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Issue Date: 07 February 2005

In the Matter of:

ANTHONY F. GONZALEZ,
Complainant,

Case No. 2004-SOX-00039

v.

COLONIAL BANK,
Respondent.

&
THE COLONIAL BANCGROUP. INC.,

Respondent.

ORDER DENYING REQUEST FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Respondents, Colonial Bank and The Colonial BancGroup, Inc., request that the undersigned Administrative Law Judge certify for interlocutory appeal to the Administrative Review Board the December 20, 2004 Order Denying Motion To Reconsider Order On Motion For Leave To Amend as well as the underlying Order dated August 17, 2004 (together referred to as "Orders"). Respondents assert that the Orders involve a controlling question of law which, if resolved in Respondents favor, will terminate this matter immediately.

Initially, the Secretary of Labor and the Administrative Review Board ("ARB") have consistently ruled that interlocutory appeals are disfavored and will not be accepted. In *Carter v. B&W Nuclear Technologies, Inc.*, 94-ERA-13 (Sec'y Sept. 28, 1994), the Secretary denied review of an administrative law judge order requiring the joinder of TVA as an additional respondent. The Secretary reasoned: "There is no provision for interlocutory appeals to the Secretary either in the regulations implementing the ERA, 29 C.F.R. Part 24, or in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 129 C.F.R. part 18." The Secretary also instructed that interlocutory appeals are "generally disfavored" and there is a "strong policy against them." See also *Hasan v. Commonwealth Edison Co.,* ARB No. 99-097, ALJ No. 1999-ERA-17 (ARB Sept. 16, 1999) and *Amato v. Assured Transportation and Delivery, Inc.*, ARB No. 98-167, ALJ No. 1998-TSC-6 (ARB Jan. 31, 2000) where the ARB denied interlocutory appeals, again reasoning that interlocutory appeals are generally disfavored and there is a strong policy against piecemeal appeals.

In *Greene v. United States Environmental Protection Agency*, ARB No. 02-050, ALJ No. 2002-SWD-1 (ARB Sept. 18, 2002) the ARB denied review of the ALJ's refusal to recuse himself. The ARB cited *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949) for the tenet that the collateral order exception to the finality doctrine allows interlocutory appeal for 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." The ARB quoted *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) as support for its finding that for an interlocutory order to be considered, the order 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." The ARB explained that it must strictly construe the collateral appeal exception when determining whether to accept an interlocutory appeal in order to avoid the serious hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.[1] The ARB applied this reasoning to the request to consider the ALJ's order denying the recusal motion and held that it would not consider the order because, "[d]isqualification questions are fully reviewable on appeal from final judgment. . . . Precisely because disqualification issues are reviewable following entry of judgment, as a threshold matter, the *Cohen* doctrine is unavailing."

The ARB's reasoning compels a finding that an interlocutory appeal of the Orders here is not warranted. The Orders granting complainant's motion to amend his complaint to include The Colonial BancGroup, Inc. as a respondent resolve issues that are neither separate from the merits of the action nor unreviewable on appeal from the final decision. Respondents have failed to satisfy the collateral order exception.

Moreover, it is not clear that this matter would be terminated immediately if the Orders were resolved in Respondents' favor, as argued by Respondents. The Colonial BancGroup, Inc would be dismissed; however, it is an open question as to whether Colonial Bank would also have to be dismissed. At issue is whether Complainant is protected by the Sarbanes-Oxley whistleblower provision where his employer, Colonial Bank, is not publicly traded but is a subsidiary of a public-traded company. The *Order Denying Motion For Summary Decision* issued in this matter on August 20, 2004 answered the question in the positive. It held that Complainant was protected because The Colonial BancGroup, Inc., Colonial Bank's parent company, was publicly traded. Cited as support was the Administrative Law Judge decision in *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 (ALJ Jan. 28, 2004). In *Morefield***,** the ALJ reasoned: "A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries. In this context, the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary. It imposed reforms upon the publicly traded company, and through it, to its entire corporate organization." Thus under *Morefield* the Complainant's employment at Colonial Bank would be protected regardless of *The Colonial BancGroup, Inc*.'s responsibility over, or supervision of, that employment. The ALJ did note in *Morefield* that the public trading company was a party before him, and that was the basis for distinguishing his decision from the

[1] See also *Welch v. Cardinal Bankshares Corporation*, ARB No. 04-054, ALJ No. 2003-SOX-15 (*Final Decision and Order Dismissing Petition For Review With Prejudice*, May 13, 2004).

ALJ decision in *Powers v. Pinnacle Airlines, Inc.*, 2003 AIR 12 (ALJ Mar. 5, 2003). In *Powers v. Pinnacle Airlines, Inc.* the Sarbanes-Oxley count in the complaint was dismissed because the employer was not a publicly traded company and the Complainant had failed to name the parent publicly traded entity as a party respondent. However, the *Morefield* discussion distinguishing *Pinnacle Airlines* is dicta, as *Morefield* provides no reasoning for requiring the parent company to be named as a party when jurisdiction exists solely on the basis of the employer being a subsidiary of a publicly traded company.

Accordingly, it is determined that Respondents have not put forward a basis for departing from the ARB's strong policy against interlocutory appeals.

ORDER

In consideration of the aforesaid, IT IS HEREBY ORDERED THAT Respondents' request for certification for interlocutory appeal to the Administrative Review Board the December 20, 2004 Order Denying Motion To Reconsider Order On Motion For Leave To Amend as well as the underlying Order dated August 17, 2004 is denied.

A
Thomas M. Burke
Associate Chief Administrative Law Judge