In the Matter of:

UNITED STATES DEPARTMENT OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS,

PLAINTIFF,

v.

BANK OF AMERICA,

DEFENDANT.

ARB CASE NO. 10-048

ALJ CASE NO. 1997-OFC-016

DATE: April 29, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

Theresa Schneider Fromm, Esq., Beverly I. Dankowitz, Esq., Katherine E. Bissell, Esq., M. Patricia Smith, Esq., *United States Department of Labor*, Washington, D.C.

For the Defendant:

Bruce M. Steen, Esq., Aaron J. Longo, Esq., *McGuireWoods LLP*, Charlotte, North Carolina; W. Carter Younger, Esq., *McGuireWoods LLP*, Richmond, Virginia

DECISION AND ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW

BACKGROUND

On January 21, 2010, a Department of Labor Administrative Law Judge issued a Recommended Decision and Order (R. D. & O.) in this case arising under Executive Order No. 11246,[1] as amended by Executive Order No. 11375[2] and Executive Order No. 12086[3] (collectively, Executive Order 11246); Section 503 of the Rehabilitation Act of 1973, as amended,[4] and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended.[5] The ALJ found that OFCCP has demonstrated by a preponderance of the evidence that Bank of America intentionally and unlawfully discriminated against African-American candidates in hiring into entry level positions in 1993 and in 2002-2005. The ALJ also stated, "I will retain jurisdiction of this matter for the remedy phase of the case. The parties shall confer and jointly submit a proposed schedule for the adjudication of damages within thirty days of receipt of this decision."[6] The ALJ attached a notice of appeal rights to the R. D. & O.[7]

On January 26, 2010, the Administrative Review Board received Bank of America's Motion for Extension of Time to File Exceptions to ALJ's Recommended Decision and Order, in which the Bank requested that it be permitted to file a petition for review in this case on or before February 23, 2010. The Bank noted that it had conferred with counsel for the OFCCP and that counsel did not object.

Because the ALJ has retained jurisdiction of this case to adjudicate the remedies to which OFCCP is entitled, Bank of America's appeal of the ALJ's decision on the merits is interlocutory. Accordingly, given the Board's strong precedent against permitting interlocutory review, we ordered Bank of America to show cause why the Board should not deny its request for an enlargement of time to file an interlocutory appeal of the R. D. & O. We also gave OFCCP permission to reply to Bank of America's response and suspended the time for filing a petition for review pending disposition of the Bank's motion for an enlargement of time.

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1 30 Fed Reg. 12319.

2 32 Fed. Reg. 14303.

3 43 Red. Reg. 46501.

4 29 U.S.C. § 793 (2002)

5 38 U.S.C. §§ 4211-4212 (2000).

6 *OFCCP v. Bank of America,* ALJ No. 1997-OFC-016, slip op. at 65 (Jan. 21, 2010).

7 *Id.*

DISCUSSION

Bank of America relies upon 28 U.S.C.A. § 1292(b)(Thomson/West 2006) as grounds for requesting interlocutory review of the ALJ's R. D. & O. 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.

In *Plumley v. Federal Bureau of Prisons*,[8] the Secretary of Labor described the procedure for obtaining review of an ALJ's interlocutory order pursuant to section 1292(b).[9] The Secretary determined that when an administrative law judge has issued an order, of which a party seeks interlocutory review, it is appropriate for the judge to follow the procedure established in section 1292(b) for certifying interlocutory questions for appeal from federal district courts to appellate courts. OFCCP avers that Bank of America is not entitled to interlocutory review pursuant to section 1292(b).

Initially, OFCCP argues that the ALJ has not entered an order stating that the R. D. & O. 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."[10] OFCCP is correct that the ALJ has entered no such order. Bank of America argues that by notifying the parties of their

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[8] 1986-CAA-006 (Sec'y April 29, 1987). The Secretary of Labor's delegation to the Board to issue final agency decisions includes, "the discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute." Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

[9] Slip op. at 2.

[10] 28 U.S.C.A. § 1292(b).

appeal rights, the ALJ has in effect certified the R. D. & O. for interlocutory review, citing *Dempsey v. Flour* [sic] *Daniel, Inc.*[11]

In *Dempsey*, the administrative law judge intentionally bifurcated his adjudication of the coverage and other merits issues because the parties maintained at the hearing that they were only prepared to litigate the coverage issue.[12] The judge found that the complainant was a covered employee under the Clean Air Act's whistleblower protection provisions[13] and remanded the case to the Occupational Safety and Health Administration to conduct an investigation on the remaining merits issues.[14] The judge's order included a statement of appeal rights. The respondent filed an interlocutory appeal with the Board, but it did not request the judge to certify a controlling question of law to the Board. Nevertheless, the Board held that this failure was not fatal to the respondent's interlocutory appeal because, by including the appeal rights, the judge had in effect issued a certification.[15]

In *Dempsey*, the Board gave the respondent the benefit of the doubt on certification, perhaps because the judge remanded the case to OSHA and thus, his inclusion of the appeal rights appeared intentional and signaled a certain degree of finality as far as the judge was concerned. Here, however, the ALJ retained jurisdiction of the case, thus suggesting that the attachment of the appeal rights was no more than an administrative oversight, and not an indication that the case was ripe for review pursuant to section 1292(b). In any event, regardless whether we excused Bank of America's failure to request certification pursuant to section 1292(b), we are not persuaded that we should grant interlocutory review in this case.

As we noted in our Order to Show Cause, the ARB generally disfavors interlocutory appeals resulting in piecemeal litigation of cases.[16] Consistent with this

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[11] ARB No. 01-075, ALJ No. 2001-CAA-005, slip op. at 3 (May 7, 2002).

[12] ALJ No. 2001-CAA-005, slip op. at 1 (ALJ June 27, 2001).

[13] 42 U.S.C.A. § 7622 (West 2003).

[14] *Dempsey*, ALJ No. 2001-CAA-005, slip op. at 10.

[15] *Dempsey*, ARB No. 01-075, slip op. at 3.

[16] *Johnson v. Siemens Building Techs.*, ARB No. 07-010, ALJ No. 2005-SOX-15, slip op. at 3 (ARB Jan. 19, 2007); *Walsh v. Resource Consultants, Inc.*, ARB No. 05-123, ALJ No. 2004-TSC-001, slip op. at 2 (ARB Aug. 10, 2005); *Cook v. Shaffer Trucking, Inc.*, ARB No. 00-057, ALJ No. 2000-STA-017, slip op. at 2 (ARB Aug. 31, 2000); *Amato v. Assured Transp. & Delivery, Inc.*, ARB No. 98-167, ALJ No. 1998-TSC-006, slip op. at 2 (ARB Jan. 31, 2000); *Allen v. E G & G Defense Materials, Inc.*, ARB No. 98-073, ALJ No. 1997-SWD-008, -010, slip op. at 2 (ARB Sept. 28, 1998).

general rule, the Secretary of Labor, in *The Cleveland Clinic Foundation*, refused to consider the Foundation's interlocutory appeal of an administrative law judge's liability finding in a case arising under Executive Order 11246, in which the judge, like the judge here, bifurcated the liability and damages issues.[17] In refusing to accept the interlocutory appeal of the liability finding, the Secretary acknowledged the general rule against accepting interlocutory appeals and noted that he had only rarely accepted such an appeal.[18]

To satisfy the statutory prerequisites for section 1292(b) review, the party seeking such review of a non-final order must establish (1) that the order involves a controlling question of law, (2) there is a substantial ground for difference of opinion in resolving the issues presented by the order, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. Bank of America initially argues that the Board should grant interlocutory appeal because the remedies phase would be time-consuming and expensive and would involve "several hundred mini-trials for every African-American candidate or job seeker in 1993 and 2002-2005 who was not hired by the Bank."[19] OFCCP responds, "The Bank's concerns are unfounded and patently inconsistent with the Bank's own statements in the Joint Memorandum in Support of Joint Motion to Bifurcate for Trial the Issues of Liability and Relief," which Bank of America and OFCCP jointly filed with the ALJ.[20] According to OFCCP, when Bank of America was attempting to convince the ALJ to bifurcate the merits and remedies issues, the Bank contended that the remedy phase would not proceed as several hundred mini-trials, but "'a **formula** to determine class-wide relief will have to be identified.'"[21] OFCCP acknowledges that the parties recognized in the Joint Memorandum that "they will have to conduct discovery to gather the facts necessary for their respective formulas," but that individual hearings to determine each class member's entitlement to relief and the amount of back pay would not be necessary.[22] Accordingly, OFCCP avers "[t]he burdens on the parties in the remedy phase, therefore, are not 'sufficiently egregious or inordinate in this case to override the strong presumption against piecemeal litigation.'"[23]

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17 *OFCCP v. The Cleveland Clinic*, 1991-OFC-020 (Sec'y April 18, 1995).

18 *Id.*

19 Bank of America Response Brief (Bank of America Resp. Br.) at 4.

20 OFCCP's Reply to Bank of America's Response to ARB's Order to Show Cause (OFCCP Rep. Br.) at 11-12.

21 *Id.* at 12.

22 *Id.*

23 *Id.* at 13, *quoting OFCCP v. Interstate Brands Corp.*, ARB No. 00-071, ALJ No. 1997-OFC-006, slip op. at 3 (ARB Aug. 11, 2000).

We agree with OFCCP that the apparent flexibility in Bank of America's averments, depending on the relief sought and the forum before which the averment is made, does detract from the strength of its argument before us. In any event, the difficulty or complexity of litigating the remedies issue is not in and of itself a ground for accepting an interlocutory appeal. First, Bank of America must establish that the order involves a controlling question of law and that there is a substantial basis for difference of opinion in resolving the issues. Ultimately, we agree with OFCCP that Bank of America has failed to establish these two prerequisites to interlocutory review.

Bank of America argues that the ALJ made errors in controlling questions of law.[24] OFCCP counters that most, if not all, of the grounds upon which the Bank seeks interlocutory appeal do not involve controlling questions of law, but instead involve the ALJ's application of the record facts to the law.[25] As OFCCP explains,

> The courts have viewed "controlling questions of law" as involving the determination of "the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *MaFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1258 (11th Cir. 2004). The term is viewed in "much the same way a lay person might, as referring to a 'pure' question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case." *McFarlin*, 381 F.3d at 1258, quoting *Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 677 (7th Cir. 2000). Accord *U.S., ex rel. Borges* v. *Doctor's Care Medical Center, Inc.*, 2007 WL 984404, *2 (S.D.Fla.).[26]

Here, Bank of America has failed to identify **a** controlling question of law, i.e., an issue upon which this case turns, for the Board's consideration. The plethora of allegedly "controlling" questions that Bank of America has identified, at least nine, and its myriad citations to the record below, including references to the ALJ's factual findings, the

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[24] Bank of America Resp. Br. at 6-20.

[25] OFCCP Rep. Br. at 6.

[26] *Id.* at. 7. *Accord Gonzalez v. Colonial Bank*, ARB No. 05-060, 2004-SOX-039, slip op. at 6 (ARB May 31, 2005)(interlocutory appeal denied in case in which the issue presented was not a purely legal question).

hearing transcripts, and the exhibits plainly demonstrate that these are not issues that the Board could decide quickly and cleanly without resort to consideration of the record. Furthermore, while Bank of America thoroughly explains why **it** has differences with the ALJ's resolution of the issues, that fact alone is not sufficient to establish that there is necessarily a substantial basis for difference of opinion in resolving the issues.

Finally, Bank of America relies on the Secretary of Labor's decision to grant limited interlocutory review in *OFCCP v. Honeywell, Inc.*[27] in support of its argument that the Board should accept its interlocutory appeal:

> [*Honeywell*] had been pending more than ten years, had involved many days of hearing testimony, had generated more than 150 exhibits, and involved several thousand claimants. The Secretary reviewed the case despite the fact that there had been no final disposition on the merits by the ALJ because, *inter alia*, the Secretary was "concerned that litigation of each and every issue in the case to a final conclusion could be extremely time consuming and costly. Id. at 1. These same factors and considerations obtain here (the matter has been pending more than 16 years, has generated more than 170 exhibits and involves several thousand candidates), which argue in favor of the ARB reviewing the RD&O prior to any remedy phase.[28]

However, as the Board held in distinguishing *Honeywell* when it denied interlocutory review in *OFCCP v. Interstate Brands, Corp.*,[29] "The Secretary considered the interlocutory appeal of specific limited threshold legal issues in the hope that such decision would encourage the parties to engage in voluntary mediation. Significantly, the Secretary specifically refused to consider the issue whether the plaintiff had carried its burden of proving that defendant had violated the Executive Order."[30] As was true in *Interstate Brands*, the defendant here has indentified no threshold legal issues, the resolution of which would encourage the parties to engage in voluntary mediation. Instead, Bank of America has requested the Board to consider the very issue the Secretary refused to consider in *Honeywell*, i.e., whether OFCCP has carried its burden of establishing that the defendant has violated the Executive Order. Additionally, while certainly not determinative, OFCCP in this case (unlike in *Honeywell*) does object to the interlocutory appeal.

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27 1977-OFC-003 (Sec'y 1993).

28 Bank of America Resp. Br. at 6 (footnote omitted).

29 ARB No. 00-071, ALJ No. 1997-OFC-006 (Sept. 29, 2000).

30 *Id.* slip op. at 3.

CONCLUSION AND ORDER

Finding that Bank of America has failed to establish a sufficient basis for departing from our general rule against accepting interlocutory appeals, we **DENY** its motion for an enlargement of time to file a petition for review, and we **REMAND** this case to the ALJ for further proceedings and to issue a recommended decision resolving this case in its entirety.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge