U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of the disqualification of

EDWARD A. SLAVIN, JR.,

ARB CASE NO. 02-109

DATE: June 30, 2003

Counsel for Complainant in

In re Jean F. Greene v. EPA Chief Judge Susan Biro,
U.S. Environmental Protection Agency (EPA),
EPA Office of Inspector General, and EPA
Office of Administrative Law Judges,
DOL OALJ No. 2002-SWD-00001,
HUDALJ No. 02-01-NAL

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

FINAL DECISION AND ORDER

Both the Complainant and the Complainant's counsel (hereinafter referred to collectively as "the Petitioners") have appealed the disqualification of the Complainant's counsel (Counsel) by William C. Cregar, Administrative Law Judge (the ALJ) of the Department of Housing and Urban Development (HUD).[1] The ALJ's June 20, 2002 Order of Disqualification specifically provides that Counsel is "permanently barred" from appearing as a representative or from acting in an advisory capacity to any party, in either the above-noted *Greene* whistleblower case or in any other matter to come before the ALJ. Ord. of Disqualif. at 26. The Order of Disqualification

[1] Judge Cregar was temporarily and intermittently detailed by the Office of Personnel Management from HUD to assist the Department of Labor Office of Administrative Law Judges by hearing the above-noted whistleblower complaint, pursuant to 5 U.S.C.A. § 3344 (West 1996), implemented at 5 C.F.R. § 930.213 (2001). At that time, Judge Cregar was the Acting Chief Administrative Law Judge for HUD. *See* Ord. of Disqualif. at 1.

further directs that a copy be forwarded to the Board of Professional Responsibility for the State where the attorney is licensed to practice law and also that relevant portions of the case record be made available to that disciplinary body for appropriate action.[2] *Id.* The Order afforded the Complainant a period of 30 days in which to obtain another representative or to advise the ALJ that she needed additional time to obtain new counsel or that she would proceed pro se. *Id.* We affirm in part and reverse in part.

BACKGROUND and JURISDICTION

Pursuant to Section 18.36(b) of the Rules of Practice and Procedure for the Department of Labor's Office of Administrative Law Judges, an Administrative Law Judge's ruling excluding a representative from further participation in a case is directly appealable to the Chief Administrative Law Judge. 29 C.F.R. § 18.36(b). In this matter, however, Chief Administrative Law Judge John M. Vittone granted Counsel's motion that he recuse himself from review of the ALJ's disqualification ruling. *See* Ord. of Recusal dated July 26, 2002 at 4-5, 14. Jurisdiction of this appeal was conferred on the Administrative Review Board by the Secretary's Order of Referral, which substituted the Board for Chief Judge Vittone pursuant to Section 18.1(b).[3] Ord. of Referral dated Aug. 19, 2002; *see* 29 C.F.R. § 18.1(b) (2002); *accord Holub v. H. Nash Babcock & King, Inc.* 93-ERA-25, Ord. Rev'g Disqualif. (Sec'y Feb. 6, 1995) (Attorney disqualification matter decided by Secretary who was substituted for Chief, Deputy Chief and Associate Chief Judges following their recusal); *see generally* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (Superseding Secretary's Order 2-96, 61 Fed. Reg. 19,978 (May 3, 1996), which established the ARB to render decisions in matters that had previously been decided by the Secretary, by modifying the Secretary's delegation of authority to the Board).[4]

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[2] This aspect of the ALJ's order is consistent with the reporting by Federal courts and agencies of attorney misconduct and disciplinary sanctions against attorneys to licensing jurisdictions, as an aid to state bar authorities in the exercise of their oversight responsibilities. *See generally* ABA Model Code of Judicial Conduct, Canon 3D, Disciplinary Responsibilities; 61 Fed. Reg. 65323, 65330-31 (Dec. 12, 1996) (Final rule, 29 C.F.R. Part 102, National Labor Relations Board, discussing NLRB policy of notifying state bar authorities of disciplinary sanctions the agency has imposed on attorneys).

[3] As noted by the Secretary's Order of Referral, the same circumstances that support recusal of Chief Administrative Law Judge Vittone also prevent referral of this matter to the Associate Chief Administrative Law Judge, and warrant substitution of this Board pursuant to 29 C.F.R. § 18.1(b). *See* Order of Recusal at 10-11, 13.

[4] On June 28, 2002, and thus before Judge Vittone's July 26, 2002 Order of Recusal and the Secretary's August 19, 2002 Order of Referral, the Complainant filed a Petition for Review of Illegal Disqualification Order and Motion to Consolidate Appeals with the ARB. At that time, Complainant's petition for review of the ALJ's interlocutory order refusing to recuse himself in the *Greene* case was pending before the ARB. *See Greene v. EPA Chief Susan Biro, United States Envtl. Prot. Agency,* ARB No. 02-050, ALJ No. 02-SWD-1 (ARB Ord. Dismissing Interlocutory Appeal,

On January 24, 2003, we issued an Order directing the ALJ to provide the Board copies of documents from the record in the *Greene* whistleblower proceeding that were relevant to the grounds cited by the ALJ for his disqualification of Counsel. Ord. of Jan. 24, 2003, at 2. The Board Order also directed the ALJ to provide the Petitioners and the Environmental Protection Agency (EPA), as respondent in the *Greene* whistleblower case, lists of the copies of documents provided to the Board. Copies of the documents, rather than the original documents contained in the *Greene* whistleblower case record, were requested to ensure compliance with 29 C.F.R. § 18.36(b). That provision requires that the underlying proceeding not be suspended pending disposition of an appeal of a representative's exclusion under Section 18.36. *Id.; see* Board Order at 1-2. The parties in the case were already in receipt of the documents in the *Greene* case record, either by virtue of having been served the respective document or having been the source of the document submitted to the ALJ. Consequently, it was unnecessary for the ALJ to serve copies of the documents that he was providing the Board on the parties. Instead, lists of the documents being sent to the Board provided the necessary notice to the parties regarding the materials that are before the Board for review in connection with this appeal. The Board received the requested documents from the ALJ on February 11, 2003.

On February 23, 2003, the Complainant filed a Motion to Order That [the ALJ] Forward *Complete* Record to Complainant Judge Greene and Counsel. The substance of that motion, which was filed on the Complainant's behalf by Counsel, suggests that the Petitioners failed to read the Board's January 24, 2003 Order, with which the ALJ has fully complied. The motion objects to the ALJ's sending copies of only a portion of the record to the ARB, the ALJ's delay in forwarding the case record in *Greene* to the ARB until requested to do so by the ARB, and the ALJ's service on the parties of only lists of the documents that the ALJ sent to the ARB instead of providing the parties copies of those documents. Motion at 1-2.

Pursuant to Section 18.36, the ALJ properly retained the case record in order to resume – after an appropriate period was afforded the Complainant to obtain other counsel or to proceed pro se – adjudication of the *Greene* whistleblower complaint. *See* 29 C.F.R. § 18.36(b). Pursuant to our January 24 Order, the ALJ provided the Board with only the relevant documents from the *Greene* case record. Furthermore, the ALJ provided the parties with lists describing each of the documents, rather than copies of the documents, in compliance with the Board Order. We have explained why such lists provided adequate notice to the parties regarding the contents of the record that is before the Board in this appeal of the ALJ's disqualification order. The Petitioners' February 23 motion does not request any particular document from the *Greene* case record that is contained on the list provided by the ALJ. Moreover, we have reviewed the documents provided by the ALJ. Our review of those documents confirms that all the documents were either generated by the Complainant through her Counsel or were served by the ALJ or the EPA on the Complainant through her Counsel with, in many instances, additional service on the

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Sept. 18, 2002). Our decision in this matter addresses the sanctions recommended by the ALJ under both 29 C.F.R. § 18.34(g)(3) and § 18.36. This decision thus disposes of the challenge to the ALJ's disqualification order in toto which was advanced by the Petition for Review of Illegal Disqualification Order that was filed on June 28, in addition to the Section 18.36 issue, which was specifically referenced in the Secretary's Order of Referral.

Complainant at her then-operative EPA office address. *See generally* 29 C.F.R. § 18.3(b) (Service and filing of documents). The Complainant's request that the ALJ provide her copies of all the documents that he submitted to the Board on February 11, 2003, is therefore **DENIED**.

ISSUES PRESENTED

1. Whether the in futuro bar imposed against Counsel can be sustained pursuant to the procedural requirements and the substantive criteria of 29 C.F.R. § 18.34(g)(3).

2. Whether the exclusion of Counsel from further participation in the *Greene* whistleblower case can be sustained pursuant to the procedural requirements and substantive criteria of 29 C.F.R. § 18.36.

THE ALJ'S ORDERS and THE PETITIONERS' ARGUMENTS

The ALJ's Order to Show Cause and Order of Disqualification

On January 28, 2002, the ALJ issued an order directing Counsel to show cause why he should not be disqualified from appearing before the ALJ pursuant to 29 C.F.R. §§ 18.29, 18.34(g)(3) and 18.36. Ord. to Show Cause (OSC) at 1, 4. The case had been assigned to the ALJ in October 2001, and was at the prehearing stage when the ALJ issued the OSC. *Id.* at 1-4. The OSC stated that the attorney had engaged in the following three types of misconduct:

1) Engaging in improper and unethical professional conduct by making a false statement in a pleading regarding the ALJ's selection to hear the *Greene* case;
2) Making insulting, abusive and unprofessional statements about the ALJ and other government officials; and
3) Violating the ALJ's written prehearing order by filing pleadings containing inappropriate and uncivil language and failing to refrain from improper and misleading use of string citations to case law.

Id. The ALJ cited specific statements made by Counsel and provided other factual support as grounds for issuance of the order. *Id.* The OSC afforded Counsel until February 11, 2002, to respond. *Id.* at 4.

Neither of the Petitioners filed a response to the OSC with the ALJ. Rather, on February 11, 2002, the Complainant filed an appeal with this Board of another order that was also issued by the ALJ on January 28, 2002. Comp. Pet. for Interlocutory App., *Greene v. EPA Chief Judge Susan Biro*, ARB No. 02-050, ALJ No. 02-SWD-1; *see* n.4 *supra.* That second January 28 order denied the Complainant's January 8, 2002 motion for the ALJ's recusal from the case. ALJ Ord. issued Jan. 28, 2002. Also on February 11, the Complainant filed a motion with the ALJ, requesting that he stay the proceedings in the adjudication of the whistleblower complaint

pending disposition of the interlocutory appeal. Complainant's Motion for Stay filed Feb. 11, 2002. The ALJ issued an Order denying Greene's stay request, on February 26, 2002. ALJ Ord. issued Feb. 26, 2002. On September 18, 2002, the Board dismissed the Complainant's petition for review in ARB Case No. 02-050 as an impermissible interlocutory appeal. *Greene*, Ord. Dismissing Interlocutory App.

On June 20, 2002, the ALJ issued the Order of Disqualification, which contains a lengthy analysis of Counsel's conduct in comparison with relevant legal standards. The ALJ discussed not only Counsel's conduct in the *Greene* whistleblower proceeding but also in other cases, including adjudications before Department of Labor Judges, the ARB, and in State and Federal courts. Ord. of Disqualif. at 8-17. The ALJ noted that Counsel had not responded directly to his OSC. The ALJ also noted, however, that he had considered the letter filed by the Complainant in support of her February 11, 2002 interlocutory appeal to the ARB to determine whether it offered any argument in response to the January 28 OSC. Ord. of Disqualif. at 5. The ALJ concluded that the Complainant's appeal letter did not "respond directly to the issues raised in the Order to Show Cause or articulate reasons why" Counsel should not be disqualified. *Id.*

Concerning Counsel's conduct before the ALJ in the *Greene* proceeding, the ALJ provided an expanded discussion of the three basic types of misconduct that he had described in the OSC, viz.: 1) making a false statement in a pleading regarding the ALJ's selection to hear the case pursuant to 5 C.F.R. § 930.213; 2) making insulting, abusive and unprofessional statements regarding the ALJ and officials at the Office of Personnel Management (OPM), the Department of Labor Office of Administrative Law Judges (DOL OALJ), and HUD; and 3) failing to comply with the ALJ's November 13, 2001 prehearing order by making "inappropriate and uncivil statements" in documents filed with the ALJ and by indiscriminately citing decisions as support for legal propositions without providing adequate explanation and/or accurate citation. Ord. of Disqualif. at 2-8. Regarding other cases, the ALJ stated that Counsel's misconduct had prompted censure in a minimum of eight other reported cases, and the ALJ described Counsel's conduct and the tribunal's action in each of those cases. Ord. of Disqualif. at 8-17.

The ALJ analyzed Counsel's conduct in the *Greene* whistleblower proceeding against the criteria outlined in Sections 18.34(g)(3) and 18.36, and found that Counsel had violated both standards. Specifically, the ALJ found that Counsel's misconduct constituted improper professional conduct, within the meaning of Section 18.34(g)(3), and the refusal to comply with directions and to adhere to reasonable standards of orderly and ethical conduct, within the meaning of Section 18.36. Ord. of Disqualif. at 2-8, 18-25. For guidance in evaluating the foregoing misconduct under Sections 18.34(g)(3) and 18.36, the ALJ looked to the American Bar Association Model Rules of Professional Conduct (MRPC) and the rules of professional conduct adopted by the Supreme Court of Tennessee, where Counsel is licensed to practice.[5] *Id.* at 18-25.

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[5] The ALJ noted that the Tennessee Bar Association had proposed that the Tennessee Supreme Court adopt new rules of professional conduct that are basically identical to the MRPC. Ord. of Disqualif. at 18 n.10. Those rules have now been adopted by the Tennessee Supreme Court, effective March 1, 2003. *In re Tennessee Rules of Professional Conduct*, ___ S.W.3d ___, No. M2000-02416-SC-RL-RL (Tenn. Sept. 17, 2002). The ALJ also noted that the substantive

The Petitioners' arguments on appeal

a. Generally

The appeal from the ALJ's disqualification of counsel was initially filed with Chief Judge Vittone pursuant to Section 18.36(b) on June 28, 2002. *See* Complainant Judge J. F. Greene's Pet. for Rev. of Illegal Disqualif. Order. On July 2, 2002, Chief Judge Vittone issued a Notice of Receipt of Appeal and Prehearing Order (Prehearing Order). The Petitioners filed a response to the Prehearing Order on July 16, 2002, and a supplemental response on July 26, 2002. Comp. Judge J. F. Greene's Response to Prehearing Order dated July 16, 2002 (Comp. July 16, 2002 Resp. to Prehearing Ord.); Comp. Judge J. F. Greene's Supp. Resp.to Prehearing Order dated July 26, 2002 (Comp. July 26, 2002 Supp. Resp. to Prehearing Ord.). The only arguments before us are those advanced by the Complainant and her Counsel. Because we have been substituted for Chief Judge Vittone to hear this appeal, we will rely on the Petitioners' contentions that are set out in the July 16 and 26, 2002 responses to the Prehearing Order.[6]

Before summarizing the relevant arguments, we note that all of Petitioners' arguments in support of Chief Judge Vittone's disqualification from hearing this appeal have been rendered moot by his subsequent recusal on July 26, 2002. The Prehearing Order directed the Petitioners to respond to specified questions concerning the effect of the Petitioners' failure to file a response with the ALJ to the OSC, including whether the Petitioners had thereby waived the right to a formal hearing before the Chief Judge. Prehearing Ord. at 3-4, 5. The Prehearing Order also directed the Petitioners to specify the witnesses they would call and to provide a summary of each witness' anticipated testimony, assuming such hearing were available. *Id.* at 5. The Prehearing Order additionally instructed the Petitioners to respond to questions concerning the appropriateness of the sanctions the ALJ imposed. *Id.* at 4-5. The Petitioners raise a number of issues in response to the Prehearing Order.

As a threshold matter, we note that the Petitioners challenge the validity of the disqualification of counsel provision found at 29 C.F.R. § 18.34. Comp. July 16, 2002 Resp. to Prehearing Ord. at 17. The ARB is bound by the regulations duly promulgated by the Department of Labor, and is not authorized to rule on the validity of those regulations.

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differences between the former Tennessee Code of Professional Responsibility, which was based on the ABA Model Code of Professional Responsibility, and the more recent MRPC is not significant for purposes of the ALJ's disqualification analysis. *Compare* Tenn. Sup. Ct. Rules, Rule 8 (2002) (incorporating with minor modifications the MRPC) *with* Model Rules of Prof'l Responsibility (1983).

[6] In the July 26, 2002 supplemental response to Chief Judge Vittone's Prehearing Order, the Petitioners do not advance any further argument regarding the merits of the Order of Disqualification, but do add Judge Cregar to the list of witnesses that the Petitioners would call to testify if a hearing were held in this Section 18.36(b) appeal, along with the subjects about which he would be expected to testify. Comp. July 26, 2002 Supp. Resp. to Prehearing Ord.

Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272, 64,273 (Oct. 17, 2002). We will therefore not rule on the Petitioners' argument concerning the validity of Section 18.34.

The Petitioners also raise objections to the procedure followed by the ALJ and urge that an evidentiary hearing should be scheduled as part of the Petitioners' appeal of the disqualification order. The Petitioners' further arguments challenge the grounds the ALJ relied on in determining that disqualification was proper.

b. Arguments regarding the ALJ's procedure and in support of a formal hearing in this appeal

The Prehearing Order noted the Petitioners' position that submission of copies of documents filed with other Department of Labor officials constituted adequate response to the ALJ's OSC and requested that the Petitioners provide a legal basis for the view. Prehearing Ord. at 3. The Petitioners' response confirms their position on this issue but fails to provide any legal authority to support that position. Instead, the Petitioners assert that the ALJ was divested of jurisdiction in the *Greene* whistleblower case by the filing of the Complainant's interlocutory appeal of the ALJ's order refusing to recuse himself. Comp. July 16, 2002 Resp. to Prehearing Ord. at 17. That appeal was filed on February 11, 2002, and the ARB dismissed it as an impermissible interlocutory appeal on September 18, 2002. The Petitioners urge that the ALJ was thus without jurisdiction to act on the OSC that he had issued on January 28, 2002, which ordered Counsel to show cause, on or before February 11, 2002, why he should not be disqualified from appearing before the ALJ, OSC at 4. The Petitioners also assert that the ALJ "never gave the parties notice that he intended to issue an order based upon a fabrication (an assumption of 'default') in the face of a hotly contested interlocutory appeal . . . ." Comp. July 16, 2002 Resp. to Prehearing Ord. at 8. The Petitioners further contend that disqualification of counsel during the adjudication of the *Greene* whistleblower complaint before the ALJ was improper and that any sanction against the Complainant's Counsel should not have been imposed until completion of that adjudication. *Id.* at 22-23.

In answer to a question in the Prehearing Order regarding whether the Petitioners had waived their right to a hearing on the disqualification order, the Petitioners assert only that "it was error for Judge Cregar to have been assigned to this case." Comp July 16, 2002 Resp. to Prehearing Ord. at 20. In reply to the question of what factual issues would be adjudicated should a hearing be held in this appeal, the Petitioners cite issues regarding the ALJ's "conduct and questioned assignment to this case, including but not limited to collusion between OPM, HUD and DOL regarding the assignment" of the ALJ. *Id.*

c. Arguments regarding the ALJ's grounds for disqualifying Counsel

The Petitioners challenge the ALJ's imposition of sanctions for statements made by Counsel as inconsistent with certain aspects of an attorney's role in the legal system. The Petitioners cite an attorney's legitimate interest in improving the legal system under Canon 8 of the Model Code of Professional Responsibility and an attorney's obligation to zealously represent his client's interests. Comp. July 16, 2002 Resp. to Prehearing Ord. at 6-7, 7-8, 9, 10,

11, 13, 16. The Petitioners also cite protections extended to criticism of government officials and judges as an exercise of free speech under the First Amendment to the Constitution. *Id.* at 6-7, 7-8, 9, 10, 11.

Relevant to the ALJ's conclusion that Counsel had made a false statement regarding the circumstances surrounding the ALJ's selection under 5 C.F.R. § 930.213 to hear the *Greene* whistleblower case, the Petitioners do not deny that Counsel made allegations of impropriety in the Section 930.213 assignment process but instead reiterate those allegations. Comp. July 16, 2002 Resp. to Prehearing Ord. at 1, 7, 18; *see* Ord. of Disqualif. at 2-3, 19-23; *see also* OSC at 3. The Petitioners also argue that the evidence on which the ALJ relied is inadequate to establish that Counsel's allegations of impropriety are false, and they cite evidence in the record that they contend supports the allegations. Comp. July 16, 2002 Resp. to Prehearing Ord. at 1, 18, 21.

Pertinent to the ALJ's further conclusion that the Complainant's Counsel had made insulting, abusive and unprofessional statements about the ALJ and other government officials, the Petitioners do not deny that the statements identified by the ALJ were made by Counsel. Instead, the Petitioners contend that such statements were properly made in the interest of Counsel's professional obligation to zealously represent his client and to seek improvement in the legal system. Comp. July 16, 2002 Resp. to Prehearing Ord. at 9, 10, 11, 13, 15-20.

The Prehearing Order asked the Petitioners to address legal authority concerning an attorney's obligation "to be scrupulous in making truthful statements to a tribunal, whether of law or fact." Prehearing Ord. at 4. The Petitioners do not address such authority but instead assert that "EPA has been less than candid with the tribunal . . ." and they comment on certain aspects of the Complainant's whistleblower complaint against EPA. Comp. July 16, 2002 Resp. to Prehearing Ord. at 18-19.

