In the Matter of:

DAVID E. WELCH, **ARB CASE NO. 04-054**

COMPLAINANT, **ALJ CASE NO. 03-SOX-15**

v. **DATE: May 13, 2004**

CARDINAL BANKSHARES CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
D. Bruce Shine, Esq., ***Shine & Mason Law Office, Kingsport, Tennessee***

For the Respondent:
Laura Effel, Esq., ***Flippin, Densmore, Morse & Jesse, Roanoke, Virginia***

FINAL DECISION AND ORDER DISMISSING PETITION FOR REVIEW WITHOUT PREJUDICE

BACKGROUND

On January 28, 2004, a Department of Labor Administrative Law Judge (ALJ) issued a document entitled Recommended Decision and Order (R. D. & O.) in this case arising under the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A § 1514A (West 2002). The ALJ found that the Respondent, Cardinal Bankshares Corp., had retaliated against the Complainant, David Welch, in violation of the SOX's whistleblower protection provisions, however he did not make a final determination on the amount of damages Cardinal owed to Welch. The ALJ stated that the record would remain open for thirty days to allow Welch to produce evidence upon which an award of back pay could be calculated and permitted Cardinal to respond to any evidentiary submission within fifteen days from the date upon which it received Welch's evidence. The ALJ also instructed the parties to inform him if they concluded that an evidentiary hearing was necessary to resolve the damages issue.

Attached to the R. D. & O. was a Notice of Appeal Rights. The Notice stated that the R. D. & O. would become the Secretary of Labor's final order pursuant to 29 C.F.R. § 1980.109 (c) and § 1980.110(a) unless a petition for review was timely filed before the Administrative Review Board (ARB or Board).[1] The Notice further stated that to be effective the petition must be filed within ten days of the date of the R. D. & O.

On February 3, 2004, the ALJ issued an Erratum. The ALJ stated that the inclusion of the Notice of Appeal Rights in the R. D. & O. was inadvertent and that the R. D. & O. was not intended to be a final appealable order since the ALJ had not yet calculated the back wages and interest due to Welch. Accordingly, the ALJ ordered that the paragraph captioned "Notice of Appeal Rights" be deleted from the R. D. & O.

On February 5, 2004, Cardinal filed a petition for review with the Board. On February 6, 2004, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule. In response, Welch filed a motion to dismiss appeal as premature or in the alternative to hold in abeyance until a final judgment is issued. Cardinal then filed a memorandum in opposition to motion to dismiss appeal. On February 26, 2004, the Board ordered Cardinal to show cause why the Board should not dismiss its interlocutory appeal. On March 4, 2004, the Board issued an Order Holding the Briefing Schedule in Abeyance pending resolution of the Board's Show Cause Order.

ISSUES

1) Whether Cardinal's appeal is interlocutory.

2) If so, whether the Board should dismiss Cardinal's petition for review as an impermissible interlocutory appeal.

DISCUSSION

The Board's interlocutory appeal policy incorporates the final decision requirement found in 28 U.S.C.A § 1291 (West 1993), which provides that the courts of appeals have jurisdiction "'from all final decisions of the district courts … except where a direct review may be had in the Supreme Court.'" *Hibler v. Exelon Generation Co., LLC*, ARB No. 03-106, ALJ No. 2003-ERA-9, slip op. at 3-4 (Feb. 26, 2004). Pursuant to section 1291, ordinarily a party may not prosecute an appeal until the district court has issued a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). This policy is fully consistent with 29 C.F.R. § 1980.110(c), which starts the Board's 120-day period for issuing a final decision at "the conclusion of the hearing, which will be deemed to be **the conclusion of all proceedings before the administrative law judge** – *i.e.*, 10

[1] The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under the SOX to the Administrative Review Board. Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

business days after the **date of the decision** of the administrative law judge …." (Emphasis supplied*).*

The ALJ in this case bifurcated his consideration of the entitlement and damages issues presented by Welch's complaint. Accordingly, the ALJ's initial R. D. & O. finding that Cardinal had retaliated against Welch in violation of the SOX did not fully dispose of the complaint before him as it reserved the damages claim for further adjudication. The proceedings before the ALJ are not yet concluded and the ten-day period for filing a timely appeal from the ALJ's decision has not yet commenced. Thus, by definition, the appeal of the ALJ's R. D. & O. is an interlocutory appeal.

Nevertheless, Cardinal argues that the Board should accept its appeal because it is "not interlocutory." Respondent's Memorandum in Response to Order to Show Cause (Resp. Mem.) at 1. Cardinal states that because the R. D. & O. is a "decision of the administrative law judge" it is subject to immediate review pursuant to 29 C.F.R. § 1980.110(a).[2] However, this argument that all ALJ decisions are subject to section 1980.110(a)'s immediate review procedures ignores not only 29 C.F.R. § 1980.110(c) and the ALJ's Erratum stating that his R. D. & O. was not subject to such review, but also a substantial body of ARB precedent, which Cardinal did not discuss, much less attempt to distinguish. *See e.g., Hibler* (petition for review of ALJ recommended decision deciding only that hearing request was timely, dismissed as interlocutory); *Greene v. EPA Chief Susan Biro, U. S. Envtl. Prot. Agency,* ARB No. 02-050, ALJ No. 02-SWD-1 (Sept. 18, 2002)(appeal of decision denying motion to recuse, dismissed as interlocutory); *Dempsey v. Fluor Daniel, Inc.,* ARB No. 01-075, ALJ No. 01-CAA-5, (ARB May 7, 2002)(appeal of decision resolving only whether complainant was a covered employee, dismissed as interlocutory). Thus, we do not find Cardinal's argument to be persuasive.

Cardinal also argues that the ALJ's decision was irrevocably "vacated" when the Board issued its Notice of Appeal and Briefing Schedule and that "there is no provision authorizing the Board to un-accept a matter for review." Resp. Mem. at 3. Cardinal cites no support for its assertion that the Board may not correct a premature acceptance of a petition for review and in fact its argument is contrary to Board precedent. *See Dempsey*, slip op. at 5 (case remanded to ALJ to conduct further proceedings and to issue a recommended decision resolving the case in its entirety after Board had issued Notice of Appeal and Order Establishing Briefing Schedule).

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[2] This regulation states:

> Any party desiring to seek review, including judicial review, of a decision of the administrative law judge, … must file a written petition for review with the Administrative Review Board …. To be effective, the petition must be filed within ten business days of the date of the decision of the administrative law judge.

Furthermore, 29 C.F.R. § 1980.110(b) provides that the ALJ's recommended decision becomes "inoperative," when the Board accepts the case, not that the decision is vacated as Cardinal asserts. The ALJ's initial decision was not issued at the conclusion of all proceedings before the ALJ, as provided in 29 C.F.R. § 1980.110(c). At the time the Board accepted the petition for review, the ALJ's initial decision was "inoperative" and did not have the potential of becoming "operative" until all proceedings were completed and it was subsumed in the ALJ's final recommended decision and order disposing of the complaint. Accordingly, the Board's acceptance of the petition for review did not in any way affect the status of the ALJ's initial decision. It was inoperative and it will remain inoperative until such time that the ALJ issues a final recommended decision after concluding all proceedings before him and either Cardinal does not file a timely appeal of the ALJ's final decision within ten business days of the date on which it is issued or after consideration upon an appeal timely filed, the Board issues an order adopting the decision.

We also reject Cardinal's assertion that it will be prejudiced if we refuse to hear the case at this time because:

> [i]f the Board fails to proceed now, Respondent's rights will be placed in jeopardy as the Board's time for consideration may run before it has an opportunity to act. The Board has only 120 days from 10 business days after the date of the ALJ's decision to issue its decision. 29 C.F.R. § 1980.110(c). That period expires on June 10, 2004.

Resp. Mem. at 3. As stated above, the 120-day period provided for the Board to issue its final decision does not begin to run until ten business days after the conclusion of all proceedings before the administrative law judge. Because those proceedings have not yet concluded, the Board's 120-day period has not yet begun to run.

Furthermore, the 120-day period for issuing a final decision is directory and not jurisdictional. *See Roadway Express, Inc., v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991)(agency does not lose jurisdiction for failing to comply with statutory time limits unless the statute both expressly requires the agency to act within a specified period and states a consequence for failing to comply.); *Thomas v. Arizona Pub. Serv. Co.*, No. 89-ERA-19, slip op. at 16 n.8 (Sec'y Sept. 17, 1993)(same). *Accord Brock v. Pierce County*, 476 U.S. 253 (1986). Thus, Cardinal's assertion that the Board may not issue a decision in this case after June 10, 2004, is erroneous.

Finally, we reject Cardinal's argument that it was unduly prejudiced because it began working on its brief once the Board issued the Briefing Schedule. Resp. Mem at 3-4. Surely any resources Cardinal expended will not be wasted, but will simply be transferred to its appeal of the ALJ's final recommended decision and order in this case. In any event, the premature expenditure of resources in preparing Cardinal's brief did not render an otherwise interlocutory appeal "not interlocutory."

In *Plumley v. Federal Bureau of Prisons*, 86-CAA-6 (Sec'y April 29, 1987), the Secretary of Labor described the procedure for obtaining review of an ALJ's interlocutory order. Slip op. at 2. The Secretary determined that when an administrative law judge has issued an order of which a party seeks interlocutory review, it would be appropriate for the judge to follow the procedure established in 28 U.S.C.A. § 1292(b)(West 1993)[3] for certifying interlocutory questions for appeal from federal district courts to appellate courts. *Id.* In *Plumley*, the Secretary ultimately concluded that because no judge had certified the questions of law raised by the respondent in his interlocutory appeal as provided in 28 U.S.C.A. § 1292(b), "an appeal from an interlocutory order such as this may not be taken." (Citations omitted).

In this case, Cardinal argues that it was not necessary for it to follow the Board's certification procedures because the Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct 17, 2002), defines the Board's delegated authority in cases arising under the statutes listed in the Order, including the SOX, to encompass "the discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute." When the Secretary's Order was issued, the authority of the Secretary, and later of the Board, to consider interlocutory appeals from administrative law judge decisions was already well established. *See, e. g.*, *Amato v. Assured Transp. and Delivery, Inc.*, ARB No. 98-167, ALJ No. 98-TSC-6 (ARB Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.*, ARB No. 99-097; ALJ No. 99-ERA-17 (ARB Sept. 16, 1999); *Carter v. B & W Nuclear Technologies, Inc.*, ALJ No. 94-ERA-13 (Sec'y Sept. 28, 1994); *Plumley*, 86-CAA-6. Thus, the Secretary's Order did not confer upon the

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[3] 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).

Board new or additional authority to consider interlocutory appeals. It simply recognized and confirmed already existing precedent that established the Secretary's and the Board's authority to consider such appeals. The certification process is the long-standing procedure the Secretary adopted to govern the interlocutory appeal process. Accordingly, the Secretary's Order 1-2002 did not relieve Cardinal from complying with the certification procedure for obtaining interlocutory review.

However, we need not decide whether the failure to obtain certification is fatal to Cardinal's request to file an interlocutory appeal. Even if this failure was not dispositive, Cardinal cannot prevail because, as we discuss below, it has failed to articulate sufficient grounds warranting departure from our strong policy against such piecemeal appeals. *See e.g., Amato,* ARB No. 98-167; *Hasan,* ARB No. 99-097; *Carter* ALJ No. 94-ERA-13 (Sec'y).

The purpose of the finality requirement underlying the Board's interlocutory appeal policy is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Nevertheless, the Supreme Court has recognized a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court further refined the "collateral order" exception to technical finality. *Van Cauwenberghe v. Biard*, 406 U.S. 517, 522 (1988). The Court in *Coopers & Lybrand* held that to fall within the collateral order exception, the order appealed must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U.S. at 468.

In determining whether to accept an interlocutory appeal, we must strictly construe the *Cohen* collateral appeal exception to avoid the serious "'hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.'" *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp*., 614 F.2d 958, 961 n.2, quoting *Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1094 (5th Cir. 1977). Most obviously the question whether Cardinal retaliated against Welch in violation of the SOX's whistleblower protection provisions is neither separate from the merits of the action nor unreviewable on appeal from a final judgment. Therefore, this appeal does not fall within the collateral appeal exception of the finality rule.[4]

[4] Cardinal argues that the R. D. & O. places Cardinal in an untenable position because the ALJ has ordered immediate reinstatement, but has "frustrated Respondent's ability to challenge this promptly." Cardinal's concerns are unfounded. It does not appear that the ALJ has issued a preliminary order of reinstatement in this case, *see McNeill v. Crane Nuclear*, ARB No. 02-002, ALJ No. 2001-ERA-003 (ARB Dec. 20, 2002), nor would it appropriate for him to do so until such time as he issues his final recommended decision and

Accordingly, we **GRANT** Welch's motion and **DISMISS** Cardinal's interlocutory appeal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

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order in this case. 29 C.F.R. § 1980.110(b) ("If **a case is accepted for review,** the decision of the administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, **except** that a **preliminary order** of reinstatement will be effective **while review is conducted by the Board**.")(emphasis supplied).