In the Matter of:

RICHARD D. HIBLER, **ARB CASE NO. 03-106**

COMPLAINANT, **ALJ CASE NO. 2003-ERA-9**

v. **DATE: February 26, 2004**

EXELON GENERATION CO., LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Richard D. Hibler, pro se, *Wilmington, Illinois*

For the Respondent:
Donn C. Meindertsma, Esq., *Winston & Strawn, Washington, D.C.*

ORDER DISMISSING PETITION FOR INTERLOCUTORY REVIEW

BACKGROUND

Richard D. Hibler has filed a complaint alleging that Exelon Nuclear Generating Co. (Exelon) has terminated his employment in violation of the whistleblower protection provisions of the Energy Reorganization Act, 42 U.S.C.A § 5851 (West 2003). The complaint was referred to a Department of Labor Administrative Law Judge for hearing and initial administrative adjudication.

Pursuant to 29 C.F.R. § 24.4(d)(2)(2003), Hibler timely served the ALJ with a request for a hearing within five business days of the receipt of the Occupational Safety and Health Administration's determination that the complaint "must be dismissed for

lack of merit." However, pursuant to 29 C.F.R. § 24.4(d)(3),[1] Hibler failed to serve Exelon with a copy of his hearing request.

On March 27, 2003, Exelon filed a Motion to Dismiss with the ALJ alleging that Hibler's failure to serve Exelon with his hearing request deprived the ALJ of jurisdiction to adjudicate his case. The ALJ denied Exelon's motion. The ALJ acknowledged that 29 C.F.R. § 24.4(d)(2) specifically provides that if a party fails to timely serve the ALJ with a hearing request, the notice of determination shall become the final order of the Secretary. However, the ALJ concluded that 29 C.F.R. § 24.4(d)(4), providing for service of the request on the respondent, does not specify any consequence, much less dismissal of the complaint, for failure to perfect service on the respondent. Similarly, the ALJ noted that while the "Appeal Notification" provided to Hibler in the notice of determination informed him of the necessity of serving the ALJ and the consequences of his failure to do so and that it was necessary to send copies of the hearing request to Exelon, the notification did not specify how the copies should be sent to Exelon or advise Hibler of the consequences of his failure to serve Exelon. Consequently, the ALJ denied Exelon's motion, "as too harsh a result for this pro se Complainant."

In response, Exelon filed a motion requesting the ALJ to certify the case to the Administrative Review Board to consider an interlocutory appeal of the order denying the motion to dismiss. The ALJ granted this motion, and Exelon filed a petition for interlocutory review and brief in support of the petition with the Board. Hibler has filed a response to the petition.

ISSUE

Whether the Board should grant Exelon's interlocutory petition for review.

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[1] This regulation provides:

> A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall be sent by the party requesting a hearing to the … respondent (employer) … on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall also be sent to the Assistant Secretary for Occupational Safety and Health and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

DISCUSSION

In *Plumley v. Federal Bureau of Prisons*, 86-CAA-6 (Sec'y April 29, 1987), the Secretary of Labor described the procedure for obtaining review of an ALJ's interlocutory order. Slip op. at 2. The Secretary determined that when an administrative law judge has issued an order of which a party seeks interlocutory review, it would be appropriate for the judge to follow the procedure established in 28 U.S.C.A. § 1292(b) (West 1993)[2] for certifying interlocutory questions for appeal from federal district courts to appellate courts. *Id.* Those procedures have been followed in this case, and the ALJ has so certified the case. Nevertheless, the Secretary and the Board have held many times that interlocutory appeals are generally disfavored, and that there is a strong policy against piecemeal appeals. *See e.g., Amato v. Assured Transp. and Delivery, Inc.,* ARB No. 98-167, ALJ No. 98-TSC-6 (ARB Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.,* ARB No. 99-097; ALJ No. 99-ERA-17 (ARB Sept. 16, 1999); *Carter v. B & W Nuclear Technologies, Inc.*, ALJ No. 94-ERA-13 (Sec'y Sept. 28, 1994). Accordingly, we must determine whether it is appropriate under established precedent to accept this interlocutory appeal.

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,

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[2] 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. 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).

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). 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 Indus. 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 Litig. Steering Comm. v. Mead Corp.*, 614 F.2d 958, 961 n.2, (5th Cir.1980), quoting *Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1094 (5th Cir. 1977).

In support of its petition for review, Exelon argues that the case presents a controlling question of law "concerning the very jurisdiction of the OALJ to further entertain this case." Brief in Support of Respondent's Petition for Interlocutory Review at 6. However, in so arguing, Exelon has failed to address the Board's Order Denying Interlocutory Appeal and Amending Briefing Schedule (ARB June 22, 1998) and Final Decision and Order (ARB Mar. 30, 2001) in *Shelton v. Oak Ridge Nat'l Lab.*, ARB No. 98-100, ALJ No. 95-CAA-19, a case directly on point.

In *Shelton*, the complainant filed a petition for interlocutory review of an ALJ's order rejecting her argument that the Wage and Hour Division's determination in her favor became the Department of Labor's final order because the respondents did not file a request for a hearing with the Chief Administrative Law Judge within five calendar days of the Administrator's order pursuant to 29 C.F.R. § 24.4(d)(3). The Board initially denied the petition for interlocutory review, noting that the complainant could raise any arguments concerning the timeliness of the respondent's request for a hearing in her brief challenging the ALJ's recommended decision. Slip op. at 2. Thus the challenge to the ALJ's finding that the request for a hearing was timely did not fall within the collateral order exception because the finding was not effectively unreviewable on appeal from the final judgment. In the Final Decision and Order, the Board reiterated that the time limit for filing a request of a hearing is not a jurisdictional prerequisite and that the ALJ

properly determined that the limitations period was subject to equitable tolling. Slip op. at 6.

Exelon has not presented the Board with any reason to depart from this established precedent. Accordingly, we **DENY** Exelon's petition for interlocutory review and **REMAND** the case to the ALJ for further adjudication.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge