**In the Matter of:**

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| **UNITED STATES DEPARTMENT OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS,** | **ARB CASE NO. 04-169** |
| | **ALJ CASE NO. 97-OFC-16** |
| **PLAINTIFF,** | **DATE: December 17, 2004** |

**v.**

**BANK OF AMERICA,**

**DEFENDANT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Plaintiff*
**James M. Kraft, Esq., Beverly I. Dankowitz, Esq., Gary M. Buff, Esq., Howard M. Radzely, Esq.,** ***U. S. Department of Labor, Washington, D.C.:***

*For the Defendant:*
**Richard F. Kane, Esq., Bruce M. Steen, Esq.,** ***McGuireWoods LLP, Charlotte, North Carolina***

## REMAND ORDER

### BACKGROUND

On August 11, 2004, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order on Cross-Motions for Summary Judgment (R. D. & O.) in this case arising under Executive Order 11246 and its implementing

regulations at 41 C.F.R. Chapter 60.[1] The ALJ found that the Plaintiff Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) was entitled to partial summary judgment on the issue of the Defendant Bank of America's Fourth Amendment challenge to OFCCP's selection of Bank of America (BOA) for a compliance review. The ALJ further provided, "the merits of the compliance action filed by OFCCP have not yet been litigated. A notice of hearing and prehearing order will be forthcoming after consultation with the parties."[2]

BOA filed Exceptions to the ALJ's Recommended Order on Cross-Motions for Summary Judgment, and in response, OFCCP filed Plaintiff's Motion to Dismiss Interlocutory Appeal and to Defer Proceedings on Defendant's August 30, 2004, Exceptions to the ALJ's Recommended Decision and Order on Cross Motions for Summary Judgment. BOA filed a response to OFCCP's motion and contemporaneously filed a motion with the ALJ requesting that she certify her R. D. & O. for interlocutory appeal.

On October 14, 2004, the ALJ issued an Order Denying Defendant's Motion for Certification for Interlocutory Appeal. Accordingly, we must decide whether BOA's appeal of the ALJ's ruling on partial summary judgment satisfies the collateral order exception to the finality requirement.[3] We have considered OFCCP's Motion, BOA's response and the ALJ's Order Denying Certification, and concluding that BOA has failed to establish that its Fourth Amendment challenge to its selection process will be "effectively unreviewable on appeal from a final judgment,"[4] we dismiss BOA's interlocutory appeal and remand this case to the ALJ to complete the adjudication of this case.

## DISCUSSION

In *Plumley v. Federal Bureau of Prisons,* the Secretary of Labor described the procedure for obtaining review of an ALJ's interlocutory order.[5] 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

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[1] Executive Order 11246 (30 Fed. Reg. 12319), as amended by Executive Orders 11375 (32 Fed. Reg. 14303), 12086 (43 Fed. Reg. 46501) and 13279 (67 Fed. Reg. 77141).

[2] R. D. & O. at 23.

[3] *See e.g., Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978).

[4] *Id.*

[5] 86-CAA-6 (Sec'y Apr. 29, 1987). Slip op. at 2.

established for certifying interlocutory questions for appeal from federal district courts to appellate courts.[6] In *Plumley*, 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."[7]

In this case, the ALJ has denied BOA's request that she certify the case for interlocutory review. But, we need not decide whether the denial of certification is fatal to BOA's request to file an interlocutory appeal. Even if the denial of certification was not dispositive, BOA cannot prevail because, as we discuss below, we agree with the ALJ and OFCCP that it has failed to articulate any grounds warranting departure from our strong policy against such piecemeal appeals.[8]

The Board's policy against interlocutory appeals incorporates the final decision requirement found in Title 28 of the United States Code Annotated, 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."[9] Accordingly, pursuant to § 1291, ordinarily, a party may not prosecute an appeal until the district court has

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[6] *Id.* 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).

[7] *Plumley*, slip op. at 3 (citation omitted).

[8] *United States Dep't of Labor, OFCCP v. Interstate Brands Corp.,* ARB No. 00-071, ALJ No. 97-OFC-6, slip op. at 2 (ARB Sept. 29, 2000).

[9] 28 U.S.C.A. § 1291 (West 2001).

issued a decision that, "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[10] The finality requirement's purpose is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."[11] Furthermore, in *Firestone Tire & Rubber Co. v. Risjord*,[12] the Supreme Court explained the rationale for the requirement that a party generally must raise all claims of error in one appeal at the conclusion of litigation before the trial court:

> [The rule] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

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*,[13] the Court further refined the "collateral order" exception to technical finality.[14] 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."[15] Thus, in

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**10** *Catlin v. United States*, 324 U.S. 229, 233 (1945).

**11** *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1949).

**12** 449 U.S. 368, 374 (1981), quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

**13** 437 U.S. 463 (1978).

**14** *Van Cauwenberghe v. Biard*, 406 U.S. 517, 522 (1988).

**15** 437 U.S. at 468.

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.'"[16]

BOA argues that the consent issue is effectively unreviewable on appeal because of the "enormous" expense and time involved in litigating the merits of this case.[17] In support of this argument BOA cites the OFCCP's "burdensome" proffer of twenty-six interrogatories "with 114 subparts and document requests."[18] But given the Board's strong policy against piecemeal appeals, we are not persuaded by BOA's bare, totally unsupported allegation that the OFCCP's request for twenty-six interrogatories (even with 114 subparts) will be so onerous for BOA that it will render the consent issue effectively unreviewable following trial. Accordingly, we reject BOA's interlocutory appeal and **REMAND** this case to the ALJ to complete her adjudication of the case.

**SO ORDERED.**

**OLIVER M. TRANSUE**
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**
**Chief Administrative Appeals Judge**

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

**17** BOA's response at 5.

**18** *Id.*