



**In the Matter of:**

**OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS,  
UNITED STATES  
DEPARTMENT OF LABOR.**

**ARB CASE NO. 16-013**

**ALJ CASE NOS. 2015-OFC-002  
2015-OFC-003  
2015-OFC-004  
2015-OFC-005  
2015-OFC-006  
2015-OFC-007  
2015-OFC-008**

**PLAINTIFF,**

**v.**

**CONVERGYS CUSTOMER  
MANAGEMENT GROUP, INC.,**

**DEFENDANT**

**DATE: JAN 31 2019**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**ORDER LIFTING STAY AND REMANDING  
THE CASE TO A NEW ADMINISTRATIVE LAW JUDGE**

These consolidated cases arise under Executive Order 11246, as amended; Section 503 of the Rehabilitation Act, 29 U.S.C.A. § 793; and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C.A. § 4212.<sup>1</sup>

By order dated October 10, 2017, the Administrative Review Board (ARB) granted the Administrator's Unopposed Motion to hold the Briefing Schedule in Abeyance pending litigation before the U.S. Supreme Court. On January 12, 2018, the Court granted review in *Raymond J. Lucia Co., Inc., v. S.E.C.*, 832 F.3d 277 (D.C. Cir. 2016), to resolve a conflict in the circuit courts of appeals.<sup>2</sup>

<sup>1</sup> These provisions are implemented through 41 C.F.R. Parts 60-30 (Executive Order 11246), 60-741 (Rehabilitation Act), and 60-250 (Veterans' Act). The cases were consolidated by order issued on September 14, 2017.

<sup>2</sup> In *Bandimere v. S.E.C.*, 844 F.3d 1168 (10th Cir. 2016) and *Burgess v. F.D.I.C.*, 867 F.3d 297 (5th Cir. 2017), the courts held that the agencies' Administrative Law Judges (ALJs) were acting as inferior officers without proper appointment as required by Article II, Section 2, Clause 2 of the U.S. Constitution, the appointments clause. The D.C. Circuit has twice held that the Article II does not cover agencies' ALJs. *Raymond J. Lucia Co., Inc., v. S.E.C.*, 832 F.3d 277 (D.C. Cir. 2016) and *Landry v. F.D.I.C.*, 204 F.3d 1124 (D.C. Cir. 2000).

On January 26, 2018, the Administrator filed a motion to lift the stay and remand the case to Chief Administrative Law Judge Henley. Convergys Custom Management Group filed an opposition asking that the stay remain until *Lucia* had been decided and that any remand go to a different ALJ. The ARB did not address the Administrator's motion.

On June 21, 2018, the Supreme Court decided that ALJs at the Securities and Exchange Commission (SEC) are subject to the appointments clause, that the SEC judge decided *Lucia*'s case without a constitutional appointment, that *Lucia* timely objected, and that the appropriate remedy was to hold a new hearing before a different ALJ. The Court specified that a properly appointed official cannot be the same ALJ who previously decided the case because he "cannot be expected to consider the matter as though he had not adjudicated it before."<sup>3</sup>

Accordingly, the Board dismisses Convergys' petition for review and remands this case to the Office of Administrative Law Judges for the appointment of an ALJ to reconsider the issues raised in Convergys' exceptions to ALJ Henley's July 31, 2017 Recommended Decision and Order.

FOR THE ADMINISTRATIVE REVIEW BOARD:



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**WILLIAM T. BARTO**  
Chief Administrative Appeals Judge

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<sup>3</sup> *Lucia v. S.E.C.*, 138 S.Ct. 2044, 2055-56 (2018).