In the Matter of:

SHARYN ERICKSON, **ARB CASE NO. 04-071**

COMPLAINANT, **ALJ CASE NO. 04-CAA-00007**

v. **DATE: April 30, 2004**

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 4, ATLANTA, GA.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Edward A. Slavin, Jr., Esq., ***St. Augustine, Florida***

ORDER DISMISSING INTERLOCUTORY APPEAL

BACKGROUND

The petition for review that is before us arises from a complaint filed under the whistleblower protection provisions of the Clean Air Act, 42 U.S.C.A. § 7622 (West 2004); the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i) (West 2004); the Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2004); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 2004); and the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.A. § 9610 (West 2004), by the Complainant, Sharyn Erickson, against the Respondent, Environmental Protection Agency (EPA). On March 25, 2004, Erickson filed a Petition for Review of Order of Recusal [ ],[1] asking the Board to review the March 16, 2004 recusal order issued by Administrative Law Judge Clement J. Kennington (the ALJ).

[1] We have omitted that portion of the title of the March 25, 2004 petition that refers to a request for review of the Administrative Law Judge's March 19, 2004 Order Denying

The ALJ previously decided two cases involving complaints Erickson brought against EPA. *See* n.1 *supra.* EPA had sought to recuse the ALJ from considering the complaint in this case, citing findings made in those decisions. *See* ALJ's March 16, 2004 Order of Recusal. In his March 16, 2004 recusal order, the ALJ stated that he was disqualifying himself from presiding in the instant case because of personal health concerns. He explicitly stated that he was not disqualifying himself because he agreed with EPA's contentions. Erickson objects to the ALJ's recusal.

ISSUE PRESENTED

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

DISCUSSION

In *Greene v. EPA Chief Susan Biro, U.S. Envtl. Prot. Agency,* ARB No. 02-050, ALJ No. 02-SWD-1 (Sept. 18, 2002), the Board dismissed an appeal of an administrative law judge's order in which the judge refused to disqualify himself because the Board determined that the order did not qualify as an exception to the general rule against hearing appeals from interlocutory orders. On similar grounds, we conclude that this appeal from the ALJ's recusal order must be dismissed.

In *Greene*, the Board examined two principles underlying the Board's policy against accepting appeals from interlocutory orders. First, the Board addressed an administrative law judge's authority to request the Board to review an interlocutory order that turns on an unsettled question of law. The Board explained that, pursuant to 29 C.F.R. §§ 18.1(a), 18.29(a), an administrative law judge may resort to procedural rules applicable to the Federal district courts in circumstances that are not specifically addressed by the Part 18 Rules of Practice and Procedure for Department of Labor Administrative Law Judges. *Greene*, slip op. at 2-3 (citing *Plumley v. Fed. Bureau of Prisons*, No. 86-CAA-6 (Sec'y Apr. 29, 1987)). Federal district court judges are authorized to certify questions for review by Federal appellate courts at an interlocutory stage of a civil proceeding by 28 U.S.C.A. § 1292(b) (West 1993). *See Plumley*, slip op.

Complainant's Motion to Reopen Record. We have assigned ARB No. 04-086 to that appeal, which concerns a post-judgment order issued by the ALJ that relates to two decisions he previously issued involving these parties. Those two decisions – one issued on September 24, 2002, that disposes of consolidated complaints ALJ Nos. 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18, and the other issued on November 13, 2003, to dispose of consolidated complaints ALJ Nos. 2003-CAA-11, 2003-CAA-19, 2004-CAA-1 – are pending on appeal before the ARB. The appeals and cross-appeals of those decisions have been docketed as ARB Nos. 03-002, 03-003, and 03-004, for appeals of the September 24, 2002 decision, and ARB Nos. 04-024 and 04-025, for appeals of the November 13, 2003 decision. We will address the appeal in ARB No. 04-086 in a separate order.

at 2. An administrative law judge's certification of such a question would be a relevant factor in the Board's determination whether to accept the interlocutory appeal for review. *See Ford v. Northwest Airlines*, ARB No. 03-014, ALJ No. 02-AIR-21, slip op. at 2-3 (ARB Jan. 24, 2003); *Greene*, slip op. at 2-3. As in *Greene*, the ALJ here has clearly not requested that the Board review his order to resolve an unsettled question of law.

The second principle that the Board discussed in *Greene* is the final decision requirement that applies to the Federal appellate courts pursuant to 28 U.S.C.A. § 1291. The Board's general rule against accepting appeals from interlocutory orders parallels the standard that has developed in the Federal courts regarding Section 1291. Similar to the Federal appellate courts, the Board applies the finality requirement in the interest of "'combin[ing] in one review all stages of the proceeding that effectively may be reviewed and corrected if and when'" a decision on the merits of the case is issued by the administrative law judge. *See Greene*, slip op. at 4 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). The Board also applies the collateral order exception allowed by the *Cohen* standard, and will hear appeals from orders rendered in the course of the proceeding before the administrative law judge that meet certain criteria. Specifically, the collateral order exception accommodates the review of orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see Greene*, slip op. at 4.

As discussed by the Board in *Greene*, the question of whether or not an administrative law judge should have disqualified himself is reviewable on appeal with the decision on the merits issued by an administrative law judge. *See Greene*, slip op. at 4 and cases there cited. Consequently, an order of recusal, like that issued by the ALJ on March 16, 2004, does not qualify for immediate review under the collateral order exception to the *Cohen* finality doctrine.

CONCLUSION

We accordingly conclude that this appeal does not provide a basis for departing from our strong policy against interlocutory appeals, and we therefore **DISMISS** Erickson's petition for review of the March 16, 2004 Order of Recusal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge