



In the Matter of:

**GREGORY A. DANN, LON A. FULLER,
AND THOMAS J. LOSCIK,**

COMPLAINANTS,

v.

**BECHTEL SAIC COMPANY, LLC, AND
BECHTEL NEVADA,**

RESPONDENTS.

ARB CASE NO. 05-150

**ALJ CASE NOS. 2005-SDW-4
2005-SDW-5
2005-SDW-6**

DATE: October 31, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Respondent Bechtel Nevada:

*Emily F. Keimig, Esq., Patrick R. Scully, Esq., Sherman & Howard L.L.C.,
Denver, Colorado*

FINAL DECISION AND ORDER

The Respondent, Bechtel Nevada Corp., has requested the Administrative Review Board to review a Department of Labor Administrative Law Judge’s Order Granting Motion to Impose Sanctions on Bechtel Nevada (Ord.) and, in the alternative, to disqualify the Administrative Law Judge (ALJ) based on his alleged prejudgment of the evidence and law in this matter arising under the Safe Drinking Water Act (SDWA).¹ The ALJ found that Bechtel Nevada had failed to comply with his August 9, 2005 Order requiring it to provide complete responses to the Complainant’s discovery requests. As a sanction the ALJ “irrebuttably determined that Bechtel Nevada’s actions to bar the Complainants from employment at the Nevada Test Site were motivated at least in part by an intention to retaliate against the Complainants[’] protected activities, including the

¹ 42 U.S.C.A. § 300(j)-9(i)(West 1991).

Complainants' internal safety complaints and their refusals to sign the affidavits concerning Ron Dollens."²

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under SDWA to the Board.³ Because the ALJ has not issued his final recommended decision and order in this matter, Bechtel Nevada's request that the Board review the ALJ's order is an interlocutory appeal. The Secretary's delegated authority to the Board includes, "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute."⁴

In *Plumley v. Federal Bureau of Prisons*,⁵ the Secretary of Labor described the procedure for obtaining review of an Administrative Law Judge's interlocutory order. The Secretary determined that where an Administrative Law Judge has issued an order of which the party seeks interlocutory review, the procedure for certifying interlocutory questions for appeal from federal district courts to appellate courts is applicable.⁶ In *Plumley*, the Secretary ultimately concluded that because no Administrative Law 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."⁷

² Ord. at 5.

³ Secretary's Order 1-2002, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 67 Fed. Reg. 64272 (Oct. 17, 2002).

⁴ *Id.* at 64273.

⁵ 86-CAA-6 (Sec'y April 29, 1987).

⁶ *Id.* The applicable procedure is found at 28 U.S.C.A. § 1292(b) (West 1993):

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.

⁷ *Plumley*, slip op. at 3 (citation omitted).

Bechtel Nevada failed to request the ALJ to certify the case for interlocutory review and thus did not comply with the Board's well-established procedure for obtaining interlocutory review. Furthermore, the Board has held many times that interlocutory appeals are generally disfavored, and that there is a strong policy against piecemeal appeals.⁸ Finally, since Bechtel Nevada failed to request the ALJ to recuse himself and therefore has not complied with the applicable regulations,⁹ there is no order denying recusal for the Board to review.¹⁰ In any event, the Board has held that denial of a recusal motion is not subject to interlocutory review because disqualification issues are fully reviewable on appeal from the final judgment.¹¹

Thus, we ordered Bechtel Nevada to show cause why the Board should not dismiss its interlocutory appeal. On October 17, 2005, Bechtel Nevada filed a Withdrawal of Interlocutory Appeal Without Prejudice in Response to Order to Show Cause. Bechtel Nevada acknowledged that the Board had

indicated that an interlocutory appeal of Judge Mapes' Order was not appropriately before the ARB absent a certification from Judge Mapes that his Order involved 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."¹²

⁸ See e.g., *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 03-SOX-15 (ARB May 13, 2004); *Amato v. Assured Transportation and Delivery, Inc.*, ARB No. 98-167, ALJ No. 98-TSC-6 (ARB Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.*, ARB No. 99-097, ALJ No. 99-ERA-17 (ARB Sept. 16, 1999).

⁹ 29 C.F.R. § 18.31(b)(2005).

¹⁰ The Secretary of Labor has delegated her authority to the Board to "act for the Secretary of Labor in review or on appeal of . . . final decisions of Administrative Law Judges." Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). While the delegation of authority does include review of interlocutory decisions, in this case there has been no decision whatsoever on recusal for the Board to review.

¹¹ *Greene v. EPA*, ARB No. 02-050, ALJ No. 02-SWD-1, slip op. at 4 (Sept. 18, 2002).

¹² Quoting 28 U.S.C.A. § 1292(b) (West 1993).

Bechtel Nevada “determined to withdraw its appeal without waiver of or prejudice to its rights to raise the arguments contained in the appeal in the course of these proceedings.” Accordingly, we **DISMISS** Bechtel Nevada’s interlocutory appeal.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge