**In the Matter of:**

**BEVERLY M. MIGLIORE,**

**COMPLAINANT,**

**v.**

**RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,**

**RESPONDENT.**

**ARB CASE NO. 04-156**

**ALJ CASE NO. 2000-SWD-1**

**DATE: November 30, 2004**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearance:**

***For the Complainant:***
**Richard E. Condit, Esq., General Counsel,** ***Public Employees for Environmental Responsibility, Washington, D.C.***

## FINAL ORDER OF DISMISSAL

This case arises under the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995), and the implementing regulations at 29 C.F.R. Part 24. On August 2 and September 20, 2004, the Complainant Beverly M. Migliore filed Petitions for Review of, respectively, the Recommended Order of Dismissal, issued by the Administrative Law Judge (ALJ) on July 14, 2004, and the Supplemental Recommended Order of Dismissal issued on September 8, 2004. On November 15, we issued an Order to Show Cause, directing Migliore to show cause why, pursuant to the decisions of the federal courts in *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002), and *Rhode Island v. United States*, 301 F. Supp. 2d 151 (D. R.I. 2004), the Administrative Review Board should not dismiss this consolidated appeal.[1] Based on the State's

[1] Like the ALJ's recommended dismissal orders, the Board Order did not cite the initial court order enjoining these proceedings, *Rhode Island v. United States,* 115 F. Supp.

Continued . . .

sovereign immunity, the foregoing court orders enjoined the Department of Labor's adjudication of four complaints that Migliore and two co-workers at the Rhode Island Department of Environmental Management had initiated. Migliore filed two of the four complaints at issue, but only one of her complaints is before the Board in this appeal. The complaints these private parties were pursuing had reached different stages of the Department of Labor (DOL) administrative process when the State initially sought injunctive relief from the United States District Court for the District of Rhode Island in 2000 and again when the State returned to the federal courts in 2003 for enforcement of the Court of Appeals' 2002 order. 304 F.3d at 39 n.3; 301 F. Supp. 2d at 152-53; *Rhode Island v. United States,* 115 F. Supp. 2d 269, 279 (D. R.I. 2000). The question before us is the interpretation of the court orders as they specifically pertain to this second of Migliore's complaints (*Migliore II*).

In response to Migliore's August 2 and September 20, 2004 Petitions for Review, Rhode Island filed documents asserting that the filing of the petitions violated the injunctive relief afforded the State by the federal courts. Rhode Island contended, "Any act other than outright dismissal of this filing will violate the rulings" of the federal courts regarding Migilore's and her co-workers' complaints. State of Rhode Island ltr. dated Aug. 4, 2004 at 2; State of Rhode Island ltr. dated Sept. 17, 2004. To the extent that Rhode Island is suggesting that the ARB is without authority to entertain Migliore's arguments regarding the proper application of the federal courts' rulings to Migliore's second complaint, we reject Rhode Island's contention. Because the 2004 District Court order focused primarily on the one complaint that had reached the ARB at that time – namely, the first complaint filed by Migliore (*Migliore I*) – the District Court order provides limited guidance regarding the Court of Appeals' mandate as it pertains to the other three complaints that were before the courts. 301 F. Supp. 2d at 152-56; *see* n.3, infra. We thus conclude that we are acting within our authority, as circumscribed by the federal courts' orders, to dispose of the Complainant's arguments regarding the proper application of those court orders.

On November 29, 2004, we received Migliore's response to the show cause order.[2] For the reasons that follow, we conclude that Migliore's Petitions for Review filed August 2 and September 20, 2004, must be dismissed based on our reading of the foregoing court orders.

---

2d 269 (D. R.I. 2000), because it was modified by the 2002 Court of Appeals decision. *See* discussion infra at p. 3.

[2] The Board Order to Show Cause noted that Rhode Island had waived its interest in participating in this show cause proceeding. Order at 3 n.5.

