In the Matter:

TERRY O. PUCKETT, **ARB CASE NO. 02-070**

COMPLAINANT, **ALJ CASE NO. 2002-ERA-15**

v. **DATE: September 26, 2002**

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1]

Appearances:

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

For the Respondent:
Dillis D. Freeman, Jr., Esq., Linda J. Sales-Long, Esq., Thomas F. Fine, Esq., Maureen H. Dunn, *Tennessee Valley Authority, Knoxville, Tennessee*

FINAL ORDER DENYING INTERLOCUTORY APPEAL

Background

Petitioner Terry O. Puckett has filed a complaint against Respondent Tennessee Valley Authority ("TVA") alleging that Respondent retaliated against him in violation of the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1995); Clean Air Act, 42 U.S.C.A. § 7622 (West 1995); Federal Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001); Safe Drinking Water Act, 42 U.S.C.A. § 300(j)-9(i) (West 1991); Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995); and Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998). On April 19, 2002, Puckett filed an "Interlocutory Appeal and Motion for Stay of Orders" ("Interlocutory Appeal") with the Administrative Review Board ("Board") requesting the Board to review an Administrative Law Judge's discovery orders and to stay "every single one" of the Administrative Law Judge's orders. Interlocutory Appeal and Motion for Stay of Orders at 1. Respondents filed a response to Puckett's Interlocutory Appeal arguing that the Board should dismiss the appeal. Response

[1] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19, 978 § 5 (May 3, 1996).

to Complainant's Interlocutory Appeal and Motion to Stay Order. As explained below, we dismiss Puckett's interlocutory appeal.

On May 2, 2002, the Board issued an order requiring Puckett to show cause why the Board should not dismiss his interlocutory appeal. The order permitted TVA to file a reply to Puckett's response to the order.

On May 20, 2002, the Board received Puckett's response to the show cause order. Shortly thereafter, TVA filed a Motion to Strike Puckett's brief "on the grounds that Complainant's response contains scandalous, disparaging, and impertinent remarks about" the ALJ. Motion to Strike at 1. TVA also filed a reply to Puckett's response to the order to show cause and the Declaration of Linda J. Sales-Long. In response, Puckett filed a Motion to Strike TVA Filing, to which TVA filed a response. Finally, Terry Puckett, apparently without the assistance of his attorney, filed a letter with the Board, to which TVA filed a response and motion to strike.

Issue Presented

Whether the Board should dismiss Puckett's petition for review as an impermissible interlocutory appeal.

Discussion

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). In considering the appropriate procedure to follow in determining whether to entertain interlocutory appeals, the Secretary of Labor concluded that "[t]o the extent any situation is not provided for in [29 C.F.R. Part 24], the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18 . . . , and the Federal Rules of Civil Procedure apply." *Id.* Turning to 29 C.F.R. Part 18 for guidance, the Secretary noted that 29 C.F.R. § 18.29(a), permits administrative law judges to "'take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts . . .'" *Id.* The Secretary determined that in cases in which a party seeks interlocutory review of an administrative law judge's order, an appropriate action would be for the judge to follow the procedure established in 28 U.S.C.A. § 1292(b)(West 1993)[2] for certifying interlocutory questions for appeal from

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[2] 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

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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, Puckett has not requested the ALJ to certify the questions of law underlying his appeal to the Board. However, we need not decide whether this failure to obtain certification is fatal to Puckett's request that we consider his interlocutory appeal. Even if Puckett's failure to obtain certification was not determinative, he cannot prevail because, as we discuss below, he has failed to articulate any grounds warranting departure from our strong policy against such piecemeal appeals. *See e.g.*, *Greene v. EPA,* ARB No. 02-050, ALJ No. 02-SWD-1 (ARB Sept. 18, 2002); *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); *Carter v. B & W Nuclear Technologies, Inc.*, ALJ No. 94-ERA-13 (Sec'y Sept. 28, 1994).

As we recently held in *Greene,* slip op. at 3, the Board's policy against interlocutory appeals incorporates 28 U.S.C.A. § 1291's final decision requirement, 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." 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." *Catlin v. United States*, 324 U.S. 229, 233 (1945). In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), the Supreme Court explained the rationale for the requirement that a party generally must raise all claims of error in one appeal at the conclusion of litigation before the trial court:

> [The rule] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays

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> 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).

> in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

449 U.S. at 374, quoting *Cobbledick v. United States,* 309 U.S. 323, 325 (1940). Accordingly, the purpose of the finality requirement 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 Industrial Loan Corp.,* 337 U.S. 541, 546 (1949). While ALJs in environmental whistleblower cases issue recommended, rather than final decisions, the ALJ, who presides over the hearing phase of the litigation, is entitled to the same opportunity to issue independent decisions as a district court judge. Moreover, as the Supreme Court recognized in *Cobbledick*, permitting interlocutory appeals would not, as Puckett argues,[3] expedite the administrative adjudication process. Instead, meritorious appeals would languish while the Board was forced to adjudicate "a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick v. United States,* 309 U.S. at 325.

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.

As we recognized in *Greene,* slip op. at 4, 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 Litigation Steering Comm. v. Mead Corp.*, 614 F.2d 958, 961 n.2, *cert. denied,* 449 U.S. 888 (1980), quoting *Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1094 (5th Cir. 1977). Applying the collateral order test to the facts of this case, we conclude that the ALJ's discovery orders to which Puckett objects, do not fall within the exception's coverage.

Discovery orders are readily subject to review upon appeal. *McKesson Corp. v. Islamic Republic of Iran,* 52 F.3d 346, 353 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996); *Reise v. Board of Regents*, 957 F.2d 293, 295 (7th Cir. 1992). Accordingly, such orders, generally, do

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[3] Complainant's Response to Order to Show Cause and Request for Oral Argument on his Interlocutory Appeal at 28.

not qualify as appealable collateral orders. *McKesson Corp. v. Islamic Republic of Iran,* 52 F.3d at 353; *Simmons v. City of Racine, PFC,* 37 F.3d 325, 327 (7th Cir. 1994); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749 (10th Cir. 1993); *Lewis v. Bloomsburg Mills, Inc.,* 608 F.2d 971, 973 (4th Cir. 1979). In *Lewis,* the Fourth Circuit cited with approval Judge Clark's dissent in *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 280 F.2d 800, 805-806 (2d Cir.1966) (which the Supreme Court also quoted with approval in *Switzerland Cheese Ass'n v. E. Horne's Market*, 385 U.S. 23, 25 n.3 (1966)):

> A district judge's orders advancing a case to trial ought not to be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication. . . . I believe this is an intolerable burden for us, an improper and uncertain interference with trial court discretion, and a confusing invitation to indiscriminate appeals in the future all contrary to settled federal law against piecemeal appeals.[4]

If Puckett believes that the ALJ's discovery orders constituted an abuse of discretion that prejudiced his case, he may so argue upon appeal, if and at such time as, the ALJ issues a recommended decision and order denying his claim. Accordingly, as Puckett has not demonstrated a basis for departing from our strong policy against interlocutory appeals, we decline his invitation to do so in this case.

As indicated above, the parties filed a number of motions after we issued our order to show cause in this case. We dispose of them here. TVA's Motion to Strike Puckett's brief is **DENIED.** While we share TVA's concern that parties, at the very least "comply with the most basic elements of decorum required of a legal professional," Motion to Strike at 4, we find that Puckett's argument in this case, while clearly on the razor's edge of acceptability, is not quite of the same degree of "immaterial, offensive excoriation" for which we sanctioned Puckett's counsel in *Pickett v. TVA,* ARB No. 00-076, ALJ No. 99-CAA-25 (ARB Nov. 2, 2000). However, we reiterate that unsupported, gratuitous, disparagement of an ALJ's integrity and ability does not serve the interests of counsel's clients. *Id.* at 2. As we stated in *Pickett*, slip op. at 2, "'the use of odiums, sarcasm, and vituperative remarks have no place in a brief and are wholly unwarranted. Frankly, resort to the use of such statement is an indication of a lack of confidence in the law and the facts to support the position of the one using them.'" quoting, *State ex rel. Dyer v. Union Electric Co.,* 312 S.W.2d 151, 154 (Mo. Ct. App. 1958).

We also **DENY** Puckett's motion to strike TVA's filing. We note that while Puckett has moved to strike Sales-Long's sworn statement concerning the ALJ's April 19, 2002 teleconference, Puckett's petition for review and response to our show cause order are replete with unsworn "testimony" regarding the same teleconference. See *e.g.,* Interlocutory Appeal and Motion for Stay of Orders at 1-3, Complainant's Response to Order to Show Cause and Request for Oral Argument on his Interlocutory Appeal at 3, 4, 9, 11, 13, 16, 18-20, 22, 25, 30, 34. In

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[4] In accordance with Judge Clark's dissent, the Second Circuit, *en banc*¸ subsequently reversed *Peter Pan Fabrics, Inc. Chappell & Co. v. Frankel*, 367 F.2d 197, 200 (1996).

any event, neither Sales-Long's sworn statement, nor Puckett's counsel's unsworn testimony is relevant to our disposition of this case. Accordingly, we **DENY** Puckett's motion to strike as moot.

Finally, we **DENY** TVA's motion to strike Puckett's personal letter. While as TVA asserts, a party represented by counsel should communicate with the Board through such counsel, we consider this letter to be only a simple request that we expedite our decision, and therefore it was not considered in determining the merits of this case.

Conclusion

Puckett's interlocutory appeal does not fall within the collateral order exception to the finality rule. Accordingly, we **DISMISS** Puckett's petition for review.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge