In the Matter of:

JOAN TAYLOR, **ARB CASE NO. 04-166**

COMPLAINANT, **ALJ CASE NO. 2001-SWD-1**

v. **DATE: November 29, 2004**

RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

RESPONDENT.

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 27, 2004, the Complainant Joan Taylor filed a Petition for Review of the Recommended Order of Dismissal, which the Administrative Law Judge (ALJ) issued on August 12, 2004. On September 16, we issued an Order to Show Cause, directing Taylor 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 appeal. Based on the State's sovereign immunity, the foregoing court orders enjoined the Department of Labor's adjudication of this complaint, as well as three others initiated and pursued by the Rhode Island Department of Environmental Management employees. 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).[1]

On October 1, we received Taylor's response to the show cause order.[2] The question before us is the interpretation of the court orders as they specifically pertain to Taylor's complaint. As we discuss below, the 2004 District Court order provided guidance regarding the Court of Appeals mandate, but the District Court focused primarily on the one complaint that had reached the ARB at that time. 301 F. Supp. 2d at 152-56. For the reasons that follow, we conclude that the we must dismiss the August 27, 2004 Petition for Review based on our reading of the foregoing court orders.

BACKGROUND

Taylor's SWDA complaint was filed on November 22, 1999, with the DOL Occupational Safety and Health Administration (OSHA). Complaint ltr. dated Nov. 18, 1999, signed by J. Ruch, Taylor's atty. Taylor alleged that Rhode Island Department of Environmental Management (Rhode Island or the State) retaliated against her for testifying in the hearing on a SWDA complaint her co-worker Beverly M. Migliore had filed. *Id.* at 1, 2, 5-8. OSHA investigated and found substantiation for Taylor's allegation that a supervisor who objected to Taylor's testimony in the Migliore hearing intentionally delayed a desk audit, which was prompted by her reassignment to a different division and a position with more complex responsibilities. Nov. 14, 2000 ltr. from R. Fazzio, Area Dir., OSHA, to RIDEM. The State timely requested a hearing before an administrative law judge. Nov. 20, 2000 ltr. from D. George, RIDEM, to Chief Admin. Law Judge.

While OSHA was investigating Taylor's complaint, Rhode Island initiated a federal court action for injunctive relief against further DOL investigation and adjudication of the complaints filed by Taylor, Migliore and another co-worker. 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 Taylor 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 Taylor's.[3]

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[1] The Court of Appeals modified the District Court's 2000 order. *See* discussion infra at pp. 2-3.

[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.4.

[3] In addition to this complaint that Taylor filed, Rhode Island brought these three complaints before the District Court: 1) a complaint – actually the consolidation of three 1998 complaints – Migliore filed, which OSHA investigated and determined to lack merit,

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On September 29, 2000, the District Court permanently enjoined DOL from adjudicating the four complaints, but declined to enjoin OSHA investigation of the complaints as Rhode Island had requested. *Rhode Island v. United States,* 115 F. Supp. 2d 269, 279 (D. R.I. 2000). Following appeals by Taylor, 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, which are barred by sovereign immunity, and federal administrative agency actions to enforce federal laws against states, which 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 whether the appellate court's decision allowed intervention on the Secretary's behalf in the *Migliore I* appeal, although he had not filed a motion to

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but which 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 a hearing before an administrative law judge; that hearing request was pending in February 2000; and 3) a second complaint Migliore filed, which OSHA had investigated and determined to have merit, and on that basis had assessed damages against Rhode Island; Rhode Island had requested a hearing regarding the complaint and that hearing request was pending in February 2000 (*Migliore II*). 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).

[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.

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 July 11, 2003 order, Rhode Island returned to the District Court to seek enforcement of the injunction and the Court granted Rhode Island 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 the Secretary must intervene "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, Taylor's complaint, which Rhode Island's November 2000 request for hearing had elevated to the Office of Administrative Law Judges, had been pending there during the proceedings in the federal courts. 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 Taylor's complaint. Resp. to Order on Intervention, filed May 18, 2004 with the ALJ. On June 30, 2004, the ALJ issued an Order to Show Cause, directing Taylor to show cause why the case should not be dismissed pursuant to the federal court rulings already discussed. Order to Show Cause issued June 30, 2004 by the ALJ. On August 12, 2004, the ALJ issued a Recommended Order of Dismissal (R.O.D.), concluding that the doctrine of sovereign immunity barred Taylor's complaint pursuant to the Court of Appeals' decision and the District Court's 2004 ruling. This appeal followed.

DISCUSSION

The arguments before the ALJ

Noting that the Secretary – through her designee the Assistant Secretary – has indicated that she will not intervene in Taylor's case, the ALJ rejected the Complainant's argument that the aforesaid decisions of the Court of Appeals and the District Court *require* the Secretary to intervene and prosecute Taylor's complaint. R.O.D. at 2. The ALJ similarly found that other authorities the Complainant cited did not support the contention that the ALJ could order the Secretary to intervene or to provide a hearing on the merits of the complaint. *Id.*

We agree with the ALJ that neither the federal court decisions granting injunctive relief to Rhode Island nor other legal authorities that may be generally relevant to this proceeding support compulsory intervention by the Secretary. Indeed, the Court of Appeals framed its concluding order to allow the Secretary to intervene, "if she so chooses . . . ." *Rhode Island Dep't of Envtl. Mgmt.*, 304 F.3d at 55. In addition, both court decisions focused on the regulation at 29 C.F.R. § 24.6(f)(1), which clearly states that the Assistant Secretary, as the Secretary's designee, may participate in the proceedings "at [his] discretion." *Rhode Island*, 301 F. Supp. 2d at 153-54 (quoting *Rhode Island Dep't of Envtl. Mgmt.*, 304 F.3d at 53-54).

The ALJ also properly rejected Taylor's contention that the Secretary is required to provide her a hearing on the merits of the complaint. Both the Court of Appeals and the District Court made clear that Rhode Island's sovereign rights exceed "a mere defense to liability," they also protect the State "from being haled before a tribunal by private parties . . . ." 304 F.3d at 43; *see* 301 F. Supp. 2d at 155; 115 F. Supp. 2d at 279. Consequently, in the absence of Secretarial intervention, the sovereign immunity bar precludes Rhode Island's participation in a hearing on the merits. An adversarial hearing of the type conducted under the Part 24 regulations obviously cannot proceed without the respondent employer's participation.

The arguments raised before the Board

In response to the Board's show cause order, Taylor does not debate whether the Assistant Secretary unequivocally refused to intervene in the case before the ALJ, and Taylor 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 1- 5. Rather, Taylor urges that Secretarial intervention is not necessary to remove the sovereign immunity bar to Taylor's further pursuit of the complaint in proceedings before the ALJ. Taylor specifically contends that the State waived its immunity from her complaint when the State requested a hearing before the ALJ. Comp. Resp. to the Board's OSC at 4 (citing *Lapides v. Board of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002)).

In the alternative, Taylor contends 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, may be interpreted as a withdrawal of the State's hearing request. Taylor cites the regulation concerning the investigation of Part 24 whistleblower complaints by OSHA that provides that the OSHA investigator's determination will become final unless one of the parties requests a hearing. 29 C.F.R. § 24.4(d)(2). Taylor then argues that, if the State's hearing request were deemed to be withdrawn, the OSHA investigator's finding in her favor, along with the investigator's award of monetary damages, must be reinstated. Therefore, urges Taylor, the Board should order the OSHA determination reinstated. Comp. Resp. to the Board's OSC at 3-4.

In response to Taylor's August 27, 2004, Petition for Review, Rhode Island filed a document asserting that the filing of the Petition 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 Taylor's and her co-workers' complaints. State of Rhode Island ltr. dated Sept. 10, 2004, filed Sept. 15, 2004. To the extent that Rhode Island is suggesting that the ARB lacks authority to entertain Taylor's arguments regarding the proper application of the federal courts' rulings to Taylor's complaint, we reject Rhode Island's contention.

The District Court's 2004 order specifically addressed a narrow question regarding whether the Court of Appeals' order permitted Secretarial intervention at the ARB level or only at an earlier stage of the DOL complaint proceedings. 301 F. Supp. 2d at 152, 156. The District Court noted the different stages that the four complaints had reached in 2000 when the State initially sought injunctive relief. *Id.* at 152-53. The court's 2004 ruling focuses on the one complaint that had reached the ARB stage at that time, where it had been stayed until after the Court of Appeals issued its decision in late 2002. *Id.* at 153-56. The District Court did not address any developments in the processing of the other three complaints, including Taylor's, since the time when the State initially sought injunctive relief. *Id.* at 152-56; *cf.* 304 F.3d at 39 n.3 (Court of Appeals' observation that, subsequent to Rhode Island's initiation of the first action before the District Court, the OSHA investigation of Taylor's complaint had been completed and that Rhode Island had requested a hearing, at which time the DOL proceedings were held in abeyance). The arguments Taylor advances before this Board are based on developments in the processing of her complaint that the courts did not examine, and not the question of when Secretarial intervention must occur. We therefore conclude that we are acting within our authority, as circumscribed by the federal courts' orders, to dispose of those arguments.

The Lapides waiver argument

In *Lapides*, the United States Supreme Court held that the State of Georgia had waived its immunity from suit in federal court by agreeing to removal of an action from state court to federal court. 535 U.S. at 620-24. The Supreme Court pointed out that, although Georgia did not agree to remove the case to federal court to gain litigating advantages for itself, it nonetheless did so "to provide its codefendents, the officials sued in their personal capacities, with the generous interlocutory appeal provisions available in federal, but not in state, court." *Id.* at 621. The Supreme Court added that Georgia "intended, from the beginning, to return to state court, when and if its codefendants had achieved their own legal victory." *Id.* The Court of Appeals discussed the *Lapides* decision at length in its opinion regarding the State's immunity to the complaints of Taylor and her co-workers. 304 F.3d at 48-51.

The Court of Appeals rejected two applications of *Lapides* to different actions taken by Rhode Island in defending itself against the four whistleblower complaints that were before the court. The court first rejected the argument advanced by Taylor and the other complainants that Rhode Island's voluntary participation in the adjudication of *Migliore I* before an administrative law judge amounted to a waiver of the State's immunity. The court found no support in *Lapides* or pertinent case law for the broad rule

Taylor and her co-worker complainants advocated that would have required the State to "preserve[ ] its immunity only by failing to appear before the ALJ and refusing to participate in the administrative proceedings entirely." 304 F.3d at 48. The court also examined sua sponte an issue that is more relevant to the *Lapides* argument Taylor advances here.

Specifically, the Court of Appeals also found that *Lapides* does not compel the conclusion that Rhode Island, through its resort to the federal courts to seek injunctive relief, waived its immunity to this and the related complaints. 304 F.3d at 48-51. In distinguishing Rhode Island's actions from Georgia's in *Lapides,* the court stated:

> In this case, the state invoked the District Court's aid, not to obtain an unseemly litigation advantage, but to clarify its entitlement to sovereign immunity where the agency's rules provided no means for doing so.

304 F.3d at 50. The court further explained why Rhode Island's invocation of federal court jurisdiction did not constitute a waiver of sovereign immunity:

> If the state cannot seek an interim judicial determination of immunity without waiving that very immunity, the state is constrained to participate in the proceedings all the way to their termination. While the state might be able to assert its immunity upon judicial review of the agency's final order, by that time the protections of sovereign immunity will have been reduced to a mere defense from liability. . . . To be sure, we have observed that litigation may sometimes present the state with a difficult choice as to whether immunity should be waived. . . . But the waiver doctrine still requires the state to be able to make *some* choice, and using *Lapides* to deprive the state of its immunity in this case would allow the state no choice at all.

304 F.3d at 50 (citations omitted). On the following basis, we conclude that the Court of Appeals' reasoning regarding Rhode Island's resort to the federal courts to clarify its sovereign immunity protections is equally applicable to Rhode Island's request for an administrative law judge hearing to force resolution of the Secretarial intervention issue.

The Court of Appeals and the District Court – in both its 2000 and 2004 orders – ruled that the State's immunity from DOL adjudication did not bar OSHA investigation of the complaints of Taylor and her co-workers. 304 F.3d at 54 n.13; 301 F. Supp. 2d at 153-54; 115 F. Supp. 2d at 279. Both courts focused on the demarcation between the OSHA investigatory stage and the adjudication of the complaints by an administrative law judge, and each court indicated that the sovereign immunity defect arose when the case moved from the investigatory to the adjudicatory stage. 304 F.2d at 49, 53-54; 115 F. Supp. 2d at 274-75.

Under the process outlined by the federal courts' orders granting Rhode Island injunctive relief, the question whether the sovereign immunity defect will be cured in regard to a particular complaint will be resolved when, and if, the case moves to the hearing stage. The only mechanism for moving the complaint to the hearing stage is for one of the parties to make a hearing request, pursuant to Section 24.4(d)(2). Regardless of who requests the hearing, elevation of the complaint from the investigatory level to the level where an administrative law judge will decide the case forces resolution of the sovereign immunity question, because the Secretarial intervention that can cure the sovereign immunity defect must occur "at or before the ALJ stage." 301 F. Supp. 2d at 154, 156. Rhode Island's request for a hearing following the OSHA investigator's finding favorable to Taylor is thus analogous to Rhode Island's application to the federal courts for injunctive relief to clarify its entitlement to sovereign immunity. And like Rhode Island's application to the federal courts for injunctive relief, the State's request for a hearing before an administrative law judge must be permitted without requiring the State to yield the very immunity that it is seeking to assert. We therefore reject Taylor's argument that the State waived its immunity by requesting a hearing before an administrative law judge.

1. Taylor's request that we order reinstatement of the OSHA determination

Contrary to Taylor's view, Rhode Island did not effectively withdraw its hearing request when it requested the ALJ dismiss Taylor's complaint. Instead, the State received the benefit of an ALJ hearing on the threshold issue of its sovereign immunity, which was resolved in the State's favor. Although that resolution precluded continuation of the proceedings to an evidentiary hearing on the merits of Taylor's complaint, the case was nonetheless resolved at the hearing level, albeit on procedural grounds.

Taylor cites the District Court statements indicating that the court did not "disturb the $10,000 award made in *Migliore II*" and that the court did not enjoin "OSHA from investigating the alleged violations" contained in the complaints of Taylor and her co-workers. Comp. Resp. to OSC at 3 (quoting 301 F. Supp. 2d at 153). But the court's statements do not suggest that the OSHA determinations in Taylor's and her co-workers' cases are exempt from operation of Section 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 hearing request is dismissed. 29 C.F.R. § 24.4(d)(2).[5] The

[5] Regarding the circumstances in which the OSHA determination will become the final order of the Secretary, Section 24.4(d)(2) provides:

> The notice of determination shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing

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Court of Appeals specifically noted that Section 24.4(d)(2) provides that the OSHA determination becomes inoperative upon the timely filing of a hearing request. 304 F.3d at 37. In its 2000 order, the District Court similarly observed that the Part 24 regulations provide that the OSHA determination becomes the final order of the Secretary if review is not requested. 115 F. Supp. 2d at 271. Both the District Court and the Court of Appeals distinguished between the OSHA investigatory phase and the subsequent adjudicatory phases of the DOL complaints process, and each declined to enjoin OSHA investigative proceedings. 304 F.3d at 54 n.13; 301 F. Supp. 2d at 153-54; 115 F. Supp. 2d at 274, 279. But the courts' orders do not indicate an intent to invalidate the legal effect of a hearing request under Section 24.4(d)(2). Inasmuch as the court orders

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> with the Chief Administrative Law Judge within five business days of receipt of the determination. The complainant or respondent in turn may request a hearing within five business days of the date of a timely request for a hearing by the other party. If a request for a hearing is timely filed, the notice of determination of the Assistant Secretary shall be inoperative, and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, the notice of determination shall become the final order of the Secretary.

The next to last sentence of Section 24.4(d)(2) above must be clarified within the context of the Part 24 scheme for processing whistleblower complaints. That sentence states that, once a timely hearing request is filed, the OSHA investigation determination "shall become operative only if the *case* is later dismissed," which clearly means that the OSHA determination "shall become operative only if the *hearing request* is later dismissed." The Rules of Practice and Procedure for the Department of Labor Office of Administrative Law Judges specifically provide for dismissal of a hearing request, either upon abandonment by the requesting party or at the request of the requesting party or parties in connection with a settlement. 29 C.F.R. § 18.39(b) (2004). Dismissal of a hearing request under Section 18.39(b) nullifies the requesting party's challenges to the Department's preliminary investigatory findings, thereby facilitating reinstatement of those preliminary findings. *See Chelladurai v. Core Consultants Inc.*, ARB No. 02-110, ALJ No. 02-LCA-0010, slip op. at 4-6 (ARB Aug. 26, 2003) (in case arising under H-1B visa program of Immigration and Nationality Act, employee's abandonment of hearing request resulted in reinstatement of Wage and Hour investigator's finding of $288.46 in wages owed, as opposed to $4,615.39 that employee sought by requesting hearing); *Hall v. Yellow Freight Sys.*, No. 93-STA-24 (Notice of Case Closing) (Sec'y/OAA July 1, 1993) (in whistleblower case arising under Surface Transportation and Assistance Act, complainant's withdrawal of request for hearing resulted in reinstatement of OSHA regional administrator's findings against the complainant). In this case, the ALJ dismissed Taylor's *complaint* because it was barred by Rhode Island's sovereign immunity, but Rhode Island's *hearing request* was not dismissed. Section 24.4(d)(2) thus does not support Taylor's request for reinstatement of the OSHA determination in her favor.

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 reject Taylor's request that the OSHA determination should be reinstated.

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 Taylor's favor, 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 Taylor and her co-worker complainants for Taylor's argument that the OSHA determination in her favor, dated November 14, 2000, should be reinstated. We accordingly **DISMISS** this appeal.[6]

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

[6] 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.