## BACKGROUND

The instant complaint was filed on August 31, 1999, with the DOL Occupational Safety and Health Administration (OSHA). Complaint ltr. dated Aug. 31, 1999, signed by T. Robins and J. Landry, Migliore's attys. Migliore alleged that Rhode Island Department of Environmental Management (Rhode Island or the State) retaliated against her for pursuit of her first complaint. *Id.* at 1 - 4. OSHA investigated and found substantiation for Migliore's allegation that after issuance of the administrative law judge decision in Migliore's favor in *Migliore I*, Rhode Island had, among other things, issued a statement to the media that personally attacked Migliore's credibility and went "beyond mere disagreement" with the administrative law judge's *Migliore I* findings. Oct. 22, 1999 ltr. from R. Hooper, Asst. Reg. Adm'r, OSHA, to RIDEM. The State timely requested a hearing before an administrative law judge. Oct. 28, 1999 ltr. from A. Shoer, RIDEM, to Chief Admin. Law Judge.

While its request for an administrative law judge hearing on this complaint was pending, Rhode Island initiated a federal court action for injunctive relief against further investigation and adjudication by DOL of the complaints Migliore and her two co-workers had filed. Specifically, on February 1, 2000, Rhode Island filed an action with the United States District Court for the District of Rhode Island to restrain DOL from processing further four complaints, including this complaint that Migliore had filed, based on the State's sovereign immunity. At that time, the other three complaints had progressed further in the DOL complaints process than had this second of Migliore's complaints.[3]

On September 29, 2000, the District Court permanently enjoined DOL adjudication of the four complaints, but declined to enjoin OSHA investigation of the

---

[3] In addition to this complaint that Migliore filed in August 1999 (*Migliore II*), Rhode Island brought these three complaints before the District Court: 1) a complaint – actually the consolidation of three 1998 complaints – Migliore filed that OSHA had investigated and determined to lack merit, but that an administrative law judge had then heard de novo; the judge issued a recommended decision in August 1999 in Migliore's favor, recommending an award of equitable relief and a large damages award; Rhode Island appealed that recommended decision to the ARB, where the appeal was pending in February 2000 (*Migliore I);* 2) a complaint Barbara Raddatz filed, which OSHA had investigated and determined to lack merit, and on which Raddatz had requested an administrative law judge hearing; that hearing request was pending in February 2000; and 3) a complaint Joan Taylor filed that OSHA had investigated and found to have merit and on that basis had assessed damages against Rhode Island; in February 2000, OSHA was still investigating the Taylor complaint; in November 2000, the State requested an administrative law judge hearing on the complaint. 115 F. Supp. 2d at 272; *see Migliore v. Rhode Island Dep't of Envtl. Mgmt.,* ARB No. 99-118, ALJ Nos. 98-SWD-3, 99-SWD-1, -2, slip op. at 2 n.1 (ARB Apr. 30, 2004).

complaints as Rhode Island had requested. *Rhode Island v. United States*, 115 F. Supp. 2d 269, 279 (D. R.I. 2000). Following appeals by Migliore, her co-worker complainants, and the U.S. Attorney General to the United States Court of Appeals for the First Circuit, that court issued a decision in which it upheld the District Court's order with one substantial modification. *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002). The Court of Appeals discussed the distinction between suits against states that private parties initiate and pursue in federal courts or administrative tribunals that are barred by sovereign immunity, and federal administrative agency actions to enforce federal laws against states that are not. 304 F.3d at 53; *see* 304 F.3d at 39 (quoting from District Court's discussion of *Alden v. Maine*, 527 U.S. 706 (1999), 115 F. Supp. 2d at 273-74). The Court of Appeals concluded that the Secretary's intervention pursuant to 29 C.F.R. § 24.6(f)(1) would effectively convert the case from the first category to the second, and thereby remove the sovereign immunity bar to DOL adjudication of the complaints before the court. 304 F.3d at 53-54.[4] The Court of Appeals thus modified the District Court's ruling to permit adjudication of the complaints to proceed if the Secretary intervened pursuant to 29 C.F.R. § 24.6(f)(1). *Id.* at 55.

The Assistant Secretary for OSHA is the Secretary's designee responsible for administration of the Part 24 regulations. 29 C.F.R. § 24.1(c) (2004). At the conclusion of appellate proceedings in the federal courts regarding the injunction against DOL, the *Migliore I* complaint was pending on appeal before the ARB, *see* n.3 *supra.* In the following months, the Assistant Secretary pursued the question of intervention in the *Migliore I* appeal before the Board. The Assistant Secretary initially requested that the Board rule on the issue of whether the appellate court's decision allowed intervention on behalf of the Secretary in the *Migliore I* appeal, although he had not filed a motion to intervene. In July 2003, the Board issued an order declining to provide an advisory opinion regarding the court's ruling on intervention, but the Board did afford the Assistant Secretary thirty days within which to file a motion to intervene. Rhode Island objected to further proceedings before the Board and urged the Board to immediately dismiss the *Migliore I* complaint pursuant to the State's reading of the Court of Appeals' decision. The Board denied Rhode Island's request pending expiration of the period afforded the Assistant Secretary for filing a motion to intervene. *Migliore v. Rhode Island Dep't of Envtl. Mgmt.*, ARB No. 99-118, ALJ Nos. 98-SWD-3, 99-SWD-1, -2 (Order), slip op. at 4-5 (ARB July 11, 2003).

Soon after the Board issued its order in July 2003, Rhode Island returned to the District Court to seek enforcement of the injunction and was granted an interim stay of the ARB proceedings in *Migliore I*. *Rhode Island v. United States*, C.A. No. 00-44T, Order Granting Plaintiffs' Motion to Stay (D. R.I. Oct. 23, 2003). On January 29, 2004, the District Court granted Rhode Island's motion to enforce the injunction, ruling that

---

[4] The Court of Appeals agreed with the District Court that OSHA was "not enjoined from receiving complaints, conducting its own investigations on such complaints, and making determinations as to liability under 29 C.F.R. § 24.4(d)(1)." 304 F.3d at 54 n.13.

Secretarial intervention had to occur "at or before the ALJ stage," if at all. *Rhode Island*, 301 F. Supp. 2d at 156; *see Migliore v. Rhode Island Dep't of Envtl. Mgmt.*, ARB No. 99-118, ALJ Nos. 98-SWD-3, 99-SWD-1,-2, slip op. at 4 (ARB Apr. 30, 2004). The Board dismissed the appeal in *Migliore I* on April 30, 2004. *Id.*

Meanwhile, the ALJ had stayed this second of Migliore's complaints following Rhode Island's initiation of action in the District Court in February 2000. On May 18, 2004, the Assistant Secretary filed a statement with the ALJ assigned to hear the case, stating that the Secretary would not intervene in the adjudication of Migliore's complaint. Resp. to Order on Intervention, filed May 18, 2004 with the ALJ. On June 22, 2004, the ALJ issued an Order to Show Cause, directing Migliore to show cause why the case should not be dismissed pursuant to the federal court rulings already discussed. Order to Show Cause issued June 22, 2004 by the ALJ. On July 14, 2004, the ALJ issued a Recommended Order of Dismissal (R. O. D.), concluding that the doctrine of sovereign immunity barred the instant complaint pursuant to the Court of Appeals' decision and the District Court's 2004 ruling. On September 8, 2004, the ALJ issued a Supplemental Recommended Order of Dismissal (S. R. O. D.) that superseded the R. O. D., which the ALJ acknowledged had been issued prematurely.[5] Migliore then appealed the S. R. O. D. to this Board.

## DISCUSSION

### *The arguments before the ALJ*

In her August 23, 2004 response to the ALJ's show cause order, Migliore argued that the State waived its immunity from her complaint when it requested a hearing before the ALJ, under the United States Supreme Court's decision in *Lapides v. Board of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002). We agree with the ALJ that this contention lacks merit. As we recently discussed in dismissing the appeal that Migliore's co-worker Taylor had filed, the *Lapides* analysis provided by the Court of Appeals' 2002 decision enjoining DOL adjudication of these complaints is instructive. *Taylor v. Rhode Island Dep't of Envtl. Mgmt.*, ARB No. 04-166, ALJ No. 2001-SWD-1, slip op. at 6-8 (ARB Nov. 29, 2004).

---

[5] After the ALJ issued the July 14, 2004 R. O. D., stating that Migliore had failed to respond to the June 22 Order to Show Cause, Migliore filed a Motion for Reconsideration of the R. O. D. In that motion, Migliore urged that her attorney's office had not received the June 22 show cause order, and she submitted an affidavit to support the motion. Comp. Motion for Recon. filed July 21, 2004, at 1-2 and attachment. On August 11, 2004, the ALJ issued a second order to show cause, stating that the June 22 show cause order had been issued with an incorrect complainant's name in the caption. Order to Show Cause issued by the ALJ Aug. 11, 2004, at 1. The ALJ afforded Migliore ten days in which to respond to that order. *Id.* at 2. Migliore did so on August 23, 2004. S. R. O. D. at 1.

The Court of Appeals specifically held that two actions Rhode Island had taken in the course of defending against the complaints Migliore and her co-workers filed did not constitute a waiver of sovereign immunity under *Lapides.* First, the court held that Rhode Island's participation in the ALJ hearing in *Migliore I* did not constitute a waiver of its immunity, and second, that Rhode Island's pursuit of injunctive relief from the federal courts did not. 304 F.3d at 48-51; *see Taylor,* slip op. at 6-7. The Court of Appeals did not address whether Rhode Island's requests for ALJ hearings on Migliore's second complaint and on the Taylor complaint effected a waiver in each case.[6] But, as we discuss below and as we more fully explained in *Taylor*, the court's reasoning militates against finding a sovereign immunity waiver based on such requests.

Pursuant to the District Court's 2004 ruling, the question of whether the Secretary will intervene and thereby remove the sovereign immunity bar will be resolved "at or before the ALJ stage" of the proceedings. 301 F. Supp. 2d at 154, 156; *see Taylor*, slip op. at 7-8. When the Secretary has not yet intervened and the OSHA investigation yields a finding in favor of the complainant, the State's only option for forcing resolution of the intervention issue is to request an ALJ hearing. *Taylor*, slip op. at 8. Just as the Court of Appeals concluded that Rhode Island's invocation of federal court jurisdiction to assert its sovereign immunity did not equate to a waiver of that immunity, we conclude that Rhode Island's request for an ALJ hearing, in which the question of Secretarial intervention would necessarily be resolved, did not constitute a waiver of the State's sovereign immunity. *Id.,* slip op. at 7-8. Like Rhode Island's application to the federal courts for injunctive relief, the State's request for an ALJ hearing must be permitted without requiring the State to yield the very immunity that it is seeking to assert. *Id.,* slip op. at 8; *see* 304 F.3d at 50.

As an alternative argument, Migliore urged the ALJ to order reinstatement of the OSHA determination, including a damages award, in Migliore's favor. In support, Migliore contended that Rhode Island's request that the ALJ dismiss the complaint prior to a hearing on the merits, although based on the Assistant Secretary's refusal to intervene, should be interpreted as a withdrawal of the State's hearing request. We agree with the ALJ that this argument, which we also addressed in the *Taylor* dismissal order, must be rejected. As was the case in *Taylor*, Rhode Island did not withdraw its request for a hearing on this second Migliore complaint. Rather, Rhode Island established a basis for dismissal of the complaint – its sovereign immunity as construed by the Court of Appeals and the District Court – in the pre-hearing stage of proceedings before the ALJ.

---

[6] The primary focus of the Court of Appeals' *Lapides* analysis is Rhode Island's voluntary participation in administrative proceedings. 304 F.3d at 48-49. That was the case with the *Migliore I* complaint, on which OSHA found against Migliore, who then requested an ALJ hearing, in which Rhode Island participated. *Id.; see* n.3 supra. In two of the four complaints that were before the court, *Migliore II* and Taylor's complaint, OSHA found in favor of the complainants and Rhode Island requested hearings. *See id*.

S. R. O. D. at 3. Rhode Island thus prevailed before the ALJ, although on procedural grounds.

Also in support of reinstatement of the OSHA finding in her favor, Migliore cited the District Court's 2004 observation that, in its 2000 order, it had not "disturb[ed] the $10,000 award made in Migliore II" by OSHA and that it had not enjoined "OSHA from investigating the alleged violations" contained in the complaints of Migliore and her co-workers. 301 F. Supp. 2d at 153. The District Court's statements do not indicate, however, that the OSHA determination in *Migliore II* is exempt from operation of 29 C.F.R. § 24.4(d)(2). That regulation provides that an OSHA determination becomes the final order of the Secretary only if no timely request for hearing is filed, or if the request for hearing is dismissed. *See Taylor*, slip op. at 8-9, n.5. Although Migliore's complaint was dismissed in this case, Rhode Island's request for hearing was not. Consequently, Section 24.4(d)(2) does not support reinstatement of the OSHA determination in *Migliore II*. Furthermore, the court orders regarding Rhode Island's sovereign protections do not suggest that an OSHA determination becomes a final and enforceable order despite the filing of a timely request for hearing. We therefore agree with the ALJ's conclusion that the OSHA determination should not be reinstated.

***The arguments offered in response to the Board's Order to Show Cause***

In response to the Board's show cause order, Migliore does not debate whether the Assistant Secretary unequivocally refused to intervene in the case before the ALJ, and Migliore does not urge that the Assistant Secretary could correct the sovereign immunity defect by intervening in the case at the ARB level. *See* Comp. Resp. to Board's OSC at 3-4. Rather, Migliore reiterates three contentions that she raised before the ALJ and which we have discussed above. First, Migliore contends that Rhode Island waived its sovereign immunity when it requested a hearing before the ALJ on *Migliore II*, under the *Lapides* principle. Second, Migliore urges that Rhode Island has effectively abandoned or withdrawn its request for a hearing on *Migliore II*, and thus the OSHA determination in Migliore's favor must be reinstated. Third, Migliore argues that the federal court orders support dismissal of the case before the ALJ without prejudice to the Complainant and with reinstatement of the OSHA determination in Migliore's favor in *Migliore II*. Comp. Resp. to Board's OSC at 4-6. For the reasons we have discussed above, we reject these three contentions.

## CONCLUSION AND ORDER

For the foregoing reasons, we conclude that Rhode Island did not waive its sovereign immunity when it requested a hearing on the OSHA determination in Migliore's favor on this second complaint, that in the absence of Secretarial intervention before the ALJ in this case, the complaint cannot proceed to a hearing on the merits, and that the 2004 ruling of the District Court precludes intervention by the Secretary at this

stage. We also do not discern support in the federal courts' rulings regarding the complaints of Migliore and her co-worker complainants for reinstatement of the OSHA determination in her favor, dated October 22, 1999. We accordingly **DISMISS** this appeal.[7]

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**
**Administrative Appeals Judge**

[7] Our decision in this matter is limited to our interpretation of the injunctive orders of the United States Court of Appeals for the First Circuit and the United States District Court for the District of Rhode Island. Those court orders are controlling in this case, and we express no opinion as to how this Board might dispose of the sovereign immunity issues posed by this case if those issues arose in other circumstances or outside the First Circuit.