.C. § 3105, which authorizes each agency to "appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title."

[26] Complainant's Response to Supplement at 27.

[27] *Lucia*, 138 S. Ct. 2055.

[28] I note that Respondents' motions and Complainant's answers were submitted prior to the November 28, 2018 JO order in *Trimble*, and prior to the Secretary of Agriculture's appointment of Bobbie J. McCartney as JO and my appointment as Chief Administrative Law Judge on November 16, 2018.

Order" providing that the parties exchange their respective proposed lists of witnesses and proposed exhibits, and to file lists of same, by certain deadlines.[29]

As established by JO precedent,[30] USDA ALJs are properly appointed in accordance with US Constitution Article II and the United States Supreme Court's holding in *Lucia* as of July 24, 2017. And I have conducted no hearing and made no substantive determinations in this proceeding prior to July 24, 2017 that would preclude me from presiding over this case.

B) Motion to Disqualify ALJ

Respondents' Motion to Disqualify the ALJ is without merit. Respondents rely upon Rule of Practice 1.144, 7 C.F.R. § 1.144 ("Rule 1.144"), as the procedural mechanism for "disqualifying" me from presiding over this case. Respondents move, Motions at 79, that I "deem" myself disqualified under Rule 1.144. Pursuant to the criteria set out in the plain language of Rule 1.144, there is no justification for me or any other USDA ALJ to "not be assigned to serve" in these proceedings under Rule 1.144(a),[31] nor is there any other legitimate

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[29] Prior to and since July 24, 2017, none of the actions taken by me as the assigned ALJ have involved the allowance or rejection of evidence to the record, nor have any of these Orders been dispositive of the merits of these cases.

My actions in these cases since July 24, 2017, until today, have been issuance of: a January 17, 2018 "Order Granting Complainant's Request to Extend Time" for filing a response to Respondents' motions; a March 15, 2018 "Order on 'Stay'"; a May 23, 2018 Order Amending Case Caption; a "Summary of September 7, 2018 Telephone Conference and Order Scheduling Hearing for March 25 – March 29, 2019" issued on September 11, 2018; a September 20, 2019 Order Amending Case Caption; an October 1, 2018 Order Granting Respondents' Request to Allow Late Filing; an October 11, 2018 Order Granting Complainant's Request for Extension of Time to File Response to Supplemented Motions; and a February 6, 2019 Order Amending Case Caption. These actions are likewise administerial and non-substantive.

[30] *See Trimble,* Docket No. 15-0097, *supra* note 20.

[31] 7 C.F.R. § 1.144(a) states "No Judge shall be assigned to serve in any proceeding who (1) has any pecuniary interest in any matter or business involved in the proceeding, (2) is related within the third degree by blood or marriage to any party to the proceeding, or (3) has any conflict of interest which might impair the Judge's objectivity in the proceeding." None of these three specific reasons that bar assignment to an ALJ is applicable here.

"disqualifying reason" that would compel me to withdraw from presiding over these cases under Rule 1.144(b).

Further, Rule 1.144 does not provide for the dismissal of a complaint upon the disqualification of an ALJ. Even if there were not an Article II duly appointed ALJ available to take assignment of the case, dismissal of the cases would not be appropriate. The Rules of Practice are applicable to proceedings listed in 7 C.F.R. § 1.131 and specifically assume proper appointment of the administrative law judge. (*See* 7 C.F.R. § 1.132 ("Judge means any Administrative Law Judge appointed pursuant to 5 U.S.C. 3105")). There is no "disqualifying reason" akin to that which Respondents suggest nor justification for dismissal of these cases thereunder.

C) Motion to Disqualify JO

Respondents' constitutional challenges to the authority of the JO are beyond my jurisdiction in these matters. The Secretary of Agriculture appointed Bobbie J. McCartney Judicial Officer on November 16, 2018 and she is the current JO. It is beyond my authority to consider and determine whether the JO has been properly appointed.[32] As an ALJ I am bound by the Secretary's actions. I therefore cannot consider these contentions and Respondents' Motions

[32] *See S. Minnesota Beet Sugar Coop.*, 2004 WL 3804753, at *11 (U.S.D.A. July 2004) ("An administrative law judge's jurisdiction to rule on constitutional claims is limited. We clearly cannot declare an Act of Congress unconstitutional, nor can we invalidate an Agency regulation.") (citing *Goetz*, 61 Agric. Dec. 282, 287 (2002)).

to disqualify the JO are deemed denied for purposes of going forward with this proceeding. Such Respondents' contentions are, however, preserved for appeal.

Moreover, I note that Respondents, in their request that the JO be disqualified, again cite Rule 1.144 (7 C.F.R. § 1.144).[33] There is no provision for disqualification of the JO under Rule 1.144 nor anywhere else in the Rules of Practice.

D) Motions to Dismiss and to Vacate Previous Orders Based on Challenge to ALJ and JO Authority

Respondents contend that "because there is no lawfully qualified USDA ALJ who can preside over and decide this case, and there are no lawful alternative procedures," I should dismiss these cases and vacate any and all previous "and/or to be entered" orders "(except a dismissal order)".[34] The Rules of Practice make clear that a "motion to dismiss on the pleading" will not be entertained. 7 C.F.R. 1.143(b).

Although it is well settled that constitutional issues can and should be raised during administrative proceedings, the mere raising of such constitutional issues, whether addressed or not by the ALJ, are not justification on their own for dismissal of a case.[35] As the previous JO,

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[33] Respondents' Motions at 79.

[34] Respondents' Motions at 1, 53, 80.

[35] *See supra* note 21; *but see Lesser*,52 Agric. Dec. at 167-68 (citing *Robinson v. United States*, 718 F.2d 336, 337-38 (10th Cir. 1983) ("no agency ruling on a constitutional challenge could have resulted in a dismissal of the action.")); *Gallo Cattle Co., Inc.*, 57 Agric. Dec. 357 (U.S.D.A. 1998) ("It would be inappropriate for me to rule on the constitutionality of bloc voting, since '[n]o administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer.' *Buckeye Industries, Inc. v. Secretary of Labor*, 587 F.2d 231, 235 (5th Cir. 1979)") (other citations omitted); *Berosini*, 54 Agric. Dec. 886 (U.S.D.A. 1995) ("Respondent [argues] that USDA lacks the jurisdiction to regulate Respondent's activities. In the first place, it would be inappropriate for me to rule on the constitutionality of the Act. . . .") (citing *Buckeye Industries, Inc.*, 587 F.2d at 235, and *Orchard*, 47 Agric. Dec. 378, 379 (U.S.D.A. 1988)); and *Horne*, 67 Agric. Dec. 1244, 1253 (U.S.D.A. 2008) ("Mr. Horne and partners are challenging the constitutionality of the Raisin Order . . . I have no authority to determine the constitutionality of the various statutes administered by the

William Jenson, held, the raising of a constitutional issue should not inhibit the processing of a case.[36] Respondents cite no authority and provide no logic for the proposition that, even assuming arguendo that USDA lacks properly appointed ALJs or a JO, an otherwise proper complaint must be dismissed.

Respondents' motion that I vacate any and all orders for lack of authority to adjudicate are without merit. As previously discussed, the only order issued prior to July 24, 2017 in the captioned cases was non-substantive. Respondents state no reason why an "Exchange Order" would cause prejudice and should be reconsidered or vacated. Vacating such non-substantive order would serve no purpose.

Complainant suggests that if all orders in the captioned cases were vacated "even consent decisions previously filed in this case would be vacated."[37] That would certainly be an absurd result. Clearly respondents who signed and submitted consent decisions understand the finality

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United States Department of Agriculture . . . Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional . . . .") (citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.")).

[36] *Beasley et al.*, ("Decision and Order as to Amelia Haseldon"), WL 9473089, at *2-*3 (U.S.D.A. Oct. 2017) ("Ms. Haselden cannot avoid or enjoin this administrative proceeding by raising constitutional issues.") (citing *Beho v. SEC*, 799 F.3d 765, 774-75 (7th Cir. 2015), cert, denied, 136 S. Ct. 1500 (2016); *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 244-45 (1980) (refusing to enjoin an allegedly unlawful administrative proceeding where the court of appeals would be able to review alleged unlawfulness after the agency proceeding had concluded); *Jarkesy v. SEC*, 803 F.3d 9, 27 (D.C. Cir. 2015) (refusing to enjoin proceedings before an administrative law judge based on an Appointments Clause challenge)).

[37] Complainant's Response to Motions at 3 (emphasis in original).

of such agreements and are not challenging ALJ authority to enter consent decisions. The current pending motions appear only applicable to the above-captioned cases. [38]

Thus, the motion to vacate any and all orders is also denied.

II. Motion to Stay

In their Motion, Respondents request that I "abate further proceedings until the disposition of the petitions filed in the Supreme Court in *Bandimere* and *Lucia* and the D.C. Appeals [*sic*] have been finally resolved."[39] Respondents mention, Supplement to Motions at 2, that the motion to stay was granted in part through my March 15, 2018 "Order on 'Stay.'" With the issuance of the Supreme Court's *Lucia* decision on June 21, 2018, and the Court's denial of the *Bandimere* petition for certiorari on June 28, 2018,[40] I see no reason to further postpone these proceedings and any pending motion to "stay" or "abate" proceedings is denied.

III. Motion for Summary Judgement and Limited Penalty

Respondents seek "an order dismissing this whole proceeding and/or in the alternative a summary judgment on the issues contained in [the] pleading."[41] It is my reading of Respondents' contentions that they are requesting an order that would be squarely contrary to binding JO and

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[38] I here note that, as the Rules of Practice, 7 C.F.R. § 1.138, require me to do, I signed consent decisions in Docket No. 17-0040 on August 31, 2017; in Docket Nos. 17-0039 and 17-0044 on September 19, 2018; in Docket No. 17-0045 on February 5, 2019; and in Docket No. 17-0043 on February 14, 2019. These dockets were included on the December 23, 2018 Complaint. Once a proposed consent decision is filed with the Hearing Clerk, signed by all parties, I must "enter such decision without further procedure" and "[s]uch decision shall have the same force and effect as a decision issued after full hearing, and shall become final upon issuance to become effective in accordance with the terms of the decision." 7 C.F.R. § 1.138. The filing of such agreement waives further proceedings. *See id.*

[39] Respondents' Motions at 82.

[40] *See* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-475.html (last visited Feb. 22, 2019).

[41] Respondents' Motions at 7.

court precedents in HPA proceedings,[42] one that would create new precedent on the plain meaning of the HPA (15 U.S.C. § 1825(c)) by declaring that disqualification penalties must be determined through a subsequent and separate hearing process from the hearing proceeding where HPA violation is adjudicated. I conclude that such precedent requires that I deny Respondents' contentions.

Respondents argue that the plain language of § 1825(c) requires, as preconditions for disqualification to be determined, "(1) that respondent has previously been criminally convicted of a willful violation of HPA §1824 in a United States District Court in a proceeding filed by the

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[42] *See* Complainant's Response to Supplement, 10 (citing *Edwards et al.*, 55 Agric. Dec. 892 (U.S.D.A 1996), slip op. at 54-55 (stating "the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which the Respondent is found to have violated the Horse Protection Act for the first time."); *id.* at 12-14 (citing *Thornton v. U.S. Dep't of Agric.*, 715 F.2d 1508, 1512-13 (11th Cir. 1983); *McConnell v. U.S. Dep't of Agric.*, 23 F.3d 407 (6th Cir. 1994); *Crawford v. U.S. Dep't of Agric.*, 50 F.3d 46, 48 Note 2 (D.C. Cir. 1995); *Gray v. U.S. Dep't of Agric.*, 39 F.3d 670, 677-78 (6th Cir. 1994); *Stewart v. U.S. Dep't of Agric.*, 64 F. App'x 941, 944-45 (6th Cir. 2003); *Back v. U.S. Dep't of Agric.*, 445 F. App'x 826, 828 (6th Cir. 2011); *Derickson v. U.S. Dep't of Agric.*, 546 F.3d 335, 340 (6th Cir. 2008); *Lacy v. U.S. Dep't of Agric.*, 278 F. App'x 616, 619 (6th Cir. 2008); *Bennett v. U.S. Dep't of Agric.*, 219 F. App'x 441, 443 (6th Cir. 2007); *Zahnd v. Sec'y of Dep't of Agric.*, 479 F.3d 767, 771 (11th Cir. 2007); *Turner v. U.S. Dep't of Agric.*, 217 F. App'x 462, 465 (6th Cir. 2007); *Gray v. U.S. Dep't of Agric.*, 207 F. App'x 638, 639-40 (6th Cir. 2006); *McConnell v. U.S. Dep't of Agric.*, 198 F. App'x 417, 421 (6th Cir. 2006); *Trimble v. US. Dep't of Agric.*, 87 F. App'x 456, 458 (6th Cir. 2003); *McCloy v. U.S. Dep't of Agric.*, 351 F.3d 447, 449 (10th Cir. 2003); *Reinhart v. U.S. Dep't of Agric.*, 188 F.3d 508 (6th Cir. 1999); *Bobo v. U.S. Dep't of Agric.*, 52 F.3d 1406, 1408 (6th Cir. 1995); *Crawford v. U.S. Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir. 1995); *Rowland v. U.S. Dep't of Agric.*, 43 F.3d 1112, 1114 (6th Cir. 1995); *Gray v. U.S. Dep't of Agric.*, 39 F.3d 670, 675 (6th Cir. 1994); U.S. *Dep't of Agric. v. Kelly*, 38 F.3d 999, 1001-02 (8th Cir. 1994); *Polch v. U.S. Dep't of Agric.*, 32 F.3d 569 (6th Cir. 1994); *Wagner v. Dep't of Agric.*, 28 F.3d 279, 281 (3d Cir. 1994); *Elliott v. U.S. Dep't of Agric.*, 990 F .2d 140, 144-145 (4th Cir. 1993); *Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179, 182 (6th Cir. 1983)).

In fact, cases cited by Respondents, Motions at 20-25, *McConnell,* 64 Agric. Dec. 436 (U.S.D.A. 2005) and *Back*, 69 Agric. Dec. 448 (U.S.D.A. 2010), to support their "preconditions" reading of the HPA in fact find that one administrative enforcement proceeding is appropriate and sufficient to determine HPA violations and, if so found, to also determine disqualification penalties "in addition to" civil monetary penalties.

Attorney General of the United States under §1825(a), or (2) that the respondent has previously paid a civil penalty assessed under §1825(b)(1), or (3) that the respondent is, at the time a proceeding is initiated by a complaint seeking §1825(c) disqualification, subject to a final written order issued by the Secretary assessing a civil penalty under §1825(b)(1)."[43]

Respondent argues that, because of the "preconditions" needed to determine disqualification under § 1825(c), there must be two separate proceedings and that only when the first proceeding finding violation concludes can a "cause of action" accrue to determine a disqualification penalty.[44] Respondents provide, as support, that U.S. district courts ruling on criminal convictions under § 1825(a) do not have the authority to impose disqualification under § 1825(c) and thus, to seek disqualification of a person criminally convicted of violating § 1824 under § 1825(a), there must be a second administrative proceeding.[45] Respondents cite case law in alleged support of how the USDA JO "overlooks" preconditions and wrongly decides disqualification penalties in a single proceeding.[46]

But, as noted, these contentions are contrary to binding precedent, which unequivocally hold that a subsequent and separate proceeding is not required to determine disqualification penalties under the HPA. HPA § 1825(c) (emphasis added) reads in pertinent part:

> **(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures**
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> **In addition to** any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) or

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[43] Respondents' Motions at 8.

[44] *See id.* at 16-17.

[45] *Id.* at 18.

[46] *See* Respondents' Motions, 18-27 (citing *Greenly*, 72 Agric. Dec. 586 (U.S.D.A. 2013); *McConnell*, 64 Agric. Dec. 436 (U.S.D.A. 2005) (referencing *McConnell*, 52 Agric. Dec. 1156 (U.S.D.A. 1993); *Jenne*, 73 Agric. Dec. 501 (U.S.D.A. 2014); *Back*, 69 Agric. Dec. 448 (U.S.D.A. 2010)).

> who paid a civil penalty assessed under subsection (b) or **is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter** may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for **a period of not less than one year for the first violation** and not less than five years for any subsequent violation. . . .

Respondents contend that their "plain language" reading of this statutory text is the correct reading and that USDA ALJs, USDA JOs, and multiple circuit judges have been misreading and misapplying this statutory text. As Complainant counters, precedent on this matter clearly demonstrates that Respondents' interpretation of § 1825(c) is incorrect as the section has allowed for disqualification as a penalty "in addition to" civil penalties in a single proceeding without overturn by any Article III court.[47]

While an administrative enforcement proceeding is required to determine a penalty of disqualification separately from a criminal proceeding authorized under § 1825(c), the current matter is not a criminal proceeding but an administrative enforcement proceeding regarding civil penalties for violation of the HPA. Respondents' argument, that the language of § 1825(c) creates preconditions due to the past-tense language "was convicted" and "who paid," is misguided. The statute requires a previous conviction, previous payment, ***or*** that the person be "subject to a final order."[48] As Complainant notes,[49] the third condition is present tense and "final order" is not defined in the HPA but has been consistently read to mean "subject to" the "final order" in the same proceeding.[50] Further, Respondents do not demonstrate any statutory

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[47] *See supra* note 42.

[48] 15 U.S.C. § 1825(c).

[49] *See* Complainant's Response to Supplement at 20-21.

[50] *See supra* note 42.

requirement for a subsequent and separate hearing regarding a disqualification penalty. As precedent dictates, I hold that one administrative enforcement proceeding is appropriate and sufficient to determine HPA violations and, if so found, to also determine civil monetary and disqualification penalties. Therefore, Respondents motions for summary adjudication or request for a ruling on this matter are denied.[51]

CONCLUSION OF LAW

1. As of July 24, 2017, USDA Administrative Law Judges are properly appointed in accordance with the United States Constitution, Art. II, § 2, cl. 2 and the United States Supreme Court's holding in *Lucia v. SEC*, 138 S. Ct. 2044 (2018).
2. A subsequent and separate proceeding is not required to determine disqualification penalties under the HPA (15 U.S.C § 1825(c)).

ORDER

1. The Motion for Summary Judgment, filed on December 27, 2017 and renewed by the October 1, 2018 Supplement to the Motion, is **DENIED**.
2. The Motion to Dismiss, filed on December 27, 2017 and renewed by the October 1, 2018 Supplement to the Motion, is **DENIED**.

Respondents also argues that "final order" is defined in 15 U.S.C. § 1825(b)(3), which is an incorrect reading of the section as it is clearly referring to a situation in which a matter should be referred to the Attorney General – not applicable here—and is not a section intended to provide a definition applicable to the entire statute.

[51] As an alternative "prong" of this motion, Respondents argue, Motions at 16, that "if the USDA's position is that the ALJ's initial decision assessing a penalty . . . is a 'final order by the Secretary' under § 1825(b)(1) . . . then the ALJ's initial decision is void and of no effect, because the ALJ would be asserting authority that vests only in the Secretary or a duly appointed inferior officer." This argument is addressed and denied *supra* pp. 6-9 and thus not addressed at this place in this order.

3. The Motion to Vacate, filed on December 27, 2017 and renewed by the October 1, 2018 Supplement to the Motion, is **DENIED**.
4. The Motions to Disqualify Administrative Judge and Judicial Officer, filed on December 27, 2017 and renewed by the October 1, 2018 Supplement to the Motion, is **DENIED**.
5. The Motion to Stay, filed on December 27, 2017 and renewed by the October 1, 2018 Supplement to the Motion, is **DENIED**.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

Issued this 25th day of February 2019, in Washington, D.C.

Channing D. Strother
Chief Administrative Law Judge

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