



In the Matter of:

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

ARB CASE NO. 2020-0011

ALJ CASE NO. 2017-OFC-00007

DATE: NOV 26 2019

PLAINTIFF,

v.

JPMORGAN CHASE & CO.,

DEFENDANT.

Appearances:

For the Plaintiff:

Kate O'Scannlain, Esq.; Jeffrey S. Rogoff, Esq.; Sudwiti Chanda, Esq.;
Anna Laura Bennett, Esq.; Alexander M. Kondo, Esq.; and Molly J.
Theobald, Esq.; U.S. Department of Labor, Office of the Solicitor,
Washington, District of Columbia

For the Defendant:

William E. Doyle, Esq.; *McGuireWoods LLP*, Raleigh, North Carolina;
Bruce M. Steen, Esq; *McGuireWoods LLP*, Charlotte, North Carolina;
and Elena D. Marcuss, Esq; *McGuireWoods LLP*, Baltimore, Maryland

**ORDER DENYING DEFENDANT'S PETITION
FOR INTERLOCUTORY REVIEW**

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, and its implementing regulations at 41 C.F.R. Chapter 60.

PROCEDURAL HISTORY

The administrative complaint giving rise to this matter is currently pending adjudication before an Administrative Law Judge (“ALJ”) from the Office of Administrative Law Judges, United States Department of Labor. On December 17, 2018, Defendant, J.P. Morgan Chase (“JPMC” or “Defendant”), filed a Motion to Dismiss the Administrative Complaint and a memorandum of law supporting its motion. On January 31, 2019, the Office of Federal Contract Compliance (“Plaintiff” or “OFCCP”), filed an Opposition to Defendant’s Motion to Dismiss the Administrative Complaint. On April 2, 2019, Defendant filed a Reply in Support of its Motion to Dismiss. On February 15, 2019, Plaintiff filed its Sur-Reply to Defendant’s Motion to Dismiss. On March 1, 2019, the ALJ held oral argument with the parties by teleconference. After weighing the Parties’ contentions and reviewing the Administrative Complaint, the ALJ denied Defendant’s Motion to Dismiss the Administrative Complaint on July 11, 2019.

On October 29, 2019, Defendant filed a “Petition for Interlocutory Review” with the Administrative Review Board (“Board”) seeking “immediate rulings” by the Board on four issues:

- Whether the delegated discretion alleged by Plaintiff states a claim upon which relief can be granted;
- Whether the systemic compensation discrimination alleged by Plaintiff states a claim upon which relief can be granted;
- Whether Plaintiff must identify statutory authority to proceed without any statute of limitations; and
- Whether the instant proceedings—before the ALJ and this Board—continue to violate Article II of the United States Constitution.

On November 8, 2019, Plaintiff filed its “Opposition to Defendant’s Petition for Interlocutory Review” (“Response Brief”) in which it asserts the following:

- The ALJ’s Order is not appealable;
- The Board’s authority to grant the requested relief is not established;
- Even if the Board had the authority to grant the requested relief, Defendant has not demonstrated a clear and indisputable right to relief.

On November 19, 2019, Defendant filed a “Reply in Support of its Petition for Interlocutory Review” (“Reply Brief”) in which Defendant’s original arguments were largely reiterated and summarized.

DISCUSSION

The Secretary of Labor has delegated authority and assigned responsibility to this Board to review decisions by ALJs as provided for or pursuant to Executive Order No. 11246, as amended, and 41 C.F.R. Parts 60–1 and 60–30. Secretary’s Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (April 3, 2019)(“Secretary’s Order). Defendant points to language in the Secretary’s Order that delegates to the Board “discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute.” Secretary’s Order, para. 5. Defendant also correctly notes that the Board has relied upon this authority to review interlocutory rulings in cases arising under Executive Order No. 11246, notwithstanding the limitation on such review prescribed in 41 C.F.R. § 60-30.19(b). Reply Brief at 2-3.

Plaintiff responds that the departmental regulations implementing the Executive Order specifically limit the authority of the Board to hear interlocutory appeals of the type sought in this matter: “Rulings by the Administrative Law Judge shall not be appealed prior to the transfer of the case to the Secretary, but shall be considered by the Secretary upon filing exceptions to the Administrative Law Judge’s recommendations and conclusions.” 41 C.F.R. § 60-30.19(b). As the case below has not been transferred to the Secretary or his designee for final action, Plaintiff contends that the decision at issue by the ALJ cannot be appealed. Response Brief at 4-6.

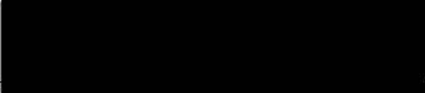
This apparent conflict in regulatory authority may be resolved by reference to a contextual canon of construction: when there is a conflict between a general provision and a more specific provision, the specific provision generally prevails. Applied to the instant petition, the general provision granting discretionary authority for interlocutory review in exceptional circumstances must yield to the specific and unambiguous restriction of that authority in § 60-30.19(b). As for the prior Board decisions to the contrary cited by Defendant, we decline to credit such

decisions in the face of the unambiguous regulatory prohibition of interlocutory review in cases arising under Executive Order No. 11246.¹

CONCLUSION

Accordingly, Defendant's Petition for Interlocutory Review is hereby **DENIED**.

FOR THE ADMINISTRATIVE REVIEW BOARD²:



William T. Barto
Chief Administrative Appeals Judge

¹ In light of this disposition, the Board need not address Defendant's arguments concerning the legal sufficiency of the allegations against it or Plaintiff's assertion that the Board could not grant the requested relief in an appropriate circumstance. But even if the Board were inclined to look beyond the prohibition of interlocutory review in § 60-30.19(b), it must be noted that a panel of this Board previously denied interlocutory review to the same petitioner in the same case raising largely indistinguishable issues based on the decision of a previous ALJ. *Office of Federal Contract Compliance Programs v. JPMorgan Chase & Co.*, ARB No. 17-063, ALJ No. 2017-OFC-007 (ARB October 5, 2017). The Board held that "none of the recognized possible 'extraordinary circumstances' for interlocutory review have been established" in the case. *Id.* at 8. If the relevant non-constitutional circumstances were determined by the Board to be unexceptional in 2017, it is unlikely that they have become more exceptional with the passage of time. As for the constitutional challenge to the ongoing adjudication, the complaint is noted for the record. However, there has been no showing that the Board has any jurisdiction to pass on the constitutional validity of contested secretarial actions, and, in the absence of such showing, the issues raised must be resolved in a court of the United States with jurisdiction over matters arising under the federal Constitution.

² The Board unanimously declined to accept Defendant's petition for review. No motion for reconsideration may be filed without permission of the Board, and any motion for leave to file a reconsideration request must be filed no later than 14 days after the date of issuance of this Order.