

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



IN THE MATTER OF:

ROBERT KREB,

ARB CASE NO. 2024-0004

COMPLAINANT,

**ALJ CASE NO. 2023-AIR-00008
ALJ SCOTT R. MORRIS**

v.

DATE: November 28, 2023

**INTEGRA AVIATION, LLC
D/B/A APOLLO MEDFLIGHT,**

RESPONDENT.

**Before HARTHILL, Chief Administrative Appeals Judge and PUST,
Administrative Appeals Judge**

**ORDER OF NON-ACCEPTANCE OF UNTIMELY PETITION FOR
INTERLOCUTORY REVIEW**

PUST, Administrative Appeals Judge:

This case arises under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ On October 31, 2023, Complainant Robert Krebs (Complainant) sought interlocutory review of the Administrative Law Judge's (ALJ) October 13, 2023 Order Denying Complainant's Motion for Order to Show Cause for Disqualification and Removal of Counsel for Respondent Apollo MedFlight, LLC (Order).²

¹ 49 U.S.C. § 42121. AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2023).

² Complainant originally filed his Petition for Interlocutory Review of ALJ Order Denying Motion for Disqualification of Counsel in another case he had pending before the Administrative Review Board. Because the petition was for review of a new order, unrelated to the initial petition for interlocutory review, the ARB docketed the petition in

1. Case Not Accepted for Review

Complainant's interlocutory appeal is untimely. AIR 21's implementing regulations provide that "a petition [for review] must be filed within ten business days of the date of the decision of the Administrative Law Judge."³ The Board applies the ten business-day appeal deadline to interlocutory appeals.⁴ The ALJ denied Complainant's motion on October 13, 2023, and Complainant filed his petition with the Board on October 31, 2023. As the filing date is outside the ten business-day deadline, the Board does not accept the case for review.⁵

2. Insufficient Collateral Order

In the alternative, the Board notes that even had Complainant's filing been timely and the case accepted for review, the Board would have denied the requested relief on the grounds that Complainant has failed to meet the requirements for collateral review of the Order.

In his petition for interlocutory review, Complainant argues that Respondent's counsel has engaged in fraud and behaved unethically, and specifically disputes Respondent's counsel's actions related to Respondent's name in the proceedings. In the Order, the ALJ found that any errors in the named Respondent have been addressed and there is no evidence that Respondent's counsel engaged in misconduct.⁶

The Board's delegated authority includes the discretionary consideration and disposition of interlocutory appeals "in exceptional circumstances, provided such

the present case separately. See *Kreb v. Integra Aviation, LLC*, ARB No. 2023-0056, ALJ No. 2023-AIR-00008 (ARB Nov. 20, 2023).

³ 29 C.F.R. § 1979.110(a).

⁴ *Priddle v. United Airlines, Inc.*, ARB No. 2021-0064, ALJ No. 2020-AIR-00013, slip op. at 5-6 (ARB Jan. 26, 2022) (Decision and Order Denying Interlocutory Appeal).

⁵ See 29 C.F.R. § 1979.110(b) ("If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the administrative law judge shall become the final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review.").

⁶ *Kreb v. Integra Aviation, LLC*, ALJ No. 2023-AIR-00008, slip op. at 3 (ALJ Oct. 13, 2023) (Order).

review is not prohibited by statute.”⁷ Interlocutory appeals are generally disfavored given the strong policy against piecemeal appeals.⁸ When a party seeks interlocutory review of an ALJ’s non-final order, the Board has elected to look to the interlocutory review procedures used by federal courts, including providing for certification of issues involving a controlling question of law as set forth in 28 U.S.C. Section 1292(b).⁹ In this case, Complainant did not request certification of this issue for interlocutory review.

Even when a party has failed to obtain interlocutory certification under 28 U.S.C. Section 1292(b), the ARB may consider interlocutory appeals if the requirements of the “collateral order” exception are met.¹⁰ To fall within the collateral order exception, the appealed order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment.¹¹ This exception is “strictly construe[d]” to avoid “unnecessarily protract[ed] litigation.”¹² If the ALJ’s Order “fails to satisfy any one of these requirements, it is not appealable”¹³

⁷ Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

⁸ *Gunther v. Deltek, Inc.*, ARB Nos. 2012-0097, -0099, ALJ No. 2010-SOX-00049, slip op. at 2 (ARB Sept. 11, 2012) (Order Dismissing Interlocutory Appeals) (citing *Carter v. B & W Nuclear Techs., Inc.*, ALJ No. 1994-ERA-00013 (Sec’y Sept. 28, 1994) (other citations omitted)).

⁹ *Fagan v. Dep’t of Navy*, ARB No. 2023-0006, ALJ No. 2021-CER-00001, slip op. at 5-6 (ARB Apr. 6, 2023) (Order Granting Interlocutory Review) (citation omitted); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0138, ALJ No. 2005-SOX-00065, slip op. at 5-6 (ARB Oct. 31, 2005) (Final Decision and Order Dismissing Interlocutory Appeal).

¹⁰ *Adm’r, Wage & Hour Div., U.S. Dep’t of Lab. v. Goldstar Amusements Inc.*, ARB No. 2022-0027, ALJ Nos. 2021-TNE-00027, -00028, slip op. at 4-5 (ARB Sept. 30, 2022) (Decision and Order Denying Interlocutory Appeal) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); see, e.g., *Jordan v. Sprint Nextel Corp.*, ARB No. 2006-0105, ALJ No. 2006-SOX-00041, slip op. at 3-4 (ARB June 19, 2008) (Order Granting Petition for Interlocutory Review) (discussing the *Cohen* collateral order exception).

¹¹ *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 2007-0010, ALJ No. 2005-SOX-00015, slip op. at 5 (ARB Jan. 19, 2007) (Final Decision and Order Denying Interlocutory Appeal) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

¹² *Id.* (quoting *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp.*, 614 F.2d 958, 961 (5th Cir. 1980) (internal quotation omitted)).

¹³ *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); see *Kossen v. Empire Airlines*, ARB No. 2021-0017, ALJ No. 2019-AIR-00022, slip op. at 2 (ARB

Here, regardless of the results of an examination of the first two prongs of the test, we deny the appeal because the issues Complainant raises can be effectively reviewed on appeal from a final judgment. Complainant has not demonstrated that the Order would be “effectively unreviewable on appeal” of a final judgment.¹⁴ To the contrary, the Supreme Court has squarely held that “[a]n order refusing to disqualify counsel plainly falls within the large class of orders that are indeed reviewable on appeal after final judgment, and not within the much smaller class of those that are not.”¹⁵ Courts have routinely denied interlocutory review of disqualification motions in civil cases.¹⁶ Accordingly, Complainant’s petition for interlocutory review would have been denied on substantive legal grounds had it been timely filed.

Feb. 25, 2021) (Order Denying Interlocutory Appeal) (“The appeal must meet all of [the collateral order exception] criteria”).


¹⁴ *Priddle*, ARB No. 2021-0064, slip op. at 8 (“To be effectively unreviewable, the right sought to be protected by the interlocutory appeal must be, for all practical and legal purposes, destroyed if it were not vindicated prior to final judgment.”) (internal quotations omitted).

¹⁵ *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (“The propriety of the district court’s denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. The decision whether to disqualify an attorney ordinarily turns on the peculiar factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits.”); *see also Richardson–Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) (extending rule to orders granting motions to disqualify).

¹⁶ *Gibbs v. Paluk*, 742 F.2d 181, 185 (5th Cir. 1984) (attorney disqualification orders are not appealable interlocutory orders); *In re Am. Airlines, Inc.*, 972 F.2d 605, 608 (5th Cir. 1992) (citations omitted) (“Orders denying motions to disqualify counsel are not appealable before final judgment under 28 U.S.C. § 1291”).

Accordingly, Complainant's petition for interlocutory review is **NOT ACCEPTED FOR REVIEW.**

SO ORDERED.



SUSAN HARTHILL

Chief Administrative Appeals Judge



TAMMY L. PUST

Administrative Appeals Judge