In the Matter of:

RICHARD T. MULL, **ARB CASE NO. 09-107**

COMPLAINANT, **ALJ CASE NO. 2008-ERA-008**

v. **DATE: Oct. 7, 2009**

SALISBURY VETERANS ADMINISTRATION MEDICAL CENTER,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER GRANTING MOTION FOR INTERLOCUTORY REVIEW AND INVITING THE ASSOCIATE SOLICITOR FOR OCCUPATIONAL SAFETY AND HEALTH TO FILE AN AMICUS BRIEF

The Complainant, Richard T. Mull, filed a complaint alleging that the Respondent, Salisbury Veterans Administration Medical Center (SVAMC), terminated his employment in violation of the employee protection provisions of the Energy Reorganization Act (ERA)[1] because he complained that SVAMC intended to hire an unqualified Radiation Safety Officer in violation of applicable regulations.

SVAMC is a medical facility of the Department of Veterans Affairs (DVA). It is a Department of Energy licensee and is thus an "employer" as the term is defined in the ERA. SVAMC terminated Mull's employment on July 25, 2007. Mull filed his initial complaint with the Occupational Safety and Health Administration (OSHA) on December 20, 2007, and he filed a First Amended Complaint on February 1, 2008. This complaint identified James B. Peake, who at that time was the Secretary of the DVA, as the Respondent. Mull described the remedy sought as "equitable relief in the form of reinstatement or front pay in lieu of reinstatement, back pay, protection from further

[1] 42 U.S.C.A. § 5851 (West 2003 & Supp. 2008).

retaliation, an injunction prohibiting further violations of the law, and attorney fees as allowed by law."[2]

OSHA, citing the Administrative Review Board's decision in *Pastor v. Department of Veterans Affairs*,[3] concluded that the complaint was barred by sovereign immunity. Mull objected to OSHA's findings and requested a hearing before a Department of Labor Administrative Law Judge (ALJ).[4]

Before the ALJ, SVAMC filed a Motion to Dismiss the complaint on the grounds of sovereign immunity. The ALJ denied the Motion. Interpreting the Administrative Procedure Act,[5] the ALJ concluded that where an employee has been injured by agency action within the coverage of the ERA, the employee may seek equitable relief (non-monetary damages) from the agency. The ALJ also found that because Mull requested equitable relief, rather than monetary damages, his case was distinguishable from *Pastor*, in which the complainant requested only monetary damages.[6]

SVAMC requested the ALJ to certify the sovereign immunity question for interlocutory review, pursuant to 28 U.S.C.A. § 1292(b) (West 1993)[7]. Mull opposed the motion.

The ALJ found that because sovereign immunity is, in any case to which it applies, a complete bar to proceeding, it is clearly a "controlling question of law" within

---

2 *Mull v. Salisbury Veterans Admin. Med. Ctr.*, ALJ No. 2008-ERA-008, slip op. at 2 (Apr. 13, 2009) (Ruling on Respondent's Motion to Dismiss the Complaint (ALJ Ruling)).

3 ARB 99-071, ALJ No. 1999-ERA-011 (ARB May 30, 2003).

4 *See* 29 C.F.R. § 24.106 (2009).

5 5 U.S.C.A. § 702 (West 1996).

6 ALJ Ruling at 3-7.

7 28 U.S.C.A. § 1292(b) provides:

> 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. . . .

the terms of 28 U.S.C.A. § 1292(b). Accordingly, the ALJ granted SVAMC's motion for certification of the sovereign immunity question to the Administrative Review Board.[8]

Both parties initially filed briefs on the merits of the sovereign immunity question with the ARB. The ARB has authority to hear interlocutory appeals of administrative law judge orders under exceptional circumstances.[9] But because SVAMC neither indicated that the ALJ had certified the question for interlocutory review, nor argued that the ALJ's order met the requirements of the collateral order exception to the finality requirement described in *Cohen v. Beneficial Indus. Loan Corp.*,[10] the Board issued an Order to Show Cause why the Board should not dismiss the interlocutory appeal.

SVAMC noted in its response that it had in fact requested certification, and contended that this case was just like *Cohen* because it involves a collateral issue. Mull argued essentially that the petition for interlocutory appeal should be denied because it was piecemeal.

The Secretary of Labor and the Board have held many times that interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals.[11] The Board's general rule against accepting appeals from interlocutory orders parallels the standard that the Federal courts have developed regarding 28 U.S.C.A. § 1291 (West 1993). 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.[12] The Board also applies the collateral order exception to the finality requirement that *Cohen* permits and will hear appeals from interlocutory orders rendered in the course of administrative law judge proceedings that meet certain criteria. Specifically, the collateral order exception allows the review of

---

[8] Citing FRAP 5(a)(3), the ALJ rejected Mull's argument that SVAMC's motion for certification was untimely because it was not filed within 10 days of the ALJ's Ruling. Mull has not renewed this objection before the Board.

[9] Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272, ¶ 4(c)(44) (Oct. 17, 2002)).

[10] 337 U.S. 541, 546 (1949).

[11] *See e.g., Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 2003-SOX-015 (ARB May 13, 2004); *Hibler v. Exelon Generation Co., LLC*, ARB No. 03-106, ALJ No. 2003-ERA-009 (ARB Feb. 26, 2004); *Amato v. Assured Transp. & Delivery, Inc.*, ARB No. 98-167, ALJ No. 1998-TSC-006 (ARB Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.*, ARB No. 99-097; ALJ No. 1999-ERA-017 (ARB Sept. 16, 1999); *Carter v. B & W Nuclear Techs., Inc.*, ALJ No.1994-ERA-013 (Sec'y Sept. 28, 1994).

[12] *See Greene*, slip op. at 4 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

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."[13] In determining whether to accept an interlocutory appeal, we 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.'"[14]

Upon consideration of the parties' arguments, the Board concludes that it is appropriate to grant interlocutory review of the sovereign immunity issue that SVAMC has raised in this case. Whether SVAMC, as a federal government employer under the ERA, is entitled to sovereign immunity is an important legal issue completely separate from the merits of Mull's claim that the Medical Center retaliated against him in violation of the ERA's employee protection provisions. Furthermore as sovereign immunity provides immunity from suit,[15] not just from judgment, a denial of sovereign immunity is effectively unreviewable on appeal from the final judgment.[16]

Although the parties have already submitted briefs in this matter, upon review of the ALJ's decision denying summary judgment, the Board orders the parties to address the following issues in supplemental briefs not to exceed ten (10) double-spaced typed pages and to be submitted on or before **November 9, 2009:**

> 1) If a federal government employer under the ERA is not immune from suit for non-monetary damages, for what types of non-monetary damages may an administrative agency hold the federal government liable? Further, if the federal government employer is not immune from suit for non-monetary damages, are the damages that may be awarded the same as equitable relief, i.e., is all equitable relief considered to be non-monetary damages? In particular, are back pay, front pay, employee benefits, and attorney fees money damages or equitable relief?
>
> 2) Does 5 U.S.C.A. § 702 permit a party to prosecute a complaint against the federal government for "other than money damages" before an

---

[13] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see Greene*, slip op. at 4.

[14] *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).

[15] *Accord Overall v. Tennessee Valley Auth.*, ARB No. 04-073, ALJ No.1999-ERA-025, slip op. at 5 (ARB June 29, 2007).

[16] *Accord Chao v. Virginia Dep't of Trans.*, 291 F.3d 276, 279 (4th Cir. 2002); *Eckert Int'l Inc. v. Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 78 (4th Cir. 1994).

administrative agency, and if so, in what types of administrative litigation have cases arisen under this section?

3) How is the term "other than money damages" defined under 5 U.S.C.A. § 702 and are such damages the same as equitable relief, i.e., is all equitable relief considered to be "other than money damages" as defined in section 702?

As indicated above, in finding that sovereign immunity did not bar Mull's request for equitable relief, the ALJ distinguished this case from the Board's *Pastor* decision. At the Board's request, OSHA, as represented by the Solicitor of Labor, filed an amicus brief in *Pastor*.[17] Therefore, the Board invites OSHA to brief this significant issue of first impression involving the federal government's immunity from suit for equitable relief under the ERA's whistleblower provisions and the specific questions stated above. Should OSHA decide to file a brief, it shall file the brief with the Board, not to exceed thirty (30) double-spaced typed pages, on or before **November 9, 2009.** If OSHA decides not to file a brief with the Board, the Solicitor's office is requested to so inform the Board.

FOR THE ADMINISTRATIVE REVIEW BOARD:

Janet R. Dunlop
General Counsel

Note: Questions regarding any case pending before the Board should be directed to the Board's Paralegal Specialist, Juanetta Walker: Telephone: (202) 693-6200
Facsimile: (202) 693-6220

[17] *See* 29 C.F.R. § 24.108(a)(l)("At the Assistant Secretary's discretion, he or she may participate as a party or participate as amicus curiae at any time at any stage of the proceedings.").