In the Matter of:

SYED M. A. HASAN, **ARB CASE NO. 03-078**

COMPLAINANT, **ALJ CASE NO. 02-ERA-32**

v. **DATE: MAR 28 2003**

SARGENT & LUNDY,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER HOLDING MOTION TO STRIKE COMPLAINANT'S MOTION IN ABEYANCE AND TO SHOW CAUSE

The complainant, Syed M. A. Hasan, filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the respondent, Sargent & Lundy, refused to hire him in violation of the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C.A § 5851 (West 1995)(ERA). Order Placing Case in Abeyance at 1. OSHA found no violation, and Hasan requested a hearing before a Department of Labor Administrative Law Judge (ALJ). *Id*

This is the third complaint Hasan has filed against Sargent & Lundy. *Id.* On August 26, 2002, Sargent & Lundy filed a motion with the ALJ requesting him to either dismiss Hasan' s complaint or hold it in abeyance pending the disposition of another case involving the same parties before another administrative law judge, *Hasan v. Sargent & Lundy,* ALJ No. 2000-ERA-7. *Id.* On September 11, 2002, the ALJ issued an Order Placing Case in Abeyance.

On December 5, 2002, an administrative law judge issued a recommended decision and order in *Hasan v. Sargent & Lundy,* ALJ No. 2000-ERA-7. The ALJ recommended that Hasan's case should be dismissed because Hasan failed to carry his burden of establishing that Sargent & Lundy refused to hire him because he engaged in protected activity. Slip op. at 16-17. In particular, the administrative law judge found, "[A]fter reviewing the entire record, I find that the Respondent has demonstrated a legitimate, nondiscriminatory reason for its decision [never to rehire Hasan]." Slip op. at 16. Hasan has appealed the administrative law judge's recommended decision and order to the Administrative Review Board (Board). *Hasan v. Sargent & Lundy,* ARB No. 03-030, ALJ No. 2000-ERA-7 (ARB).

After the administrative law judge issued his recommended decision in *Hasan v. Sargent & Lundy,* ALJ No. 2000-ERA-7 (Dec. 5, 2002), Sargent & Lundy renewed its motion to dismiss the complaint in this case, and Hasan requested the ALJ to establish discovery guidelines and schedule a formal hearing. The ALJ considered the parties' submissions and concluded that it was appropriate to continue to hold the case in abeyance until the Board issued its decision in *Hasan v. Sargent & Lundy,* ARB No. 03-030, ALJ No. 2000-ER.A-7. Order Holding Case in Abeyance at 1.

In response to the ALJ's Order Holding Case in Abeyance, Hasan filed an "Emergency Motion" requesting the Board to vacate the ALJ's Order Holding the Case in Abeyance. Sargent & Lundy filed a response to the Emergency Motion, opposing the motion and requesting the Board to strike the motion, and Hasan filed a reply to Sargent & Lundy's response.

As an initial matter, we consider Sargent & Lundy's request that we strike Hasan's motion because the Emergency Motion is "another in series of pleadings filed by Hasan that defames opposing counsel, the various judges that have been assigned his cases, the federal agencies with responsibility for ERA matters and even the U.S. Congress." Respondent's Opposition to and Request to Strike Emergency Motion to Vacate [the ALJ's] Order at 3.

Hasan has once again filed a pleading with the Board that is replete with offensive personal attacks upon the integrity and competency of the Department of Labor's administrative law judges, among others. The Board has admonished Hasan previously that:

> [I]t is reasonable for a court to demand that all litigants — including *pro se* litigants - comport themselves with a measure of civility and respect for the tribunals that hear their cases. Among *pro se* litigants, this proposition applies particularly to litigants such as Hasan, who has significant litigation experience. Not only is vituperative behavior by a litigant unwarranted and inappropriate, it ultimately is self-defeating because it detracts from a complainant's ability to make a sound legal argument in support of his case.

Hasan v. Commonwealth Edison Co., ARB Nos. 01-002, 01-003, ALJ Nos. 2000-ERA-8, 2000-ERA-11, slip op. at 4-5 (April 23, 2001). Hasan has chosen to ignore the Board's instruction. Accordingly, in light of Hasan's *pro se* status, we will give Hasan just one more opportunity to adhere to the standards of civility and respect that the Board requires of those who litigate before it. We will hold Sargent & Lundy's Motion to Strike Hasan's Emergency Motion in abeyance for the time being. However, Hasan is hereby put on notice that if he persists in filing pleadings in this case (or in any other case before the Board) that contain such vitriolic personal attacks, we will strike any such pleading and, if appropriate, dismiss the complaint in support of which the pleading was filed.

In regard to the merits of the Emergency Motion, the procedures for litigation and administrative review of whistleblower complaints under the environmental statutes at issue here are found in 29 C.F.R. Part 24. These rules provide for review of an ALJ's recommended decision and order only. They do not provide for review of an ALJ's interlocutory order issued in the course of an administrative hearing. *Plumley v. Federal Bureau of Prisons,* 86-CAA-6, slip op. at 2. (Sec'y April 29, 1987). Because the ALJ's Order Holding Case in Abeyance does not resolve the merits of

Hasan' s case and does not either recommend that the complaint be dismissed or find that the complaint has merit, the ALJ's Order is interlocutory. *See* 28 U.S.C.A. § 1291 (final decision requirement); *Catlin v. United States,* 324 U.S. 229, 233 (1945)(Pursuant to § 1291, ordinarily, a party may not prosecute an appeal until the district court has issued a decision that, "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.").

The Secretary and the Board have held many times that interlocutory appeals are generally disfavored, and that there is a strong policy against piecemeal appeals. *See e.g., Amato v. Assured Transportation and Delivery, Inc.,* ARB No. 98-167, ALJ No. 98-TSC-6 (ARB Jan. 31, 2000); *Hasan v. Commonwealth Edison so.,* ARB No. 99-097; ALJ No. 99-ERA-17 (ARB Sept. 16, 1999); *Carter v. B & W Nuclear Technologies, Inc.,* ALJ No. 94-ERA-13 (Sec'y Sept. 28, 1994). Nevertheless, the Supreme Court has recognized a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* In *Coopers & Lybrand* V. *Livesay,* 437 U.S. 463 (1978), the Court further refined the "collateral order" exception to technical finality. *Van Cauwenberghe v. Biard,* 406 U.S. 517, 522 (1988). The Court in *Coopers & Lybrand* held that to fall within the collateral order exception, the order appealed must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U.S. at 468.

In cases in which a party seeks interlocutory review of an administrative law judge's order, we follow the procedure established in 28 U.S.C.A. § 1292(b)(West 1993)[1] for certifying interlocutory questions for appeal from federal district courts to appellate courts. *Id.* In *Plumley,* the Secretary ultimately concluded that because no judge had certified the questions of law raised by the respondent in his interlocutory appeal as provided in 28 U.S.C.A. § 1292(b), "an appeal from an interlocutory order such as this may not be taken." *Id.* at 3. (citations omitted).

In this case, while Hasan refers to a telephone conversation with a legal technician in the ALJ's office concerning a request that the ALJ certify this case for interlocutory appeal, Hasan

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[1] This provision states:

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

28 U.S.C.A. § 1292(b) (West 1993).

apparently has filed no motion in writing requesting permission to file such an appeal, nor has the ALJ issued an order in response to any such request.

Thus, given the interlocutory nature of Hasan's Emergency Motion, we order Hasan to **SHOW CAUSE** why we should not dismiss this Motion as an impermissible interlocutory appeal. Hasan must demonstrate why we should consider his appeal in light of the ALJ's alleged refusal to certify the appeal to the Board. Hasan must also establish why this appeal falls within the *Coopers & Lybrand* collateral order exception that would permit the Board to consider the appeal. Hasan shall file his response to this order no later than **April 28, 2003.** Sargent & Lundy may file a reply to Hasan's response no later than **May 28, 2003.**

FOR THE ADMINISTRATIVE REVIEW BOARD:

Janet R. Dunlop
General Counsel