Relevant to the ALJ's finding that Counsel had failed to follow the ALJ's direction to refrain from improper and misleading use of string citations to legal authorities, the Petitioners raise two points. Specifically, they contend that the ALJ's directive regarding citations is ambiguous and also is inconsistent with common practice in the legal profession. Comp. July 16, 2002 Resp. to Prehearing Ord. at 19, 22-23.

ANALYSIS

The relevant Part 18 regulations

The ALJ relied on three regulations from the Rules of Practice and Procedure at 29 C.F.R. Part 18 as authority for his disqualification of Counsel. Ord. of Disqualif. at 2; OSC at 4. The first, Section 18.29, is a general provision regarding an ALJ's authority as the presiding official in matters brought before him pursuant to Part 18. 29 C.F.R. § 18.29, Authority of

administrative law judge.[7] The ALJ based his disqualification determination on the criteria provided by the other two regulations, Sections 18.34, Representation, and 18.36, Standards of conduct. Ord. of Disqualif. at 17-25. Respectively, those regulations concern the procedures to be followed and the criteria to be applied in addressing an attorney's lack of qualification to serve as a representative in cases before the OALJ and an attorney's misconduct in a particular case. 29 C.F.R. §§ 18.34(g)(3), 18.36.

Section 18.34(g)(3) provides, in relevant part:

> (g) (3) *Denial of authority to appear.* The administrative law judge may deny the privilege of appearing to any person, within applicable statutory constraints, e.g., 5 U.S.C. 555, who he or she finds after notice of and opportunity for hearing in the matter does not possess the requisite qualifications to represent others; or is lacking in character or integrity; has engaged in unethical or improper professional conduct; or has engaged in an act involving moral turpitude. . . .

Section 18.36 provides:

> (a) All persons appearing in proceedings before an administrative law judge are expected to act with integrity, and in an ethical manner.
>
> (b) The administrative law judge may exclude parties, participants, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards or orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. The administrative law judge shall state in the record the cause for suspending or barring an attorney or other representative from participation in a particular proceeding. Any attorney or other representative so suspended or barred may appeal to the Chief Judge but no proceeding shall be delayed or suspended pending disposition of the appeal; provided, however, that the administrative law judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney or representative.

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[7] Section 18.29 does provide authority for an ALJ, "where authorized by statute or law," to seek enforcement of remedial action if "any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same . . . ." through Federal District Court action. 29 C.F.R. § 18.29(b). Such enforcement action is not involved in this case, however, and the ALJ obviously invoked only the "General powers" provision of Section 18.29(a).

The ALJ in the instant case not only excluded Counsel from participation in the *Greene* whistleblower proceeding, he also barred him from appearing before the ALJ in any case in the future. The in futuro bar imposed by the ALJ, although limited to cases that come before that ALJ, goes beyond the sanction of exclusion from an on-going adjudication that is provided by Section 18.36, and must be viewed as action taken pursuant to Section 18.34(g)(3).

The application of either Section 18.34(g)(3) or Section 18.36 by administrative law judges has rarely been the subject of review by the Secretary or the ARB. The most fully developed discussion of OALJ authority to discipline attorneys for misconduct is found in *Rex v. Ebasco Servs.,* a case in which an administrative law judge recommended imposition of sanctions provided by Rule 11 of the Federal Rules of Civil Procedure against two attorneys. When *Rex* reached the Secretary for review, the Wage and Hour Administrator filed an amicus brief advocating rejection of the administrative law judge's recommendation. The Administrator urged that, since Part 18 regulations provide sanctions for attorney misconduct, it was inappropriate to resort to the Federal Rules of Civil Procedure pursuant to 29 C.F.R. § 18.1(a), and the Secretary agreed. *Rex*, 87-ERA-6, -40, slip op. at 3-7 (Sec'y Mar. 4, 1994). The Secretary discussed the sanctions provided by Sections 18.34(g)(3) and 18.36. *Id.* at 4-7. However, the Secretary dismissed the whistleblower complaint in *Rex* and, therefore, regardless of whether the attorneys had engaged in the conduct prohibited by Section 18.36, the issue of the attorneys' exclusion from a particular proceeding before an administrative law judge under Section 18.36 was rendered moot. *See id.* at 4, 5-6. Imposition of sanctions in the form of a denial of the attorneys' authority to appear in other cases pursuant to Section 18.34(g)(3) was an open question, however. The Secretary accordingly noted that administrative law judges presiding over cases in which those attorneys entered appearances in the future could take action pursuant to Section 18.34(g)(3). *Id.* at 7.

Within weeks after issuance of the Secretary's March 4 decision in *Rex*, the Chief Administrative Law Judge sent a written request to the Secretary, asking that the Secretary reopen the case and remand it to the OALJ for appointment of an administrative law judge to hold a hearing on the qualifications of the two attorneys to appear in whistleblower cases arising under 29 C.F.R. Part 24.[8] Following briefing by the parties and by the Wage and Hour Administrator, the Secretary issued an order granting the request for remand of the case. In so doing, the Secretary expressly agreed with both the recommendation of the Chief Administrative Law Judge and the position of the Administrator that a single hearing regarding the attorneys' qualifications under Section 18.34(g)(3) would serve the interest of fairness to the two attorneys and avoid the administrative burden that would result from repetitive hearings held in each Part 24 case in which the attorneys entered an appearance. *Rex,* Order, slip op. at 2-4 (Sec'y Oct. 3, 1994). The Secretary noted that the ALJ's recommended decision on remand following the hearing would be subject to review by the Secretary, and held that if the recommended decision were upheld, that decision would be binding in pending and future cases in which the two

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[8] Chief Judge Vittone's predecessor, Nahum Litt, was the Chief Administrative Law Judge at that time.

attorneys entered appearances. *Id.* at 3-4. Following the assignment of an administrative law judge on remand and the initiation of proceedings before that judge, however, a settlement agreement was entered into between the two attorneys and the Solicitor of Labor, who represented the Wage and Hour Administrator. The Secretary approved that agreement. *Rex*, Ord. Approving Settlement and Dismissal of Proceedings (Sec'y July 11, 1995).

A number of Secretarial decisions address an administrative law judge's authority to exclude a party or a party's representative from participating in a case pursuant to Section 18.36, but none of those decisions discusses the procedure to be followed before imposition of the Section 18.36 sanction. *See, e.g., Holub*, slip op. at 4-8 (Reversing ALJ's conclusion that attorney must be disqualified from participation in a case under Section 18.36 based on the likelihood that prohibited ex parte communications had occurred or would later occur);[9] *Cable v. Arizona Pub. Serv. Co.*, 90-ERA-15, slip op. at 6 n.6 (Sec'y Nov. 13, 1992) (Noting that issue of Section 18.36 exclusion of attorney from participation in a particular case was rendered moot by voluntary dismissal of the complaint); *Stack v. Preston Trucking Co.*, 89-STA-15, slip op. at 7-9 (Sec'y Apr. 18, 1990) (Rejecting administrative law judge's recommendation that pro se complainant "be warned that continued transgression may bring financial liability for hearing expenses," based on Secretary's conclusion that Rule 11 sanctions were not available).[10]

Distinctions between Section 18.34(g)(3) and Section 18.36

The ALJ properly considered both Sections 18.34(g)(3) and 18.36 to be relevant to an attorney's professional standing and conduct in cases adjudicated before the DOL OALJ. Ord. of Disqualif. at 18, 24, 25. He did not, however, address the differing purposes served by the respective regulations and the distinct procedural requirements contained in each. See Ord. of Disqualif. at 2. *But see id*. at 11 (noting that Section 18.36(b) provides for appeal to the Chief ALJ rather than the ARB). The procedure to be followed before imposition of each sanction is particularly important, as each regulation requires a procedure that is consistent with the regulation's purpose.

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9 The substantive issue in *Holub* was whether an attorney should be excluded from representing a party in a whistleblower case based on the attorney's contemporaneous representation of the then-Chief Administrative Law Judge in another forum. The Secretary reversed the administrative law judge's disqualification order based on the determination that no impermissible ex parte communications had occurred, that there was no actual ethical conflict in the attorney's concurrent representation of the party in the whistleblower case and the Chief Administrative Law Judge in another forum, and that the "threat of taint" to the whistleblower proceeding was remote. *Holub*, slip op. at 4-8.

10 In *Stack*, the Secretary also noted that the Section 18.34(g)(3) denial of authority to appear provision is expressly inapplicable to a party acting pro se. *Stack*, slip op. at 8 n.12.

By its terms, Section 18.34(g)(3) specifically authorizes denial of an attorney's authority to represent a party if the attorney "does not possess the requisite qualifications to represent others or is lacking in character or integrity, has engaged in unethical or improper professional conduct, or has engaged in an act involving moral turpitude." 29 C.F.R. § 18.34(g)(3); *see* excerpt *supra*.[11] Before an attorney can be barred from appearing as a party's representative under Section 18.34(g)(3), the attorney must be given "notice of and opportunity for hearing" regarding the foregoing criteria. *Id.* The Secretary's decision and subsequent remand order in *Rex* confirm that a formal hearing is contemplated by that regulation. The Secretary's direction in *Rex* that the Solicitor of Labor bear the burden of proving, by a preponderance of the evidence, the allegations of misconduct against the attorneys reflects the gravity of a bar under Section 18.34(g)(3) and the need for a fully developed record to support such decision. *Rex*, Oct. 3, 1994 Ord., slip op. at 4-5.

In contrast to the "notice of and opportunity for hearing" procedure of Section 18.34(g)(3) discussed in *Rex*, Section 18.36 provides for a more summary process, which facilitates the exclusion of a representative from further participation in a case being adjudicated before an administrative law judge. Specifically, Section 18.36 requires only that the case record reflect the reason for the administrative law judge's exclusion of the attorney and it provides for an appeal by the excluded attorney to the Chief Administrative Law Judge. 29 C.F.R. § 18.36(b); *see* excerpt *supra*. Section 18.36(b) reinforces the abbreviated nature of the process by requiring that proceedings in the case from which the representative was excluded are not to be suspended during the pendency of the representative's appeal. *Id.* Although the exclusion of a representative from further participation in a case is not a trivial matter, its effect is obviously less far-reaching than a disqualification order under Section 18.34(g)(3) that bars an attorney from representing parties in future cases. The summary procedure outlined by Section 18.36(b) is similar to that established by other Federal agencies to ensure that a hearing officer can readily halt disruptive behavior that would otherwise defeat the conduct of orderly proceedings. *See, e.g.*, 29 C.F.R. § 102.177(b) (2002) (N.L.R.B.); 29 C.F.R. § 2200.104(b) (2002) (Occup. Safety and Health Rev. Comm.); 12 C.F.R. § 308.109(d) (2002)(Fed. Dep. Ins. Corp.); 5 C.F.R. § 1201.31(d) (Merit Sys. Protection Bd.); *see generally* 62 Fed. Reg. 62689 (1997) (Interim rule; requests for comments, 5 C.F.R. Part 1201; discussing revisions to §§ 1201.31 and 1201.41 to provide explicit notice that an MSPB judge may exercise the authority to exclude a person from a proceeding for misconduct "at a hearing or at any other point in a proceeding" before the judge).

The formal hearing requirement of Section 18.34(g)(3)

The procedure followed by the ALJ in imposing sanctions against the attorney in this case does not comply with the "notice and opportunity for hearing" requirement of Section 18.34(g). As the Secretary's remand order in *Rex* makes clear, Section 18.34(g)(3) requires that

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11 Section 18.34(g)(1) describes the professional licensing requirements imposed on attorneys who practice before the Department of Labor Office of Administrative Law Judges. 29 C.F.R. § 18.34(g)(1).

the attorney be provided an opportunity to respond in a formal hearing to a challenge to his or her fitness to represent a party, or parties. The process followed by the ALJ does not comply with the Section 18.34(g)(3) procedure. We accordingly cannot uphold his order barring Counsel from appearing as a representative or serving in an advisory capacity to a party in any matter to come before the ALJ in the future.

The procedural requirements of Section 18.36(b)

a. Before the ALJ

The procedural requirements of Section 18.36(b) differ considerably from those of Section 18.34(g)(3). The procedure followed by the ALJ in this case clearly fulfills the requirements of Section 18.36(b). Specifically, the ALJ ensured that the record properly reflected the grounds on which he based his disqualification order. Ord. of Disqualif. at 8-25; see 29 C.F.R. § 18.36(b) and excerpt *supra*. Indeed, the ALJ assiduously analyzed the misconduct that prompted him to take action under Section 18.36. Ord. of Disqualif. at 8-25. Furthermore, the ALJ gave the Petitioners ample notice that the Complainant's Counsel could be excluded from participation in the case if he continued to engage in certain unprofessional conduct. On November 13, 2001, more than two months before the ALJ issued the OSC, the ALJ issued a prehearing order in which he advised counsel to both parties that further uncivil language or conduct would subject the offending representative to sanctions, including exclusion from participation in the case. OSC at 3; Nov. 13, 2001 Summary of Prehearing Conference, Notice of Hearing and Order at 3-4.

In the January 28 OSC, the ALJ clearly explained the grounds on which he would base the imposition of sanctions against the Complainant's Counsel unless good cause for not taking such action were shown, by February 11. OSC at 1-4. Although neither the Complainant nor the Complainant's Counsel filed a response to the ALJ's OSC, the ALJ took a further step before issuing the disqualification order on June 20, 2002. He examined the appeal letter that the Complainant filed with the ARB on February 11, 2002 – to pursue the ALJ's recusal – to determine whether that document contained argument responding to the points covered in the OSC. Ord. of Disqualif. at 5. Before issuing the Order of Disqualification on June 20, 2002, the ALJ had clearly met the procedural requirements of Section 18.36. The Petitioners' argument that the ALJ failed to provide adequate notice of his intention to issue the disqualification order pursuant to Section 18.36 is thus devoid of merit.

The Petitioners' related contention that the Complainant's filing of an interlocutory appeal with the ARB divested the ALJ of jurisdiction to issue the Order of Disqualification similarly lacks merit. The Petitioners have not cited, and we have not found, any authority to support the view that a party's filing of an appeal from an interlocutory order automatically and immediately divests an administrative law judge of jurisdiction. Furthermore, the course of conduct followed by the Complainant and her Counsel after the ALJ issued the OSC left them wholly vulnerable to issuance of the ALJ's Order of Disqualification.

Specifically, Counsel failed to either file a response to the ALJ's OSC or to request an

extension of the February 11, 2002 response deadline. In addition, on February 11 the Complainant asked the ALJ to stay proceedings in the *Greene* complaint until the Complainant's interlocutory appeal seeking the ALJ's disqualification was disposed of by the ARB, but the Complainant did not first request that the ALJ certify the question of his disqualification to the Board for interlocutory review. *See* Ord. of Disqualif. at 2 n.1. The Board has repeatedly reiterated the principle first enunciated by the Secretary in the decision of *Plumley v. Fed. Bureau of Prisons*, 86-CAA-6 (Apr. 29, 1987), that an administrative law judge's non-final rulings should be subject to interlocutory review only if the judge certifies the question for review under a procedure akin to that provided for United States District Court judges at 28 U.S.C.A. § 1292(b) (West 1993).[12] *See, e.g., Dempsey v. Fluor Daniel, Inc.*, ARB No. 01-075, ALJ No. 01-CAA-5, Remand Ord. (ARB May 7, 2002). The Board has left open the possibility that a party's failure to seek such certification may not, in all circumstances, preclude ARB review of an interlocutory order. *Puckett v. Tennessee Valley Auth.*, ARB No. 02-070, ALJ No. 2002-ERA-15, Fin. Ord. Denying Interlocutory App. (ARB Sept. 26, 2002). Nonetheless, by failing to first seek certification of the issue and by requesting the stay of proceedings on the last day of the OSC response period, the Complainant and her Counsel acted at their peril as regards the attorney disqualification issue. Indeed, the foregoing sequence of events suggests that the Petitioners recklessly pinned their hopes for success in the attorney disqualification issue on prevailing in the judge disqualification issue before the ARB. However, the Board rejected the petition for review as an impermissible appeal of an interlocutory order and dismissed it on September 18, 2002. *See Greene*, n.4 *supra*.

The Petitioners' contention that the ALJ was divested of jurisdiction is tantamount to a suggestion that a party whose representative has provoked an ALJ to take action under Section 18.36 can easily thwart the ALJ's authority by filing an interlocutory appeal with the ARB. Such practice would undermine the ALJ's obligation to ensure the orderly conduct of the hearing and the timely resumption of proceedings following a Section 18.36 exclusion. Section 18.36(b)

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12 Section 1292(b) of Title 28 of the United States Code provides:

> 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.

The OALJ regulation that outlines the procedure for seeking disqualification of an administrative law judge provides no indication that the *Plumley* principle would not be equally applicable to an interlocutory appeal taken from a judge's denial of a motion for his disqualification. 29 C.F.R. § 18.31.

expressly provides that "no proceeding shall be delayed or suspended pending disposition of the appeal" from a judge's disqualification order except "for a reasonable time for the purpose of enabling the party to obtain another attorney or representative." 29 C.F.R. § 18.36(b); *see* excerpt *supra*. Section 18.36 thus provides no support for the Petitioners' contention that the ALJ acted improperly by issuing the Order of Disqualification in June 2002 while the Complainant's interlocutory appeal was pending before the ARB.

We similarly reject the Petitioners' assertion that the ALJ should have waited to impose the disciplinary sanction of excluding Counsel from participation in the *Greene* case until he had completed adjudication of the whistleblower complaint. The purpose of Section 18.36 is to allow the ALJ to bring an immediate halt to disruptive behavior and to ensure that the offending participant poses no further obstacle to the orderly conduct of proceedings. To delay the imposition of sanctions against a party's representative until after the conclusion of adjudication would defeat that purpose. We therefore reject the Petitioners' contentions that the Order of Disqualification cannot be upheld under Section 18.36 because the ALJ failed to follow proper procedure in issuing the Order.

b. Before the ARB

Section 18.36(b) provides that an attorney or other representative who has been suspended from participation in a particular case by an administrative law judge "may appeal to the Chief Judge . . . ." 29 C.F.R. § 18.36(b), excerpt *supra.* The regulation does not provide any further guidance concerning the procedure to be followed in such an appeal. *Id.* The Petitioners urge that a formal hearing should be held to allow them to adduce testimony concerning the ALJ's "conduct and questioned assignment to this case, including but not limited to collusion between OPM, HUD and DOL regarding the assignment" of the ALJ. Comp. July 16, 2002 Resp. to Prehearing Ord. at 20. The Petitioners do not advance any legal argument in response to the Prehearing Order query as to whether they had waived the right to a hearing in this Section 18.36(b) appeal by their failure to respond to the ALJ's OSC. Instead, the Petitioners rely on the bald assertion that "it was error for Judge Cregar to have been assigned to this case." *Id.*

The Petitioners' contentions regarding the ALJ's assignment to the *Greene* case are simply not relevant to the question of whether the Petitioners waived their right to a hearing concerning the misconduct cited in the Order of Disqualification. Furthermore, the Petitioners have not cited any extenuating circumstances to justify Counsel's failure to respond to the OSC before the ALJ. As demonstrated by our previous discussion of the Complainant's filing of the interlocutory appeal with the Board, that filing does not provide justification for Counsel's failure to respond to the ALJ's OSC.

By failing to respond to the ALJ's OSC, the Petitioners failed to contest the facts cited in support of the OSC by the ALJ. The Petitioners also waived their right to contest those facts at a later stage of the proceeding. *Cf.* 29 C.F.R. § 18.5(b), (d)(1) (Responsive pleadings – answer and request for hearing, Default; Orders to Show Cause). We will, nonetheless, review their contentions that challenge the rationale on which the ALJ relied in his Order of Disqualification.

The grounds on which the ALJ relied under Section 18.36

a. The ALJ's findings and conclusions

The ALJ ultimately determined that the three types of misconduct that he had identified in this case – 1) making a false statement in a pleading regarding the ALJ's selection to hear the *Greene* case; 2) making insulting, abusive and unprofessional statements regarding the ALJ and other Federal officials; and 3) violating the ALJ's written prehearing order by filing pleadings containing inappropriate and uncivil language and failing to refrain from improper and misleading use of string citations – violated the standards established by Section 18.36. Ord. of Disqualif. at 24, 25; *see id.* at 18. As noted by the ALJ, Section 18.36 expressly requires that any person appearing in OALJ proceedings "act with integrity, and in an ethical manner" and specifies the "refusal to adhere to reasonable standards of orderly and ethical conduct" and the "refusal to comply with directions" among its prohibited actions. 29 C.F.R. § 18.36; *see* excerpt *supra.*

The ALJ found that Counsel had knowingly, or with reckless disregard for the truth, made a false statement regarding the integrity of the ALJ and other Federal officials in the January 8, 2002 motion for the ALJ's recusal that was filed with the ALJ. Ord. of Disqualif. at 2-3, 19-20, 23. Specifically, the ALJ found that Counsel's assertion that the Memorandum of Understanding (MOU) between HUD and DOL regarding the ALJ's assignment to hear the *Greene* DOL case "was established in secrecy, with HUD and DOL OALJ picking HUD and one of its judges to decide the case before OPM was contacted" was made without adequate support and also with reason to know that the statement was false. *Id.* at 3, 19-20; *see* n.1 *supra* regarding OPM assignment of ALJ pursuant to 5 C.F.R. § 930.213 (2001).

The ALJ further found that Counsel included several statements regarding the ALJ and other Federal officials in various pleadings filed in *Greene*, particularly in January 2002, that were insulting, abusive and unprofessional. Ord. of Disqualif. at 3-5, 23-24. The ALJ found similar statements contained in the petition for interlocutory review that Counsel filed with the ARB on behalf of the Complainant on January 28, 2002, and in a January 9, 2002 letter sent to the Secretary to complain about the terms of the MOU into which HUD and DOL entered regarding the ALJ's assignment to hear the *Greene* case. Ord. of Disqualif. at 3-5. Chief among the unprofessional statements cited by the ALJ are Counsel's statements implying that the ALJ, EPA, HUD, OPM and DOL OALJ officials had colluded to ensure that the ALJ protected what Counsel characterized as EPA's "prerogatives" to harass administrative law judges like the Complainant in the *Greene* case while furthering the ALJ's own professional goals. *Id.* In addition, the ALJ cited other statements Counsel made that can fairly be summarized as personal attacks upon the ALJ as opposed to assignments of error to his rulings. For example, Counsel makes general statements regarding the ALJ's conduct of the proceedings, *e.g.*, that his rulings had been "nasty, brutish and short (and bordering dangerously on bullying)," rather than framing such challenges as arguments that specific rulings are erroneous under relevant legal standards. *Id.* at 3. The ALJ also cited Counsel's statements in the letter to the Secretary that assert that the ALJ intended to adjudicate the *Greene* case with the least possible investment of his time, in order to benefit HUD financially under the terms of the MOU between HUD and DOL. *Id.* at 4.

The ALJ noted that disrespectful and offensive personal attacks on a judge violate an attorney's "'professional obligation to demonstrate respect for the courts.'" *Id.* at 21 (quoting *Williams v. Lockheed Martin Corp.*, ARB Nos. 99-054, 99-064, ALJ Nos. 98-ERA-40, -42 (ARB Sept. 29, 2000)). The ALJ also contrasted Counsel's offensive statements with properly articulated arguments that fulfill an attorney's ethical responsibility to provide zealous representation. Ord. of Disqualif. at 23-24. The ALJ quoted from one State court decision concerning the difference between well-reasoned argument, which more effectively advocates a client's cause, and indignation, belligerence, theatrics, and "overheated rhetoric." *Id.* at 23. In addition, the ALJ cited a State court decision regarding an attorney's obligation to uphold the dignity of the courts by refraining from statements in pleadings or in open court that promote disrespect for the law and for the judicial system. *Id.* at 23-24. The ALJ concluded that Counsel's statements attack "the credibility, integrity, and impartiality of two judges [the ALJ and Associate Chief Judge Thomas M. Burke], the administrative hearing system, and other government officials" involved in the ALJ's appointment to hear the *Greene* whistleblower complaint. *Id.* at 24.

The ALJ also found that Counsel had failed to comply with two aspects of the prehearing order that the ALJ issued on November 13, 2001. First, the ALJ found that the aforementioned offensive statements made by Counsel violated the ALJ's directive that both counsel conduct themselves in a "civil and professional" way and refrain from such inappropriate conduct as "terminating a telephone conversation with opposing counsel by hanging up" and the use of "emotionally laden language" in pleadings. Ord. of Disqualif. at 5-6, 24. Secondly, the ALJ found that Counsel had failed to comply with guidelines for the use of citations to legal authority, which were set out in the ALJ's prehearing order as follows:

> [R]efrain from using string cites in support of a particular point in motions or pleadings. It is usually unnecessary to cite any cases other than the most recent or, alternatively, the seminal case for a particular proposition. Only if multiple cases are necessary to articulate different aspects of the contention are multiple citations called for. Citations should be to specific pages of the case, and cited cases should be followed by brief synopsis, in parentheses, of the proposition for which the case stands.

Ord. of Disqualif. at 6 (quoting from Nov. 13, 2001 Summary of Prehearing Conference, Notice of Hearing and Order at 4).

The ALJ observed that inaccurate and misleading citations to legal authorities wastes judicial resources, and he discussed three examples of citations to legal authority found in documents Counsel filed in January 2002. One example is a citation to a case that clearly does not support the proposition for which it is offered. Ord. of Disqualif. at 6-7 (quoting from Comp. Notice of Filing and Motion RE: J. Cregar's Status at 2). The ALJ identified another example, which contains citation to eighteen court decisions and one law review article in support of the

proposition that, "Courts have repeatedly authorized individual liability for retaliators and harassers and managers who commit or tolerate it." Ord. of Disqualif. at 7 (quoting from Comp. Judge J. F. Greene's Resp. to EPA's Motion to Dismiss or in the Alternative for Summ. Decision and Her Motion to Lift Discovery Stay and Her Renewed Motion for Partial Summ. Judgment at 3). None of Counsel's nineteen citations in that example is accompanied by an explanatory parenthetical. *Id.* The ALJ found that Counsel failed to explain why the cited cases were relevant to the issue of whether a Federal agency employee can be considered an employer and thus a respondent in the *Greene* whistleblower case, which arises under the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995). Ord. of Disqualif. at 7-8. The ALJ also noted that Counsel failed to identify specific pages in the cited authorities to assist the reviewer in discerning what passages Counsel believed to be relevant. *Id.* The ALJ further determined that the cases cited were apparently irrelevant to the issues involved in the *Greene* case. *Id.*

The third example of a problematic citation is contained in Counsel's January 2, 2002 letter to Judge Burke, which requested reconsideration of Burke's December 21, 2001 denial of reconsideration. The December 21 order Burke issued denied the Complainant's request that the *Greene* case be consolidated with a later whistleblower complaint the Complainant filed, for reassignment to a DOL administrative law judge rather than the ALJ. Dec. 21, 2001 Ord. Denying Motion to Reconsider the Use of the Ofc. of Pers. Mgmt. to Select a Presiding ALJ. The ALJ noted that Counsel "cited a number of cases in support of a proposition that is both obvious and not at issue." Ord. of Disqualif. at 8. Specifically, Counsel cited twenty-three cases, two in the body of the reconsideration request and twenty-one in a footnote, in support of the proposition that, "A 'fair trial [and appeal] in a fair tribunal is a basic requirement of Due Process.'" *Id.* The ALJ noted that, although Counsel provided specific page citations for six of the twenty-three case citations, he did not provide a parenthetical synopsis for any of the cases. *Id.*

The ALJ discussed the fundamental role that attorney compliance with judicial directives plays in maintaining the integrity of the legal system. Ord. of Disqualif. at 24-25. The ALJ then concluded that, by making pejorative statements about the ALJ, opposing counsel and other Federal officials, and by continuing to use inaccurate and misleading citations to legal authorities, Counsel had refused to comply with directions and to adhere to reasonable standards of orderly conduct. *Id.* at 25.

In addition to discussing in detail Counsel's conduct in the *Greene* case, the ALJ outlined reprimands and other sanctions that had previously been imposed against Counsel in a number of cases. Specifically, the ALJ summarized eleven instances in eight different cases where Counsel's misconduct prompted action by DOL administrative law judges, previous panels of the ARB, the Special Workers Compensation Appeals Panel of the Supreme Court of Tennessee, and the United States District Court for the Eastern District of Tennessee.[13] Ord. of Disqualif. at

[13] Three of the cases involved whistleblower complaints that were appealed to the ARB following adjudication by a DOL administrative law judge and in which both the administrative law judge and the ARB addressed Counsel's misconduct. Ord. of Disqualif. at 8-12.

8-17. The ALJ determined that this history of misconduct demonstrates that Counsel was on notice that the type of conduct he had engaged in before the ALJ was unacceptable. *Id.* at 17.

Finally, the ALJ stated that Counsel's misconduct in the *Greene* case had begun at the outset of the adjudication before the ALJ and had continued despite the ALJ's November 13, 2001 written warning. Ord. of Disqualif. at 25. In addition to failing to heed the ALJ's written warning, the ALJ noted that Counsel had failed to avail himself of the opportunity to respond to the OSC with an explanation or apology. *Id.* Based on these factors, as well as the long history of misconduct in previous cases, the ALJ concluded that Counsel had demonstrated that he was "unable or unwilling to conform his behavior to professional standards." *Id.*

b. Discussion

In outlining the distinctions between Sections 18.34(g)(3) and 18.36, we explained that Section 18.36 ensures that the administrative law judge can readily halt disruptive behavior that would otherwise interfere with orderly proceedings. The conduct of proceedings in an orderly manner is critical to the fair, efficient administration of the law, and the foundation of order in such proceedings is the respect the parties and their representatives show for the presiding officer. *See* Atty. Gen. Manual on the Administrative Procedure Act, V §6(a), p. 66 (1947); *In re Weirton Steel Co.*, 8 NLRB 581, 582-83 (1938), *aff'd in relevant part sub nom., Nat'l Labor Relations Bd. v. Weirton Steel Co.*, 135 F.2d 494, 496-97 (3d Cir. 1943). The ALJ properly compared the Section 18.36 mandate that representatives comply with "reasonable standards of orderly and ethical conduct" with an attorney's professional obligation to show respect for judges and other government officers. Ord. of Disqualif. at 19 (citing MRPC Preamble); *see Rockefeller v. Carlsbad Area Office, United States Dep't of Energy*, ARB Nos. 99-002, -063, -067, -068, ALJ Nos. 98-CAA-10, -11; 99-CAA-1, -4, -6, slip op. at 17 n.10 (ARB Oct. 31, 2000)(Citing Preamble and Rules 3.5 and 8.2 of the MRPC regarding attorneys' obligation to demonstrate respect for the courts as relevant to Section 18.36). The record before us clearly supports the ALJ's conclusion that Counsel failed to fulfill his responsibility to address and respond to the ALJ in a respectful manner.

As we discuss below, the ALJ properly determined that Counsel had overstepped the bounds of zealous representation and responsible criticism of judges and the legal system by making unfounded remarks that impugn the integrity of the ALJ and other Federal officials, and by making personally offensive statements regarding the ALJ, other Federal officials, and opposing counsel. In addition, the ALJ properly concluded that Counsel had violated Section 18.36 by failing to follow the ALJ's directives regarding the use of emotionally-laden and offensive language in pleadings and regarding the proper use of citations to legal authorities. The foregoing grounds, along with the history of unprofessional conduct engaged in by Counsel in previous cases and Counsel's failure to respond to the ALJ's OSC, provide more than adequate support for the ALJ's exclusion of Counsel from further participation in the *Greene* case.

It is significant that the Petitioners do not contest the factual bases for the ALJ's

disqualification order.[14] *See* Comp. July 16, 2002 Resp. to Prehearing Ord. at 18-19. Instead, the Petitioners reiterate the assertions that DOL OALJ improperly contacted the ALJ before contacting OPM and that collusion was involved in the ALJ's assignment to hear the *Greene* case. *Id.* at 1 (referring to "long-concealed ultra vires processes" engaged in by DOL OALJ, OPM and HUD, and stating that the ALJ was "hired covertly in July 2001"). Also significant are the Petitioners' further personal attacks on the ALJ. *Id.* at 10 (stating that the ALJ is "intolerant toward protected activity"), 18-19 (stating that the ALJ's attitude "is that it is wrong to criticize 'the government' and its lawyer, but that EPA may be abusive toward Judge Greene with impunity.").

The Petitioners challenge the adequacy of the evidence to support the conclusion that Counsel knowingly made a false statement regarding the circumstances of the ALJ's assignment to the *Greene* case, contending that Counsel cannot be required to accept the statements of Judge Burke and OPM officials concerning the inter-agency communications involved in the ALJ's assignment. Comp. July 16, 2002 Resp. to Prehearing Ord. at 18, 21. In view of the ALJ's alternative conclusion that Counsel made the accusation of improper contacts and collusion with reckless disregard for the truth of those statements, however, it is unnecessary for us to determine whether or not Counsel knowingly made a false statement. The record that is before us establishes that Counsel acted with reckless disregard for the truth when he asserted that improper contacts between DOL OALJ and the ALJ occurred and facilitated a conspiracy to deny the Complainant a full and fair hearing in her whistleblower complaint.

As the ALJ determined, the five factors cited in the Complainant's January 8, 2002 motion for the ALJ's recusal fall short of supporting Counsel's statement that the MOU was "established in secrecy" and that the ALJ was selected by DOL OALJ to hear the case before DOL contacted OPM. *See* Ord. of Disqualif. at 19-20.[15] Even if one assumes that the five

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14 Our examination of the documents cited by the ALJ confirms the accuracy of his recitation of Counsel's statements. *See* Comp. Notice of Filing in Support of Motion for Recon. and Supp. Citations RE: *Ex Parte* HUD-OPM-DOL MOU dated Jan. 2, 2002 at 2-5; Comp. Request for Leave to Respond to Respondents' Jan. 2 & 3, 2002 Filings in form of ltr. to J. Burke dated Jan. 3, 2002; Comp. Notice of Filing and Motion to Strike Improper Filings dated Jan. 24, 2002 at 1-2; Comp. ltr. dated Jan. 9, 2002 to Secretary of Labor Elaine L. Chao at 2-4.

15 Complainant's Notice of Filing and Motion RE: Judge Cregar's Status, which was filed with the ALJ on January 8, 2002, listed five factors as support for the assertion that, "[T]he MOU was established in secrecy, with HUD and DOL picking HUD and one of its judges to decide this case before OPM was contacted." The motion states that DOL OALJ:

> (1) commenced private communications between HUD and DOL on judicial selection of Judge Cregar in this case while this case was still pending before OSHA, commencing July 23, 2001 (CX-9 at 34-37). DOL and HUD talked *before DOL ever sought or received approval from OPM to hire a judge from another agency.*
> (2) obtained a "draft letter" from OPM on July 26, 2001 (CX-9A at 2, enclosed);

factors specified in the January 8 motion are true, those factors do not lead to a "reasonable, objective" conclusion that improprieties occurred. *See* Ord. of Disqualif. at 22 and cases there cited; n.15, *supra.* Furthermore, one of the factors, if not plainly false, certainly derives little or no support from the documents cited in the January 8 motion. The July 23 and 24, 2001 e-mail messages among administrative staff personnel at DOL OALJ and HUD regarding the MOU do not establish that "DOL and HUD talked *before DOL ever sought or received approval from OPM to hire a judge from another agency,"* as the Complainant's motion attests (emphasis in original). Indeed, the extremely brief e-mail messages in no way refer to any communications that either HUD or DOL OALJ personnel may have had with OPM. CX 9 at 34-37.

As the ALJ discussed, an attorney who impugns the integrity of a judge based on "personal feelings or belief, innuendo, suppositions, or rumors, or 'jumping to conclusions'" instead of a sound factual basis acts recklessly and unprofessionally. Ord. of Disqualif. at 22-23 and cases there cited. We thus agree with the ALJ that Counsel made one or more factual allegations with reckless disregard for their truth in Complainant's Notice of Filing and Motion RE: Judge Cregar's Status, which was filed with the ALJ on January 8, 2002.

The ALJ properly confined his analysis of the foregoing issue to the question of what Counsel had reason to believe when he filed Complainant's January 8, 2002 motion. Ord. of Disqualif. at 2-3, 19-20. The ALJ did, however, also refer to other evidence that OPM and DOL OALJ generated after January 8, 2002, and the Petitioners have also referred in this appeal to that evidence as support for their reiteration of the collusion allegation. Ord. of Disqualif. at 4, 20; Comp. July 16, 2002 Resp. to Prehearing Ord. at 18. Those documents provide details regarding telephone conversations among the DOL OALJ, OPM officials and the ALJ that occurred between the time DOL OALJ made an oral request to OPM for detail of a judge to hear the *Greene* case and actually filed a written request with OPM. U.S. Environmental Prot. Agency's Resp. to Comp. Motion RE: J. Cregar's Status dated Jan. 15, 2002 at Exhs. 1-4. Those documents do not support the Petitioners' assertion that DOL OALJ contacted the ALJ before contacting OPM, and do not support the allegation that the ALJ was assigned to hear the case as part of a collusive arrangement. *See id.* The Petitioners have cited no authority to support the proposition that such preliminary oral communications are improper under the relevant statutory and regulatory authority, and we have found none. *See* 5 U.S.C.A. § 3344; 5 C.F.R. § 930.213.[16]

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(3) requested OPM approval on July 31 (CX-9 at 30-31);
(4) got OPM approval two days later, on August 2, 2001 (CX-9 at 29): even though it
(5) did not disclose to OPM the name of the case or parties and other information that OPM's form letter requires. *Compare* CX-9Aat 2 to CX-9 at 30-31.

Complainant's Notice of Filing and Motion RE: Judge Cregar's Status at unnumbered p. 1 (emphasis in original).

16 The two January 11, 2002 statements in the record from OPM officials Jonathan Perez and Raymond Limon indicate that it is standard practice for OPM to initiate a canvassing of candidates

Counsel's statements before the ALJ and the Petitioners' statements in this appeal suggest a lack of familiarity with the basic principle that a presumption of impartiality attaches to the ALJ's actions in hearing the *Greene* case, including his exclusion of Counsel. *See Roberts v. Morton,* 549 F.2d 158, 164 (10th Cir. 1977) and cases there cited, *cert. denied,* 434 U.S. 834. That presumption can be overcome only by proof that the ALJ acted on bias stemming from an extrajudicial source – rather than based on what he learned from his participation in the *Greene* case – or that the proceedings were pervaded by bias demonstrating a deep-seated antagonism that precludes the exercise of fair judgment by the ALJ. *See Reddy v. Commodity Futures Trading Comm.*, 191 F.3d 109, 119-20 (2d Cir. 1999); *Calex Corp. v. Nat'l Labor Relations Bd.,* 144 F.3d 904, 910 (6th Cir. 1998); *see also Liteky v. United States,* 510 U.S. 540, 543-56 (1994) (discussing extrajudicial source concept within context of recusal statute applicable to judges in the Federal courts). The Petitioners' unfounded allegations of collusion in the case assignment process, Comp. July 16, 2002 Resp. to Prehearing Ord. at 1, 18-19, fail to overcome that presumption by proof that the ALJ acted on bias from an extrajudicial source, rather than basing his exclusion of Counsel on his experience following assignment to hear the *Greene* case. The Petitioners' bare assertions that the ALJ harbors animus toward Counsel and is "intolerant of protected activity," Comp. July 16, 2002 Resp. to Prehearing Ord. at 10, 19, similarly do not demonstrate that the proceedings were pervaded by bias that demonstrated an inability to exercise fair judgment on the part of the ALJ. Indeed, the support for the ALJ's action under Section 18.36 that the record provides undermines the contention that the ALJ based his exclusion of Counsel on something other than his experience in the *Greene* case.

We also agree with the ALJ's conclusion that Counsel acted unprofessionally by making statements in pleadings that are personally offensive to the ALJ, other Federal officials and opposing counsel in the *Greene* case. As the ALJ discussed, such statements are readily distinguishable from assignments of error, which properly specify a ruling and frame arguments regarding that ruling in terms of relevant legal standards. *See* Ord. of Disqualif. at 23-24 and cases there cited.

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under Section 930.213 after OPM has received oral or informal notice of an agency's intention to request a detailee under Section 930.213 but before OPM has received a formal written request from the agency. U.S. Environmental Prot. Agency's Resp. to Comp. Motion RE: J. Cregar's Status at Exhs. 2, 3. The Limon and Perez statements are consistent with Judge Burke's letter to counsel of January 14, 2002, which provides a more detailed account of communications surrounding the assignment of the ALJ to hear the *Greene* case than do the two orders issued by Judge Burke regarding the issue on December 21, 2001 and January 3, 2002. *Id.* at Exh. 1. The Perez and Limon statements indicate that OPM frequently must contact a number of administrative law judges to find an available detailee and that finding a judge to hear the *Greene* case was complicated by the fact that the Complainant was at that time a sitting administrative law judge and her spouse was formerly chief administrative law judge at DOL. *Id*. at Exhs. 2,3. Consequently, OPM encountered difficulty in finding administrative law judges who were available for loan under Section 930.213 who did not have the same familiarity with the Complainant and/or her spouse that had precluded assignment of the *Greene* case to any of the DOL administrative law judges. *See id.*

The Petitioners assert that the objectionable statements about the ALJ were "fully justified by his refusal to conduct an on-the-record conference call[], the threatening manner of his off-the-record conference call followed by an eight-page order intimidating, coercing and restraining protected activity; his violations of the First Amendment; and his violation of Judge Greene's rights." Comp. July 16, 2002 Resp. to Prehearing Ord. at 19. The Petitioners' contention is based on a premise that is completely at odds with the standards governing attorney conduct. It is well settled that an attorney is not relieved of his professional obligation to show respect for a hearing officer because the officer issues rulings or takes other action that the attorney views as erroneous. *See, e.g., Office of Disciplinary Coun. v. Mills*, 755 N.E.2d 336, 338 (Ohio 2001). When a representative believes that a hearing officer has committed error in his conduct of proceedings, the proper course is for the representative to respectfully pursue the appropriate challenge, articulated in terms of relevant legal authority, through legitimate channels. *See Bieber v. Dep't of the Army*, 287 F3d 1358, 1361-64 (Fed. Cir. 2002) (addressing challenge to administrative judge's conduct of hearing under 5 U.S.C. § 556(b)*); see also MacDraw, Inc. v. CIT Group Equip. Fin.*, 994 F.Supp. 447, 459-61 (S.D.N.Y. 1997) (observing that attorney in the case has "a history of accusing judges of bias or prejudging cases" and discussing the proper manner in which an attorney who has a reasonable basis should pursue a bias charge).[17]

Although the Petitioners do not challenge the accuracy of the ALJ's factual findings regarding Counsel's citations to legal authority, the Petitioners contend that the ALJ's failure to respond to the Complainant's request for a clarification of his orders precludes the ALJ from relying on the November 13, 2001 prehearing directive requiring proper citation to legal authorities. Comp. July 16, 2002 Resp. to Prehearing Ord. at 19. In addition, the Petitioners characterize the ALJ's directive regarding the proper use of string citations as inconsistent with common practice in the legal profession. *Id.* at 22-23.

The ALJ's prehearing directive that the representatives for both parties in the *Greene* case use proper citations to legal authorities is neither ambiguous nor inconsistent with the presentation of argument by counsel in a comprehensible manner. *See* Summ. of Prehearing Conf., Notice of Hearing and Ord. at 4 (quoted in Ord. of Disqualif. at 6 and *supra*). The ALJ properly observed that citing legal authority without a reasonable basis for believing it to be applicable wastes valuable judicial time and resources. Ord. of Disqualif. at 6; *see id.* at 6-8, 24-25. The ALJ acted fully within his purview as presiding officer when he issued the directive concerning the proper form that citations to legal authority should follow. The ALJ also properly concluded that Counsel had failed to comply with that directive and in doing so had violated

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17 If the Petitioners intend to assign error on any of the bases cited in the above-quoted statement from the Complainant's July 16, 2002 Response to Prehearing Order at 19, they should do so with particularity and in connection with pursuit of the *Greene* whistleblower complaint itself. Our review of the orders issued by the ALJ after the November 2, 2001 telephonic prehearing conference yields no "eight-page order," as is referred to by the Petitioners in the prehearing response. The ALJ's order that summarizes the prehearing conference, which was issued on November 13, 2001, is five pages in length and the ALJ's OSC, issued January 28, 2002, is four pages.

Section 18.36. *See generally Disciplinary Proceeding*, 8 FMSHRC 410, 413-14 (Fed. Mine Safety and Health Rev. Comm. 1986) (discussing attorney's failure to demonstrate respect for administrative law judge and for attorney's obligation to comply with judge's orders).

Based on the foregoing, we conclude that the ALJ properly determined that Counsel violated Section 18.36 by failing to act with integrity and in an ethical manner, and by failing to comply with the ALJ's directions regarding reasonable standards of orderly and ethical conduct, including the proper use of citations to legal authority. *See* 29 C.F.R. § 18.36. We therefore reject the Petitioners' challenge to the ALJ exclusion of Counsel pursuant to Section 18.36.

CONCLUSION and ORDER

Accordingly, the ALJ's Order of Disqualification is affirmed in part and reversed in part. Specifically, the ALJ's Order excluding the Complainant's Counsel from further participation in any capacity before the ALJ in the adjudication of the *Greene* whistleblower case is **AFFIRMED** pursuant to 29 C.F.R. § 18.36, and the ALJ's Order affording the Complainant a period of 30 days in which to obtain another representative or to advise the ALJ of her intention to proceed pro se is also **AFFIRMED.** The ALJ's Order permanently barring the Complainant's Counsel from appearing as a representative or from acting in an advisory capacity to any party in any other matter to come before the ALJ is **REVERSED**, pursuant to Section 18.34(g)(3).

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

Wayne C. Beyer, Administrative Appeals Judge, concurring:

The Complainant in the underlying case (the "*Greene* whistleblower case") is a former Administrative Law Judge, who alleged that Environmental Protection Agency (EPA) officials and others retaliated against her in violation of the whistleblower protection provision of the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995), and other federal laws. Her counsel in that action was Edward A. Slavin, Jr. ("counsel" or "Attorney Slavin"). Presently before the Administrative Review Board ("the Board") is an appeal from a June 20, 2002 order of the then-Acting Chief Administrative Law Judge at the Department of Housing and Urban Development (HUD), William C. Cregar ("the ALJ" or "ALJ Cregar"), who was specially assigned to hear the *Greene* whistleblower case. The order disqualified Attorney Slavin from representing the Complainant in that case and also disqualified him from representing any other party in any other case that might come before ALJ Cregar. Order of Disqualification. For reasons stated below, I

would affirm ALJ Cregar's Order of Disqualification of Attorney Slavin in the *Greene* whistleblower case, but reverse the Order with regard to future cases.

BACKGROUND

The details of the procedural history can be found in my colleagues' opinion. I summarize them here:

In October 2001, the *Greene* whistleblower case was assigned to ALJ Cregar. Although ordinarily a Department of Labor (DOL) ALJ would have had jurisdiction to hear the case, to avoid potential conflicts of interest because the Complainant is the wife of a former Chief ALJ of DOL, it was specially assigned through the Office of Personnel Management (OPM) to a HUD ALJ.

In a November 2, 2001 telephone conference and a November 13, 2001 prehearing order, ALJ Cregar admonished counsel that the conduct of the *Greene* whistleblower case must be civil and professional; that one counsel should not hang up on the other; and that pleadings containing inappropriate and uncivil language would be in violation of the order, would not be considered, and could subject the violator to removal from the case.

On January 8, 2002, the Complainant (through Attorney Slavin as counsel) moved that ALJ Cregar recuse himself from the *Greene* whistleblower case.

On January 28, 2002, while the *Greene* whistleblower case was in the pre-hearing stage, ALJ Cregar issued an order under 29 C.F.R., § 18.34(g)(3) and § 18.36 (and § 18.29) directing Attorney Slavin to show cause why he should not be disqualified from appearing before the ALJ. The order provided notice of three classes of alleged misconduct (the same three that later resulted in Attorney Slavin's disqualification) and allowed the parties until February 11, 2002 to respond. Neither the Complainant nor Attorney Slavin responded directly to the order to show cause.

On January 28, 2002, ALJ Cregar also issued an order denying the Complainant's motion that he recuse himself from hearing the *Greene* whistleblower case.

On February 11, 2002, the Complainant filed an interlocutory appeal with the Board of ALJ Cregar's order denying the motion for recusal.

On February 11, 2002, the Complainant also filed a motion that ALJ Cregar stay the proceedings of the *Greene* whistleblower case while the Board considered the interlocutory appeal.

On February 26, 2002, ALJ Cregar denied the request for a stay.

On June 20, 2002, ALJ Cregar issued the Order of Disqualification at issue in this appeal, in which the ALJ denied Attorney Slavin the authority to appear before the ALJ in the *Greene*

whistleblower case and in future cases.

On June 28, 2002, pursuant to 29 C.F.R. § 18.36, the Complainant filed an appeal to the Chief ALJ for DOL, John M. Vittone ("the Chief ALJ for DOL"), from ALJ Cregar's Order of Disqualification.

On July 2, 2002, the Chief ALJ for DOL, issued a pre-hearing order on the appeal, which among other things, directed the Complainant to explain the effect of not responding to the show cause order.

On July 16, 2002, the Complainant filed a response to the pre-hearing order, but did not dispute the factual allegations underlying the Order of Disqualification.

On July 26, 2002, the Complainant filed a further response to the pre-hearing order, but again did not dispute the factual allegations underlying the Order of Disqualification.

On July 26, 2002, the Chief ALJ for DOL recused himself from considering Attorney Slavin's appeal from ALJ Cregar's ruling on disqualification.

On August 19, 2002, because the Chief ALJ for DOL had recused himself, the Secretary of Labor substituted the Board to rule on the appeal.

On September 18, 2002, the Board dismissed the Complainant's interlocutory appeal of ALJ Cregar's denial of the motion for recusal.

On January 24, 2003, the Board requested ALJ Cregar to provide portions of the record that pertained to his Order of Disqualification, which he did by February 11, 2003.

On February 23, 2003, the Complainant filed a motion to require that the ALJ also forward copies of the record to Complainant and her counsel. I concur with my colleagues' denial of that motion because, as a party and representative, they already had copies. Majority Opinion at 4.

DISCUSSION

1. Disqualification of counsel under § 18.34(G)(3)

ALJ Cregar disqualified Attorney Slavin from representing the Complainant in the *Greene* whistleblower case and from representing any other party in any other case that might come before him, citing as authority 29 C.F.R. § 18.34(g)(3). The part of the regulation of concern reads as follows:

> (g) (3) *Denial of authority to appear.* The administrative law judge may deny the privilege of appearing to any person, within applicable statutory constraints, e.g., 5 U.S.C. 555 [pertaining among other things to the right to

> counsel in administrative proceedings], who he or she finds after notice of and opportunity for hearing in the matter does not possess the requisite qualifications to represent others; or is lacking in character or integrity; has engaged in unethical or improper professional conduct; or has engaged in an act involving moral turpitude. . . .

Although Attorney Slavin's conduct may well have violated the substantive portions of § 18.34(g)(3), it is unnecessary to address that question. ALJ Cregar did not satisfy the regulation's procedural requirements. Under § 18.34(g)(3), an ALJ must afford "notice" and "opportunity for hearing" before the ALJ can deny a representative authority to appear. Although the show cause order was likely adequate notice of the charges, ALJ Cregar did not schedule the issue for a hearing or afford Attorney Slavin the opportunity to request one before denying him the authority to appear. Disqualification under 29 C.F.R. § 18.34(g)(3) is therefore procedurally defective and must be reversed.

My colleagues appear to adopt an expansive view of 29 C.F.R. § 18.34(g)(3) that is not found in the text or the interpretive caselaw; and I write separately out of concern that their position will be misinterpreted. The text of § 18.34(g)(3) says "hearing" not "formal hearing," *see* Majority Opinion at 11-12, by which I take it my colleagues mean "evidentiary hearing." *Rex v. Ebasco Services*, 87-ERA-6, -40 (Sec'y Mar. 4, 1994) held only that an ALJ is limited to the remedies available under 29 C.F.R. § 18.34(g)(3) and § 18.36 and may not import Rule 11 from the Federal Rules of Civil Procedure to award attorney's fees as a sanction. *Rex v. Ebasco Services*, 87-ERA-6, -40 (Sec'y Oct. 3, 1994) ruled that the Chief ALJ could designate a single ALJ to rule on the fitness of two counsel to appear generally in DOL cases. *Rex* did not delimit the nature or scope of any such hearing.

In my view, 29 C.F.R. § 18.34(g)(3) does not mandate that a different ALJ conduct the disqualification hearing than the one assigned to the merits of the case; that the hearing must be an evidentiary hearing (e.g., where the facts are not in dispute); that the use of the word "hearing" would authorize calling the ALJ seeking disqualification as a witness (as Attorney Slavin seems to suggest by noting ALJ Cregar on his witness list); or that a denial of authority to appear in one case under § 18.34(g)(3) necessarily applies to all other cases (e.g., where there is a conflict of interest in only one case). I conclude only that ALJ Cregar failed to afford Attorney Slavin an opportunity for a hearing as § 18.34(g)(3) requires and consequently that regulation cannot provide a basis for denying Attorney Slavin the authority to represent the Complainant in the *Greene* whistleblower case and from representing any other party in any other case that might come before ALJ Cregar. However, a remand to ALJ Cregar to conduct a hearing is not required, since I also hold that 29 C.F.R. § 18.36 afforded the ALJ a sufficient independent basis for disqualifying counsel in the *Greene* whistleblower case.

2. Disqualification of counsel under § 18.36

I concur with my colleagues that ALJ Cregar properly disqualified Attorney Slavin from further participation in the *Greene* whistleblower case pursuant to 29 C.F.R. § 18.36. However, I

write separately because I feel it is necessary to examine ALJ Cregar's findings of fact about Attorney Slavin's conduct in the context of § 18.36, and then to make rulings about what conduct violated which provisions of the regulation. 29 C.F.R. § 18.36 reads as follows:

> (a) All persons appearing in proceedings before an administrative law judge are expected to act with integrity, and in an ethical manner.
>
> (b) The administrative law judge may exclude parties, participants, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. The administrative law judge shall state in the record the cause for suspending or barring an attorney or other representative from participation in a particular proceeding. Any attorney or other representative so suspended or barred may appeal to the Chief Judge [of the DOL] but no proceeding shall be delayed or suspended pending disposition of the appeal; provided, however, that the administrative law judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney or representative.

By its terms, 29 C.F.R. § 18.36: 1) sets specific standards for disqualification; an ALJ has a right to exclude a party's representative, i.e., attorney, for "refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications"; 2) requires an ALJ to "state in the record the cause for suspending or barring an attorney" from participation in the case; 3) provides the suspended or barred attorney a right to appeal the disqualification to the Chief ALJ for DOL; and 4) allows the party whose counsel was removed time to obtain new counsel, but the underlying case is not stayed.

In the instant matter, the procedural requirements of 3) and 4) above have been satisfied, because the Secretary of Labor has substituted the Board for the Chief ALJ of DOL given his recusal, and ALJ Cregar allowed the Complainant time to find substitute counsel before proceeding with the *Greene* whistleblower case on the merits. As I see it, the issue presented for my scrutiny is whether ALJ Cregar's findings of fact 2) support his conclusion that counsel engaged in the conduct described in 1), i.e., the standards for disqualification. If so, the disqualification should be sustained.

Neither the Complainant nor Attorney Slavin responded to the order to show cause why he should not be disqualified from representing her in this case, although he was clearly on notice to do so. ALJ Cregar had the option to default Attorney Slavin on the issue of

disqualification, *see* Order of Disqualification at 2; or to proceed, as he did, to make findings of fact that led to that result. Because neither the Complainant nor Attorney Slavin responded to the show cause order, I treat the ALJ's findings of fact as uncontested, and adopt them. However, I note that those findings of fact are also fully supported by the Board's review of the record. I have considered the ALJ's rulings de novo and affirm them, except as noted below.

a. Counsel's false statements regarding the ALJ's appointment

ALJ Cregar found that Attorney Slavin had made false or reckless statements regarding the ALJ's appointment to hear the *Greene* whistleblower case, including that "the MOU [Memorandum of Understanding between HUD and DOL regarding my appointment as trial judge] was established in secrecy, with HUD and DOL picking HUD and one of its judges to decide the case before OPM was contacted." The ALJ found that the statements were made after Attorney Slavin had been informed that DOL contacted the Office of Personnel Management (OPM) to arrange a special assignment before OPM asked the ALJ whether he would be available. Order of Disqualification at 2-3, 19-20. The ALJ noted that the ABA's Model Rules of Professional Conduct (MRPC), adopted by the state in which Attorney Slavin was licensed, among other things, made it a violation to make false or reckless statements to a tribunal, or to make false or reckless statements about the qualifications, integrity or appointment of a judge or judicial officer. ALJ Cregar concluded that Attorney Slavin violated the rules of professional conduct and the standards set forth in 29 C.F.R. § 18.34(g)(3) and § 18.36. Order of Disqualification at 20, 23.

I affirm the ALJ's conclusion, specifically ruling that counsel's false or reckless statements about the ALJ amounted to "refusal to adhere to reasonable standards of orderly and ethical conduct, [and] failure to act in good faith" within the meaning of § 18.36(b).

b. Counsel's insulting, abusive, and unprofessional statements

ALJ Cregar cited phrases from Attorney Slavin's pleadings and correspondence in the *Greene* whistleblower case. To point out a few among many, in a January 8, 2002, pleading, he called ALJ Cregar "incurious and unscholarly," said his rulings indicated prejudgment of the issues, described his rulings (quoting Hobbes) as "nasty, brutish, and short," and suggested the ALJ was biased because he sought to be Chief ALJ at HUD and he had a "community of interests" with named federal agencies. A January 9, 2002 letter to the Secretary of Labor repeated some of those charges. A January 24, 2002 pleading accused the EPA, OPM, and DOL officials of corruption, suggesting that the EPA, as the defendant in the *Greene* whistleblower case, had "pull" with OPM and the Chief ALJ of DOL. A January 24, 2002 pleading accused another DOL ALJ of trying to adversely influence the outcome of Attorney Slavin's pending motion to recuse ALJ Cregar in the *Greene* whistleblower case. ALJ Cregar also found that Attorney Slavin's January 28, 2002 interlocutory appeal of the order denying the ALJ's recusal contained "inappropriate and unprofessional criticisms," "misstated more facts," and made "contemptuous" and "derogatory statements." Order of Disqualification at 3-5, 23-24. ALJ Cregar concluded that Slavin's insulting, abusive, and unprofessional statements violated the MRPC and 29 C.F.R. § 18.34(g)(3) and § 18.36. Order of Disqualification at 20, 23.

I affirm the ALJ's conclusion, specifically ruling that counsel's insulting, abusive, and unprofessional statements about the ALJ, another judge, the administrative hearing system, and other government officials amounted to "continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, [and] failure to act in good faith," within the meaning of § 18.36(b).

c. Counsel's failure to comply with prehearing order

In a November 2, 2001 telephone conference and a November 13, 2001 prehearing order, ALJ Cregar admonished counsel that the conduct of the *Greene* whistleblower case must be civil and professional; that one counsel should not hang up on the other; and that pleadings containing inappropriate and uncivil language would be in violation of the order, not considered, and could subject the violator to removal under § 18.36(b). The communications also warned against the use of lengthy string cites as wasteful of judicial time (hence dilatory) and ordered that counsel use synopses of leading cases instead. Neverthleless, ALJ Cregar cited subsequent examples of inaccurate citations. Order of Disqualification at 5-8, 24-25. Notwithstanding ALJ Cregar's directives, Attorney Slavin included "literally hundreds of case citations in his filings, many apparently made at random or with little if any relevance to the issues raised by this case." Order of Disqualification at 24. ALJ Cregar concluded that Attorney Slavin's "pejorative" comments about the ALJ, another judge, opposing attorneys and government officials and his use of string citations without synopses violated his pretrial order and 29 C.F.R. § 18.34(g)(3) and § 18.36. Order of Disqualification at 25.

I affirm the ALJ's conclusion, specifically ruling that counsel's "pejorative comments" and misuse of citations violated the ALJ's pretrial orders and amounted to "refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, [and] failure to act in good faith," within the meaning of § 18.36(b).

d. Counsel's misconduct in other cases

ALJ Cregar's Order of Disqualification summarized eight other reported cases before the ALJs and the Board of the DOL, the Special Workers' Compensation Appeals Panel of the Supreme Court of Tennessee, and the United States District Court for the Eastern District of Tennessee in which Attorney Slavin "has been disqualified, sanctioned, or cited for improper professional conduct." These cases "demonstrate that Counsel has been notified repeatedly . . . that the type of conduct he has exhibited before me does not conform to professional standards." Order of Disqualification at 8-17. Later, the ALJ noted, "Counsel has a long history of professional misconduct. . . . Counsel is unable or unwilling to conform his behavior to professional standards. . . . Issuing additional warnings would be futile and a waste of time because counsel appears to be uneducable." Order of Disqualification at 25. It appears that ALJ Cregar relied upon Attorney Slavin's misconduct in other cases to conclude that he should be disqualified from appearing before him in future cases.

I would use the cumulative effect of past misconduct as a factor in considering a

permanent denial of authority to appear after notice and hearing under 29 C.F.R. § 18.34(g)(3). However, the fact that a lawyer has been disqualified, sanctioned, or cited for improper professional conduct in other cases has little probative value on the question of whether he has engaged in separate misconduct in the case in which an ALJ is considering his disqualification. Nevertheless, in determining whether there were grounds for disqualifying Attorney Slavin under § 18.36, the fact that he may have been disqualified, sanctioned, or cited for improper professional conduct in eight other cases could be considered on the issue of notice; he knew or should have known that his failure to conform to norms of ethics and civility and his failure to obey court rulings could lead to his being sanctioned or removed. Therefore, to the extent that the ALJ considered prior misconduct to prove present misconduct under § 18.36, I believe that was error. Regardless, counsel's conduct in the *Greene* whistleblower case provided sufficient grounds for his disqualification under § 18.36, without consideration of alleged misconduct in other cases.

3. Counsel's arguments

Rather than respond frontally to ALJ's Cregar's Order of Disqualification, Attorney Slavin has waged a collateral attack by seeking the removal of ALJ Cregar from the case. I join with my colleagues in rejecting Attorney Slavin's argument that the ALJ was divested of jurisdiction in the *Greene* whistleblower case by the Complainant's filing of an interlocutory appeal of the ALJ's order refusing to recuse himself. Majority Opinion at 7, 13**.** In addition, my colleagues correctly point out that the Board does not have jurisdiction to respond to Attorney Slavin's challenge to the validity of the regulations at issue, 29 C.F.R. § 18.34(g)(3) and § 18.36. Majority Opinion at 6. Further, I reject counsel's contentions that his personal attacks on the ALJ are protected speech or permissible as zealous representation. And I deny that at a hearing on counsel's disqualification, counsel would have a right to call ALJ Cregar to testify about the circumstances of his appointment and qualifications to sit on the *Greene* whistleblower case.

CONCLUSION

For the reasons stated, I **REVERSE** the Order of (Permanent) Disqualification to appear before ALJ Cregar under 29 C.F.R. § 18.34(g)(3) and **AFFIRM** the Order of Disqualification to appear before ALJ Cregar in the *Greene* whistleblower case under 29 C.F.R. § 18.36.

WAYNE C. BEYER
Administrative Appeals Judge