U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

OSCAR SHIRANI, **ARB CASE NO. 03-028**

COMPLAINANT, **ALJ CASE NO. 02-ERA-28**

v. **DATE: December 10, 2002**

COM/EXELON CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1]

Appearances:

For the Complainant:
Michael C. McDermott, Esq., ***Chicago, Illinois***

For the Respondent:
Scott E. Gross, Esq., Darren R. Reisberg, Esq., ***Sidley, Austin Brown & Wood, Chicago, Illinois***

FINAL ORDER DENYING EMERGENCY APPEAL OF THE DENIAL OF RESPONDENTS' MOTION FOR A PROTECTIVE ORDER

Oscar B. Shirani has filed a complaint against Respondents Exelon Generation Company (GenCo) and Exelon Business Services Company (collectively – Exelon) alleging that Respondents retaliated against him in violation of the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1995). Pursuant to 20 C.F.R. §§ 24.4, 24.5 (2002), the case was referred to a Department of Labor Administrative Law Judge (ALJ) to conduct an administrative hearing.

During discovery, Shirani sought to depose Oliver Kingsley, Senior Executive Vice President of Exelon Corporation and Chief Executive Officer of GenCo. In response, Exelon filed a Motion for a Protective Order (M. P. O.), requesting the ALJ to prohibit the deposition. Exelon also filed a Motion for Summary Decision.

In an Order dated December 4, 2002, the ALJ denied Exelon's emergency motion for a protective order and also the motion for summary decision. On December 6, 2002, Exelon filed an Emergency Appeal of the Denial of Respondents' Motion for a Protective Order Prohibiting the Deposition of Oliver

[1] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

Kingsley (Emergency Appeal) with the Administrative Review Board (Board).[2] Shirani filed Complainant's Response to Respondents' Emergency Appeal (Complainant's Response) by facsimile on December 10, 2002.

In the Emergency Appeal, Exelon avers that

> Because Mr. Kingsley had absolutely nothing to do with the decision to terminate Mr. Shirani's employment from Exelon BSC and because Mr. Shirani apparently sought to depose Mr. Kingsley to ask about topics wholly irrelevant to the termination decision at issue, Respondents requested that the ALJ prevent the deposition. . . . Respondents explained in that Motion that there was no possible justification, other than harassment, for interfering with Mr. Kingsley's already overburdened schedule and duties . . ..

Emergency Appeal at 2. Exelon also stated that it had requested the ALJ to certify the case for an interlocutory appeal, but that the ALJ had not yet acted upon his request. *Id.* at 3. Given the impending hearing date, December 17th, Exelon proceeded with the motion for interlocutory review "without waiting for the certification." *Id.*

Shirani states in response to Exelon's Emergency Motion that

> Respondents have had a full opportunity to persuade the Administrative Law Judge that Mr. Kingsley should not be subject to pre-hearing discovery and they have failed to meet their burden of persuasion. . . . . The Respondents' continued recitation of conclusions and allegations not supported by the record did not persuade Administrative Law Judge Lesnick nor should these same conclusions and unsupported allegations persuade the Administrative Review Board to reverse his decision.

Complainant's Response at 1.

The Board has reiterated recently that a party seeking interlocutory review of an administrative law judge's interlocutory order should follow the procedure established in 28 U.S.C.A. § 1292(b)(West 1993)[3] for certifying interlocutory questions for appeal from federal district courts to appellate courts.

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[2] Initially Exelon filed the Motion, without attachments, by facsimile. The Board received an original copy of the Motion with attachments on December 9, 2002.

[3] This provision states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such 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, he shall so state in writing in such order.

(continued...)

Puckett v. Tennessee Valley Authority, ARB No. 02-070, ALJ No. 2002-ERA-15, slip op. at 2-3 (ARB Sept. 26, 2002); *Greene v. EPA*, ARB No. 02-050, ALJ No. 02-SWD-1, slip op. at 2-3 (ARB Sept. 18, 2002); *Hasan v. J. A. Jones Management Services*, ARB No. 02-096, ALJ No. 2002-ERA-18, slip op. at 2-3 (July 16, 2002); *Dempsey v. Fluor Daniel, Inc.,* ARB No. 10-075; ALJ No. 01-CAA-5, slip op. at 2-3 (May 7, 2002). In *Plumley v. Federal Bureau of Prisons*, 86-CAA-6, slip op. at 3 (Sec'y April 29, 1987), the Secretary ultimately concluded that because no judge had certified the questions of law raised by the respondent in his interlocutory appeal as provided in 28 U.S.C.A. § 1292(b), "an appeal from an interlocutory order such as this may not be taken." (citations omitted). However, as discussed below, given our disposition of this case it is not necessary for us to determine if, or under what circumstances, we would consider an interlocutory appeal that has not been certified by an ALJ.

The Board's policy against interlocutory appeals incorporates the final decision requirement found in 28 U.S.C.A. § 1291 (West 1993), which provides that the courts of appeals have jurisdiction "from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." Accordingly, pursuant to § 1291, ordinarily, a party may not prosecute an appeal until the district court has issued a decision that, "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Accordingly, the purpose of the finality requirement is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949).

Nevertheless, the Supreme Court has recognized a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court further refined the "collateral order" exception to technical finality. *Van Cauwenberghe v. Biard*, 406 U.S. 517, 522 (1988). The Court in *Coopers & Lybrand* held that to fall within the collateral order exception, the order appealed must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U.S. at 468.

In determining whether to accept an interlocutory appeal, we must strictly construe the *Cohen* collateral appeal exception to avoid the serious "'hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.'" *Corrugated Container Antitrust Litigation Steering Comm. v. Mead Corp.*, 614 F2d. 958, 961 n.2, quoting *Nissan Motor Corp.*

(...continued)

> The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C.A. § 1292(b) (West 1993).

Antitrust Litigation, 552 F.2d 1088, 1094 (5th Cir. 1977). Exelon has not even alleged, much less established, that the ALJ's Order Denying the Protective Order falls within the collateral appeal exception to the final decision requirement.

Finally, in response to Exelon's M. P. O., Shirani averred that

> Mr. Kingsley's knowledge of the circumstances of Complainant's termination from Exelon BS will not be the subject of his deposition. Rather, complainant is only interested in deponent's knowledge of Complainant's quality assurance audits and their impact on ComEd/Exelon Generation and his knowledge of Complainant's meeting with him on October 6, 2002. . . . Respondents assert that Mr. Kingsley "had absolutely no involvement in any other employment decisions" challenged by Complainant. However, Respondents do not deny, nor does Mr. Kingsley deny in his affidavit that he had knowledge of Complainant's work in Supplier Evaluation Services or knowledge of the business impact of his audits as set forth in Mr. Shirani's complaint, specifically the lifting of the GENE Stop Work Order in November 1997.

Complainant's Response to Respondents' "Emergency" Motion for 29 C.F.R. 18.5 Protective Order at 2. The ALJ noted in his Order Denying Respondents' Emergency Motion that Shirani's counsel had offered to hold the deposition at Kingsley's office, on a date convenient to him. He also stated that Shirani identified "specific topic areas he would explore with Mr. Kingsley." Considering the arguments of both parties, the ALJ "[found] the Complainant's arguments that Mr. Kingsley could offer relevant and material information more convincing. The Complainant is also willing to minimize the impact of this proceeding on Mr. Kingsley's schedule." Order Denying Reconsideration at 2. As the Board has repeatedly held, we are most reluctant to interfere with an ALJ's control over the course of a hearing, "but rather should support the sound exercise of an ALJ's broad discretion in this area." *Hasan v. J. A. Jones Management Services,* slip op. at 2; *Cook v. Shaffer Trucking, Inc.,* ARB No. 00-057, ALJ No. 00-STA-17, slip op. at 3 (Aug. 31, 2000); *Hasan v. Commonwealth Edison Co.,* ARB No. 99-097, ALJ No. 99-ERA-17, slip op. at 2 (Sept. 16, 1999).

As Exelon has not demonstrated a basis for departing from our strong policy against interlocutory appeals, we decline its invitation to do so in this case. Accordingly, Exelon's Emergency Appeal of the Denial of Respondent's Motion for a Protective Order is **DENIED.**

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge