U.S. Department of Labor

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

IN THE MATTER OF:

SHANNON FAGAN,

COMPLAINANT

v.

DEPARTMENT OF THE NAVY,

RESPONDENT.

ARB CASE NO. 2023-0006

ALJ CASE NO. 2021-CER-00001

DATE: April 6, 2023

Appearances:

For the Complainant:
Paula Dinerstein, Esq., Peter Jenkins, Esq., Colleen E. Teubner, Esq., and Hudson B. Kingston, Esq.; *Public Employees for Environmental Responsibility*; Silver Spring, Maryland

For the Respondent:
Rachel J. Goldstein, Esq., Julie Ruggieri, Esq., and Alana M. Sitterly, Esq.; *Naval Litigation Office, Office of General Counsel*; Washington, District of Columbia

Before HARTHILL, Chief Administrative Appeals Judge, PUST and BURRELL, Administrative Appeals Judges

ORDER GRANTING INTERLOCUTORY REVIEW

PUST, Administrative Appeals Judge:

This case arises under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[1] the Safe Drinking Water Act (SDWA),[2] and their implementing regulations.[3] In response to motions filed by Shannon Fagan (Complainant) to subpoena witnesses to testify at depositions and at hearing,[4] the Administrative Law Judge (ALJ) concluded that he lacked legal authority to issue subpoenas under CERCLA or SDWA and so denied Complainant's motions.[5] At Complainant's request and pursuant to 28 U.S.C. § 1292(b),[6] the ALJ certified for interlocutory review the question of "ALJ subpoena authority in whistleblower and other proceedings with trial-type hearings, but no express statutory authorization."[7] Complainant timely filed a petition for interlocutory review with the Administrative Review Board (Board).[8] For the following reasons, we grant Complainant's petition for interlocutory review.

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1 42 U.S.C. § 9610.

2 *Id.* § 300j-9(i).

3 29 C.F.R. Part 24 (2022). In addition, the ALJ noted that it is disputed whether the Solid Waste Disposal Act and/or the Clean Air Act are at issue. Order Denying Respondent's Motion for Summary Decision at 1 (Sept. 14, 2022).

4 Order Denying Complainant's Motion for Subpoenas for Attendance at Hearing at 1 (Oct. 7, 2022); Order Denying Complainant Motion to Compel Deposition of Susan Hulbert and Quashing Subpoenas at 1-2 (June 3, 2022).

5 Order Denying Complainant's Motion for Subpoenas for Attendance at Hearing at 2-5 (Oct. 7, 2022); Order Denying Complainant Motion to Compel Deposition of Susan Hulbert and Quashing Subpoenas at 3 (June 3, 2022).

6 Order Granting Motion to Certify Interlocutory Appeal and Stay Proceedings at 1-2 (Oct. 19, 2022).

7 *Id.* at 5. While the ALJ certified the interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the ALJ also found that there is no appeal right under the collateral order doctrine because the denial of trial subpoenas is reviewable after a final judgment. *Id.* at 6. As this matter was certified for interlocutory review, we will only analyze 28 U.S.C. § 1292(b) and do not reach the collateral order doctrine. *Cf. Mara v. Sempra Energy Trading, LLC*, ARB No. 2012-0021, ALJ No. 2009-SOX-00018, slip op. at 4-6 (ARB Jan. 31, 2012) (analyzing questions the ALJ certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and additional questions that the ALJ had not certified pursuant to the collateral order doctrine).

8 Complainant's Petition for Interlocutory Review (Oct. 30, 2022).

BACKGROUND

Complainant worked as an attorney for the United States Department of the Navy (Respondent).[9] Complainant contends she engaged in protected activity on multiple occasions from October 5, 2017, to June 11, 2018.[10] On June 15, 2018, Respondent terminated Complainant's employment, citing unprofessional conduct as the reason in her notice of termination.[11]

Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that her employment was terminated in retaliation for her having made several protected disclosures.[12] Once OSHA determined that Respondent had retaliated against Complainant in violation of CERCLA and SDWA,[13] Respondent filed objections with the U.S. Department of Labor's Office of Administrative Law Judges (OALJ) and requested a hearing.

The parties entered into a Joint Discovery Plan that provided for the taking of depositions by June 3, 2022.[14] Complainant timely issued four deposition notices to Respondent for four individuals with whom she had worked (hereinafter, "four co-workers"). On May 2, 2022, Respondent informed Complainant that the four co-workers were no longer employed by Respondent and so would not be produced for deposition.[15]

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[9] Respondent's Motion for Summary Decision at 4, Ex. B (Form SF-52), Ex. E (Deposition of Shannon Fagan, Volume I) at 29 (June 15, 2022).

[10] Agency's Opposition to Complainant's Motion to Compel Discovery Responses, Ex. 5 (Complainant's Responses to Navy's First Set of Discovery Requests, Interrogatory No. 6) at 4-8 (May 23, 2022).

[11] Respondent's Motion for Summary Decision at 5, Ex. A (Notice of Termination During Trial Period), Ex. F (Deposition of Shannon Fagan, Volume II) at 39 (June 15, 2022).

[12] Complainant's Opposition to Motion for Summary Decision, Ex. 1 (OSHA Complaint) (June 29, 2022).

[13] Notice of Docketing at 1 (Aug. 25, 2021).

[14] The record indicates that the Joint Discovery Plan called for depositions to be conducted "during the weeks of May 23 and 30, 2022." *See* Order Denying Complainant Motion to Compel Deposition of Susan Hulbert and Quashing Subpoenas at 1 (June 3, 2022).

[15] *Id.* at 2.

Relying on Respondent's assertion that it intended to call Complainant's former supervisor, Susan Hulbert (Hulbert) at hearing, Complainant initially determined that a deposition of Hulbert was unnecessary.[16] Following review of Respondent's written discovery responses submitted on May 13, 2022, Complainant served a notice of deposition on Hulbert, scheduling the deposition for June 6, 2022.[17] Faced with Respondent's opposition, Complainant sought to compel Hulbert's deposition by motion filed on June 1, 2022.[18]

Also on June 1, 2022, Complainant requested subpoenas directed to the four co-workers on the grounds that they were former and not current employees of Respondent and so required direct service. As a matter of course and without consultation with the ALJ, the subpoenas were administratively issued by OALJ.[19]

The ALJ held a telephone hearing on Complainant's motion to compel Hulbert's deposition on June 3, 2022. Respondent opposed the issuance of the subpoenas for the four co-workers and for Hulbert.[20] In an order dated June 3, 2022, the ALJ denied the motion to depose Hulbert as untimely, finding no good cause to extend the deposition deadline agreed to by the parties.[21] The ALJ also quashed the subpoenas issued to the four co-workers based on his finding that he lacked authority to issue subpoenas under CERCLA or SDWA.[22]

On September 14, 2022, Complainant filed a motion to subpoena hearing testimony for certain third-party witnesses, including but not limited to those for whom Complainant sought deposition subpoenas.[23] On October 7, 2022, the ALJ

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16 *Id.*

17 *Id.* at 1-2.

18 Complainant's Motion for Assistance in Securing Attendance at Deposition or Subpoena (June 1, 2022).

19 Order Denying Complainant Motion to Compel Deposition of Susan Hulbert and Quashing Subpoenas at 2 (June 3, 2022).

20 *Id.* at 1-2.

21 *Id.* at 2.

22 *Id.* at 3.

23 Order Denying Complainant's Motion for Subpoenas for Attendance at Hearing at 1 (Oct. 7, 2022).

again ruled that he did not have authority to issue subpoenas under CERCLA or SDWA and denied Complainant's motion.[24]

On October 11, 2022, Complainant moved for interlocutory review certification of the relevant question.[25] On October 19, 2022, the ALJ certified for interlocutory appeal "the question of ALJ subpoena authority in whistleblower and other proceedings with trial-type hearings, but no express statutory authorization" pursuant to 28 U.S.C. § 1292(b), and stayed the proceedings below.[26] On October 30, 2022, Complainant filed a petition for interlocutory review with the Board.[27]

JURISDICTION AND STANDARD OF REVIEW

The Board's delegated authority includes the consideration and disposition of interlocutory appeals "in exceptional circumstances, provided such review is not prohibited by statute."[28] Interlocutory appeals are generally disfavored given the strong policy against piecemeal appeals.[29] 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.[30]

DISCUSSION

When determining whether to entertain an interlocutory appeal before the ALJ's entry of a final judgment, the Board looks to the procedures provided in 28 U.S.C. § 1292(b).[31] Section 1292(b) interlocutory review rests on two required actions:

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[24] *Id.* at 2-5.

[25] Order Granting Motion to Certify Interlocutory Appeal and Stay Proceedings at 1 (Oct. 19, 2022).

[26] *Id.* at 5-6.

[27] Complainant's Petition for Interlocutory Review (Oct. 30, 2022).

[28] 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).

[29] *Gunther v. Deltek, Inc.*, ARB Nos. 2012-0097, -0099, ALJ No. 2010-SOX-00049, slip op. at 2 (ARB Sept. 11, 2012) (collecting cases).

[30] *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0138, ALJ No. 2005-SOX-00065, slip op. at 5-6 (ARB Oct. 31, 2005) (citations omitted).

[31] *Kim v. SK Hynix Memory Sols.*, ARB No. 2020-0020, ALJ No. 2019-SOX-00012, slip op. at 3-4 (ARB Jan. 28, 2020) (citations omitted).

> *First*, "the [trial level] court must certify that the interlocutory order 'involves a controlling question of law as to which 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.'". . . . *Second*, "[t]he [reviewing court] may then, 'in its discretion, permit an appeal to be taken from such order.'"[32]

1. Question Properly Certified

Section 1292(b) permits a tribunal to certify an interlocutory order to an appellate body for immediate review when: (1) the order involves a controlling question of law; (2) there is a substantial ground for difference of opinion in resolving the issues presented by the order; and (3) an immediate appeal may materially advance the litigation's ultimate termination.[33] In a well-reasoned opinion, the ALJ analyzed all three issues, finding all three to be established in the present case. As such, the Board concludes that the ALJ's certification order sufficiently supports the Board's consideration of whether—in its discretion—it should permit the interlocutory appeal to proceed.

2. Interlocutory Appeal Granted

The Board's analysis focuses on the same three issues addressed by the ALJ: controlling issue of law; substantial difference of opinion; and advantage of immediate appeal to resolve litigation. The ALJ's analysis is not controlling of our determination. Rather, "we must decide whether to exercise our 'discretion,' as a *prudential* matter, to 'permit an appeal to be taken from such order.' 28 U.S.C. § 1292(b). Since 'the [ALJ] has made an order, the three factors that justify interlocutory appeal should be treated as *guiding criteria* rather than *jurisdictional* requisites."[34] In effect, "[t]he three factors should be viewed together as the

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[32] *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 19 F.4th 472, 475-76 (D.C. Cir. 2021) (quoting *Microsoft Corp. v. Baker,* 582 U.S. 23, 29 (2017)).

[33] 28 U.S.C. § 1292(b); *see also Kim*, ARB No. 2020-0020, slip op. at 4.

[34] *In re Trump*, 874 F.3d 948, 951 (6th Cir. 2017) (emphasis in original) (quoting 16 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3930 (3d ed. 2002)).

statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal."[35] The efficiency of both the eventual ALJ hearing and the Board's proceedings are to be considered by weighing the benefit to the OALJ of avoiding unnecessary hearing against the inefficiency of having the Board hear multiple appeals in the same case.[36]

A. *Controlling Question of Law*

To satisfy this prong, "[a] controlling question of law must be one of law—not fact—and its resolution must 'materially affect the outcome of litigation.'"[37] Section 1292(b) appeals "were intended, and should be reserved, for situations in which the [court] can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts."[38] The legal question at issue "must be stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case and give it general relevance to other cases in the same area of law."[39]

The first aspect of this inquiry is clearly met. Whether Department of Labor ALJs have subpoena authority in "whistleblower and other proceedings with trial-type hearings, but no express statutory authorization," is a pure question of law. The answer to the inquiry is not dependent on an analysis of the facts of this or any other specific case.

The second aspect is also met in that resolution of the legal issue could materially affect the outcome of the litigation. As the ALJ opined, whether he may compel witnesses to testify will affect which witnesses testify at the hearing, which

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[35] *United Launch Servs., LLC v. United States*, 139 Fed. Cl. 721, 723 (Fed. Cl. 2018) (quoting 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3930 (3d ed. Apr. 2017 Update)).

[36] *S.E.C. v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 226-27 (S.D.N.Y. 2000).

[37] *ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1130 (9th Cir. 2022) (quoting *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981)); *accord Doe v. Mindgeek USA Inc.,* 574 F. Supp. 3d 760, 775 (C.D. Cal. 2021), *abrogated on other grounds by Does 1-6 v. Reddit, Inc.,* 51 F.4th 1137 (9th Cir. 2022) (citing *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004); *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 675-77 (7th Cir. 2000)).

[38] *McFarlin*, 381 F.3d at 1259 (citations omitted).

[39] *Id.*

in turn could affect the development of the record and the outcome of the decision.[40] The ALJ determined that if he were to find in favor of Respondent, his failure to grant subpoenas "would likely be reversible error if an appellate body found" that he had authority to issue subpoenas.[41] Thus, we conclude that whether the ALJ may issue subpoenas in the present matter is a controlling question of law.

B. *Substantial Grounds for Difference of Opinion*

Existing authority establishes that there are substantial grounds for differences of opinion as to whether ALJs have subpoena authority in proceedings brought under statutes which lack express statutory authorization for such but have trial-type hearing procedures, including CERCLA and SDWA. In *Childers v. Carolina Power & Light Co*, the Board found an implied authority to issue subpoenas under the Energy Reorganization Act (ERA), a statute which also lacks express ALJ subpoena authority but has trial-like hearing procedures.[42] Both before and after *Childers*, the courts in *Bobreski v. U.S. E.P.A.*[43] and *Immanuel v. U.S. Dep't of Lab.*[44] found no authority for ALJ-issued subpoenas under environmental statutes which, like the ERA, lack such express authority. Both *Immanuel* and *Bobreski* pre-date the Board's reaffirmation of *Childers* in a case involving the Immigration and Nationality Act (INA).[45] Given these facts, this issue clearly involves a question "over which reasonable judges might differ" and the "uncertainty provides a credible basis for a difference of opinion."[46] Thus, we find that there are substantial grounds for different opinions regarding the issue of whether ALJs have subpoena authority in matters involving statutes with trial-like

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40 Order Granting Motion to Certify Interlocutory Appeal and Stay Proceedings at 3 (Oct. 19, 2022).

41 *Id.*

42 *Childers v. Carolina Power & Light Co.*, ARB No. 1997-0077, ALJ No. 1997-ERA-00032, slip op. at 4-15 (ARB Dec. 29, 2000).

43 *Bobreski v. U.S. E.P.A.*, 284 F. Supp. 2d 67, 76-77 (D.D.C. 2003).

44 *Immanuel v. U.S. Dep't of Lab.*, 139 F.3d 889 (4th Cir. 1998).

45 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Integrated Informatics, Inc.*, ARB No. 2008-0127, ALJ No. 2007-LCA-00026, slip op. at 7 (ARB Jan. 31, 2011) (declining to reexamine *Childers* in light of *Immanuel*, stating that "[b]ecause both the ERA and the INA contain mandates that ALJs provide formal hearings in cases arising under those statutes, we reject the ALJ's decision to distinguish *Childers* on this basis.").

46 *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (quoting *In re Cement Antitrust Litig.,* 673 F.2d at 1028 (Boochever, J., dissenting on other grounds)).

hearing procedures but lacking explicit statutory provisions, including CERCLA and SDWA.

C. *Materially Advances Litigation*

An immediate appeal may materially advance the litigation's ultimate termination if "resolution of the question 'may appreciably shorten the time, effort, or expense of conducting'" the appellate proceedings.[47] The question presented on interlocutory appeal does not need to "have a final, dispositive effect on the litigation."[48] A key factor to consider is "whether permitting an interlocutory appeal would 'minimiz[e] the total burdens of litigation on parties and the judicial system by accelerating or at least simplifying trial court proceedings.'"[49] Notably, an issue may materially advance the litigation where it "would allow the parties to resolve a controlling question, while providing guidance on an unsettled area of law."[50]

The Board finds that granting this interlocutory appeal will materially advance the litigation by preventing serial hearings and resulting appeals in this case. More broadly, resolution of the certified question will promote uniformity by reducing future conflicting decisions relying on *Childers*, which will in turn promote efficient and equitable judicial administration.

While our jurisdiction in this matter flows from the ALJ's Order Granting Motion to Certify Interlocutory Appeal and Stay Proceedings as certified to the Board, we are not tied to the particular question formulated by the ALJ but may instead exercise our discretion to specify the question(s) we will consider.[51] By

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[47] *ICTSI Or., Inc.* 22 F.4th at 1131 (quoting *In re Cement Antitrust Litig.*, 673 F.2d at 1027).

[48] *Reese*, 643 F.3d at 688.

[49] *Sateriale v. RJ Reynolds Tobacco Co.*, No. 2:09-cv-08394, 2015 WL 3767424, at *4 (C.D. Cal. June 17, 2015) (quoting *Carrillo v. Schneider Logistics Trans–Loading & Distrib., Inc.,* No. 2:11–cv–8557, 2014 WL 1155403, at *4 (C.D. Cal. Mar. 21, 2014)).

[50] *Middlesex Cnty. Ret. Sys. v. Semtech Corp.*, No. CV 07–7114, 2010 WL 11523599, at *2 (C.D. Cal. May 17, 2010) (quoting *Ovando v. City of Los Angeles*, 92 F. Supp. 2d 1011, 1025 (C.D. Cal. 2000)) (citing *Mohawk Indus., Inc.*, 130 S. Ct. at 607 (holding that "district courts should not hesitate to certify an interlocutory appeal in such cases" when "a privilege ruling involves a new legal question or is of special consequence")).

[51] *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (citing 9 J. MOORE & B. WARD, MOORE'S FEDERAL PRACTICE ¶ 110.25[1], p. 300 (2d ed.1995) ("it is the *order* that is appealable, and not the controlling question identified by the district

granting interlocutory review in this matter, we do not intend to consider whether every federal whistleblower or other statute "with trial-type hearings" contains statutory direction regarding the authority of an ALJ to issue subpoenas, an inquiry that is far too vast in scope and lacking in connection to the ALJ's order in this case. Instead, we expect to focus on the issue of whether *Childers* and its progeny mandate an outcome different than that ordered by the ALJ below.

CONCLUSION

Accordingly, we **GRANT** Complainant's Petition for Interlocutory Review and direct briefing on the issue identified above in accordance with the attached **Notice of Appeal Acceptance, Electronic Filing Requirements, and Briefing Schedule**.

Given the identification and importance of the issue accepted for review, we invite briefing by amicus curiae as set forth in the attached **Order Allowing Filing of *Amicus Curiae* Briefs**.

SO ORDERED.

TAMMY L. PUST
Administrative Appeals Judge

SUSAN HARTHILL
Chief Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

court." (emphasis original)); 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3929, pp. 144–145 (1977) ("[T]he court of appeals may review the entire order, either to consider a question different than the one certified as controlling or to decide the case despite the lack of any identified controlling question.").

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For the Complainant:
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For the Respondent:
Rachel J. Goldstein, Esq., Julie Ruggieri, Esq., and Alana M. Sitterly, Esq.; *Naval Litigation Office, Office of General Counsel*; Washington, District of Columbia

Before HARTHILL, Chief Administrative Appeals Judge, PUST and BURRELL, Administrative Appeals Judges

NOTICE OF APPEAL ACCEPTANCE, ELECTRONIC FILING REQUIREMENTS, AND BRIEFING SCHEDULE

PLEASE TAKE NOTICE that, pursuant to the Administrative Review Board's (Board) Order Granting Interlocutory Review, the Board hereby issues this

Notice of Appeal Acceptance, Electronic Filing Requirements, and Briefing Schedule.

1. **ACCEPTANCE OF APPEAL.** The Board has accepted this matter for review and assigned it the case number noted above. All future filings related to this matter must include this case name and ARB Case Number. All filers are required to comply with the Board's rules of practice and procedure found in 29 C.F.R. Part 26, which can be accessed at https://www.ecfr.gov/current/title-29/subtitle-A/part-26.

2. **ELECTRONIC FILING AND SERVICE**

A. Use of EFS System

The Board's Electronic Filing and Service (EFS) system allows parties to initiate appeals electronically, file briefs and motions electronically, receive electronic service of Board issuances and documents filed by other parties, and check the status of appeals via an Internet-accessible interface. Use of the EFS system is free of charge to all users.

- **Attorneys and Lay Representatives:** Use of the EFS system is **mandatory for all attorneys and lay representatives** for all filing and all service related to cases filed with the Board, absent an exemption granted in advance for good cause shown pursuant to 29 C.F.R Part § 26.3(a)(1), (2).

- **Self-Represented Parties:** Use of the EFS system is **strongly encouraged for all self-represented parties** with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case. Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party. Using the EFS system saves litigants the time and expense of the required service step in the process, as the system completes all required service automatically. Upon a party's proper use of the EFS system, no duplicate paper or fax filings are required.

  Self-represented parties who choose not to use the EFS system must file all pleadings, including briefs, appendices, motions, and

other supporting documentation, by mail or by personal or commercial delivery directed to:

Administrative Review Board
Clerk of the Appellate Boards
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220
Washington, D.C., 20210

The filing party must also serve all other parties to the case by a method of service authorized under applicable law or rule.

- **Non-Party Participants:** Amici or other non-party participants in a case filed before the Board, if represented by counsel or a lay representative, are required to use the EFS system for all filing and service.

B. EFS Registration and Duty to Designate E-mail Address for Service

To use the EFS system, each party must register and designate a valid e-mail address by filing an online registration form, available at https://www.dol.gov/agencies/arb/arb_efile. After the Board has notified the party that the provided e-mail address has been validated, the party is allowed to electronically file and receive electronic service.

To use the Board's EFS system, a user must have a validated user account. To create a validated EFS user account, a user must register and designate a valid e-mail address by going to https://efile.dol.gov, select the button to "Create Account," and proceed through the registration process. If the user already has an account, they may simply use the option to "Sign In."

Information regarding registration for access to and use of the EFS system, including for parties responding to a filed appeal, as well as a step-by-step User Guide, answers to frequently asked questions (FAQs), video tutorials and contact information for login.gov and EFS support can be found under the "Support" tab at https://efile.dol.gov.

C. Effective Time of Filings

Any electronic filing transmitted to the Board through the EFS e-File system or via an authorized designated e-Mail address by 11:59:59 Eastern Time shall be deemed to be filed on the date of transmission.

D. Service of Filings

- **Service on Registered EFS Users:** Service upon registered EFS users is accomplished automatically by the EFS system.

- **Service on Other Parties or Participants:** Service upon a party that is not a registered EFS user must be accomplished through any other method of service authorized under applicable rule or law.

E. Proof of Service

Every party is required to prepare and file a certificate of service with all filings. The certificate of service must identify what was served, upon whom, and in what manner. Although electronic filing of any document through the EFS system will constitute service of that document on all EFS-registered parties, electronic filing of a certificate of service through the EFS system is still required. **Non EFS-registered parties must be served using other means authorized by law or rule.**

3. BRIEFING REQUIREMENTS

A. Briefing Schedule

- **Opening Brief:** Within 28 calendar days of the date of this Order, the Complainant must file with the Board a supporting legal brief of points and authorities. The Opening Brief may not exceed 50 double-spaced pages.

- **Response Brief**: Within 28 calendar days from the date of service of the petitioner's Opening Brief, the Respondent may file with the Board a Response Brief in opposition to the Opening Brief. The Response Brief may not exceed 50 double-spaced pages.

- **Reply Brief**: Within 14 calendar days from the date of service of a Response Brief, the Complainant may file with the Board a Reply Brief. The Reply Brief may not exceed 20 double-spaced pages.

No additional briefs may be filed without the prior written permission of the Board, issued by Order. Pursuant to the simultaneously issued Order Allowing Filing of *Amicus Curiae* Briefs, any person or entity who wishes to file an *amicus curiae* brief in this case is allowed to do so, in accordance with that Order,

B. Motions and Responses

All motions and other requests for extraordinary action by the Board including, but not limited to, requests for extensions of time or to exceed page limitations, shall be in the form of a motion. Motions and responses to motions may not exceed 30 double-spaced pages.

C. Appendix and Exhibit Filings

The Board already possesses the entire record. It is not allowed for any party to file the entire record as an appendix or exhibit. Parties are only permitted to file an appendix containing specific cited portions of the record relied upon in a party's accompanying filing.

Any filed appendix shall consist only of well-labeled excerpts from the record that are directly cited in the brief, motion or other filing accompanying the appendix. Parties may not include in an appendix any evidence not already contained in the record, without prior written permission granted by Board order.

Parties seeking to file new evidence must file a motion with the Board with supporting argument. The Board retains the authority to reject any appendix or exhibit filings that do not meet these requirements.

D. Page Limitations

The page limitations set forth in this Order do not include cover pages, tables of contents, tables of citations, signature blocks, or certificates of service. A motion to exceed an identified page limitation must specify why additional pages are required. Such motions will not be granted except in extraordinary circumstances.

If a brief or motion is filed without approval that exceeds the stated page limitations, the Board may, with or without notice: (1) refuse to accept the filing; (2) strike the filing with leave to refile a compliant filing within a specified time; (3) disregard the pages of the filing that exceed the page limitation; or (4) issue any other appropriate order, including the issuance of sanctions.

E. Required Format: All pleadings, briefs, and motions must comply with the following requirements:

- 12-point, 10 character-per-inch type or larger font
- Double-spaced
- Minimum of one-inch margins
- Capable of being printed on 8.5- by11-inch paper

4. INQUIRIES AND CORRESPONDENCE

After an appeal is filed, all inquiries and correspondence related to filings should be directed to the Office of the Clerk of Appellate Boards by telephone at 202-693-6300 or by fax at 202-513-6832. Other inquiries or questions may be directed to the Board at (202) 693-6200 or ARBCorrespondence@dol.gov.

SO ORDERED.

TAMMY L. PUST
Administrative Appeals Judge

SUSAN HARTHILL
Chief Administrative Appeals Judge

THOMAS H. BURRELL
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Before HARTHILL, Chief Administrative Appeals Judge, PUST and BURRELL, Administrative Appeals Judges

ORDER ALLOWING FILING OF *AMICUS CURIAE* BRIEFS

In this case pending before the Administrative Review Board (ARB or Board), any person or entity who wishes to file an *amicus curiae* brief is allowed to do so.

This Order supplements the Order Granting Interlocutory Review issued in this case. The core requirements for all *amicus* briefs filed with the Board are set forth in the Rules of the Board's Rules of Practice and Procedure (codified at 29 C.F.R. Part

26) and Rules 26 and 28 of the Federal Rules of Appellate Procedure, incorporated herein by reference. To the extent that there are significant differences between the referenced requirements, those differences are noted below. *Amicus* briefs must comply with all other relevant provisions of both the ARB's Rules of Practice and Procedure and the ARB's Briefing Order in this particular case, including the rules and requirements in the section titled Electronic Filing and Service.

1. Consent from the Parties and Permission from the Board Not Required; Notice to the Parties Required

All persons or entities desiring to do so may file an *amicus* brief in this case in support of either party or neither party. Potential *amici* do not need to obtain consent from the parties to the case or the Board to file an *amicus* brief but must provide notice to all parties of record and the Board at least 10 days prior to the deadline to file the brief.

In all matters, the Board may prohibit the filing of or may strike an *amicus* brief that would cause the disqualification of a Board member.

2. Required Contents

The text of every *amicus* brief must contain the following six sub-sections, with a separate heading and text:

a. Descriptions of the Identities and Interests – This section must describe or explain:
    i. the name and identities of each *amicus;*
    ii. the interests of each *amicus* in the appeal before the Board; and
    iii. how the *amicus* brief will be relevant to the issues involved in the appeal and the ways in which the brief will contribute materially to the proper disposition of the appeal;
b. Corporate Disclosure Statement (if applicable) – Any corporate *amicus* must identify its parent corporation(s) and must either list any publicly held corporation that owns 10% or more of the *amicus* corporation's stock or state that there is no such corporation;
c. Disclosures of Monetary or Editorial Contributions to the *Amicus* Brief – The *amicus* brief must include certain disclosures concerning monetary or editorial contributions to the brief. This section should

state whether a party or counsel for a party authored the *amicus* brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the *amicus* brief. This section also must identify every person (other than the *amicus*, its members, or its counsel), who made such a monetary contribution, or that no such contributions were made.

d. A Summary of the Argument;
e. The Argument; and
f. A Conclusion.

Any *amicus* brief longer than five pages must contain both a table of contents and a table of authorities.

3. Filing Deadlines

The deadline to file an *amicus* brief in support of a complainant or respondent is fourteen (14) days after the filing of the brief of the party the *amicus* supports. If the *amicus* brief is in support of neither party, the deadline is fourteen (14) days after the time allowed for filing the respondent's brief.

Absent extraordinary good cause shown, the Board will not: (a) accept or consider any *amicus* brief filed after the deadline for its submission; (b) entertain any motions or requests to extend the deadlines; or (c) make any exceptions to these requirements.

4. Page Limits

An *amicus* brief may not exceed 30 pages. The page limits do not include any questions presented, the title page, the listing of parties, *amici,* and counsel, tables of contents and authorities, signature block, certificate of disclosure (if needed), and certificate of service.

The Board will not accept or consider any *amicus* brief that exceeds the page limits and will not consider any requests for enlarged page limits.

5. Certain Briefs Prohibited

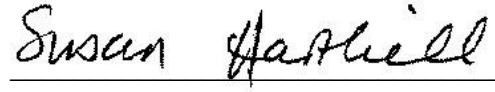
The Board will not accept or consider a reply brief from an *amicus*.

6. Information Updates Required

Amici must promptly file a supplemental statement regarding any updated information previously provided to the Board.

SO ORDERED.

TAMMY L. PUST
Administrative Appeals Judge



SUSAN HARTHILL
Chief Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge