In the Matter of:

JEAN F. GREENE, **ARB CASE NO. 02-050**

COMPLAINANT, **ALJ CASE NO. 02-SWD-1**

v. **DATE: September 18, 2002**

EPA CHIEF JUDGE SUSAN BIRO, U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA), EPA OFFICE OF INSPECTOR GENERAL (OIG), AND EPA OFFICE OF ADMINISTRATIVE LAW JUDGES (OALJ).

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*

For the Respondent:
Paul M. Winick, Esq., *U.S. Environmental Protection Agency*, *Washington, D.C.*

ORDER DISMISSING INTERLOCUTORY APPEAL

Background

Administrative Law Judge Jean F. Greene (retired), the Petitioner, has filed a complaint against the Environmental Protection Agency ("EPA"), EPA Chief Judge Susan Biro, EPA Office of Inspector General and EPA Office of Administrative Law Judges, the Respondents. She alleges that the Respondents retaliated against her in violation of the whistleblower protection provisions of the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9610 (West 1995); the Safe Drinking Water Act, 42 U.S.C.A. § 300(j)-9(i) (West 1991); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995); and the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998). On February 11, 2002, Greene filed a "Petition for Interlocutory Appeal" with the Administrative Review Board ("Board") requesting the Board to review Administrative Law Judge (ALJ) William C. Cregar's January 28, 2002 Order, in which the ALJ denied Greene's motion to recuse himself from the case. Greene also filed a Motion with the ALJ requesting that he stay all action in the case

before him pending the outcome of the interlocutory appeal. The Respondents filed a response with the ALJ arguing that both Greene's interlocutory appeal and motion for a stay should be denied.

On February 26, 2002, the ALJ issued an Order denying Greene's Motion for a Stay. The ALJ concluded that:

> Complainant has not provided grounds sufficient to support granting the Motion. Complainant has not requested that I certify issues for interlocutory appeal, as required. [Citing *Plumley v. Federal Bureau of Prisons*, 86-CAA-6 (Sec'y April 29, 1987), 29 C.F.R. §§ 18.1, 28 U.S.C.A. § 1292(b)] Therefore, there is no interlocutory appeal currently ripe for consideration.

Order (Feb. 26, 2002).

On April 5, 2002, the Board issued an Order requiring Greene "to show cause why the Board should not dismiss her petition for review as an impermissible interlocutory appeal." (Emphasis deleted). The Show Cause Order also permitted Respondents to file a reply to Greene's response. On May 17, 2002, Greene requested leave to file a response to Respondents' reply. Greene has suggested no reason why briefing beyond that specified in the Show Cause Order is warranted. Accordingly, her request to file a response is **DENIED**. On May 28, 2002, the Respondents filed a response to Greene's motion for leave to file a response to Respondents' reply. Treating this response as a motion to respond to Greene's May 17th motion, we **DENY** it as moot. On May 28, 2002, Greene filed a response to Respondents' May 28th response. Treating Greene's May 28th response as a motion to respond to Greene's May 28th response, we **DENY** it as moot. On August 25, 2002 Greene filed a motion to expedite petition for interlocutory appeal and order oral argument. Given this order dismissing the interlocutory petition for review, Greene's motion is **DENIED** as moot.

Issue Presented

Whether the Board should dismiss Greene's petition for review as an impermissible interlocutory appeal.

Discussion

In *Plumley v. Federal Bureau of Prisons*, 86-CAA-6 (Sec'y April 29, 1987), the Secretary of Labor described the procedure for obtaining review of an ALJ's interlocutory order. Slip op. at 2. The procedures for litigation and administrative review of whistleblower complaints under the environmental statutes at issue here are found in 29 C.F.R. Part 24. The Secretary acknowledged that these procedures do not provide for interlocutory review of an ALJ's rulings on motions in the course of administrative hearings. The Secretary concluded that "[t]o the extent any situation is not provided for in those regulations, the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18 . . . , and the Federal Rules of Civil Procedure apply." *Id.* Turning to 29 C.F.R. Part 18 for guidance, the Secretary noted that 29 C.F.R. § 18.29(a), which describes the authority of administrative law judges, authorizes such judges to "'take any appropriate action authorized by the Rules of Civil Procedure for the United States

District Courts . . ..'" *Id.* The Secretary determined that where an administrative law judge has issued an order of which the party seeks interlocutory review, an appropriate action would be for the judge to follow the procedure established in 28 U.S.C.A. § 1292(b) (West 1993)[1] for certifying interlocutory questions for appeal from federal district courts to appellate courts. *Id.* In *Plumley*, the Secretary ultimately concluded that because no judge had certified the questions of law raised by the respondent in his interlocutory appeal as provided in 28 U.S.C.A. § 1292(b), "an appeal from an interlocutory order such as this may not be taken." (citations omitted).

In this case, as the ALJ indicated in his Order denying Greene's Motion for Stay, Greene has not requested that he certify the questions of law underlying her appeal to the Board. However, we need not decide whether this failure to request certification is fatal to Greene's request to file an interlocutory appeal. Even if the failure to obtain certification was not dispositive, Greene cannot prevail because, as we discuss below, Greene has failed to articulate any grounds warranting departure from our strong policy against such piecemeal appeals. *See e.g.*, *Amato v. Assured Transportation and Delivery, Inc.,* ARB No. 98-167, ALJ No. 98-TSC-6 (ARB Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.,* ARB No. 99-097; ALJ No. 99-ERA-17 (ARB Sept. 16, 1999); *Carter v. B & W Nuclear Technologies, Inc.*, ALJ No. 94-ERA-13 (Sec'y Sept. 28, 1994).

The Board's policy against interlocutory appeals incorporates the final decision requirement found in 28 U.S.C.A. § 1291, which provides that the courts of appeals have jurisdiction "from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." Accordingly, pursuant to § 1291, ordinarily, a party may not prosecute an appeal until the district court has issued a decision that, "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), the Supreme Court explained the rationale for the requirement that a party generally must raise all claims of error in one appeal at the conclusion of litigation before the trial court:

---

[1] This provision states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C.A. § 1292(b) (West 1993).

> [The rule] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

449 U.S. at 374, quoting *Cobbledick v. United States,* 309 U.S. 323, 325 (1940). Accordingly, the purpose of the finality requirement is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949).

Nevertheless, the Supreme Court has recognized a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court further refined the "collateral order" exception to technical finality. *Van Cauwenberghe v. Biard*, 406 U.S. 517, 522 (1988). The Court in *Coopers & Lybrand* held that to fall within the collateral order exception, the order appealed must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U.S. at 468.

In determining whether to accept an interlocutory appeal, we must strictly construe the *Cohen* collateral appeal exception to avoid the serious "'hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.'" *Corrugated Container Antitrust Litigation Steering Comm. v. Mead Corp*., 614 F.2d. 958, 961 n.2, *cert. denied,* 449 U.S. 888 (1980), quoting *Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1094 (5th Cir. 1977). Applying the collateral order test to the facts of this case, we conclude that the ALJ's order denying Greene's recusal motion does not fall within the exception's coverage. As the court held in *Corrugated Container,* "Disqualification questions are fully reviewable on appeal from final judgment. . . . Precisely because disqualification issues are reviewable following entry of judgment, as a threshold matter, the Cohen doctrine is unavailing." *Id*. at 960-961 (citations omitted). *Accord United States v. Washington*, 573 F.2d 1121, 1122 (9th Cir. 1978); *Rosen v. Sugarman*, 357 F.2d 794, 796 (2d Cir. 1966); *Albert v. United States District Court*, 283 F.2d 61, 62 (6th Cir. 1960), *cert. denied*, 365 U.S. 828 (1961).

Conclusion

We conclude that there is no basis in this case for departing from our strong policy against interlocutory appeals, and we therefore **DISMISS** Greene's petition for review.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge