In the Matter of:

BEVERLY M. MIGLIORE,

COMPLAINANT,

v.

RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

RESPONDENT.

ARB CASE NO. 99-118

ALJ CASE NOS. 98-SWD-3
99-SWD-1
99-SWD-2

DATE: April 30, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Daniel P. Meyer, General Counsel, ***Public Employees for Environmental Responsibility, Washington, D.C.***

For the Respondent:
James R. Lee, Asst. Attorney General, ***State of Rhode Island;*** **Alan M. Shoer, Chief Legal Counsel, Deborah A. George, Senior Legal Counsel,** ***Rhode Island Department of Environmental Management, Providence, Rhode Island***

For the Assistant Secretary, Occupational Safety and Health Administration:
Howard Radzley, Solicitor, Steven J. Mandel, Associate Solicitor, Ellen R. Edmond, Senior Attorney, Joan Brenner, Attorney, ***United States Department of Labor, Washington, D.C.***

FINAL DECISION AND ORDER

The Administrative Review Board issues this dismissal order in light of the United States district court's granting of the Respondent Rhode Island Department of Environmental Management's motion to enforce a decision enjoining certain proceedings before the ARB in *Rhode Island v. United States,* 301 F. Supp. 2d 151 (D.R.I. 2004).

BACKGROUND

The Complainant Beverly Migliore filed complaints under the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995) (SWDA), with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) in May, September and October 1998 against the Respondent, Rhode Island Department of Environmental Management (Rhode Island). Recommended Decision and Order dated Aug. 13, 1999 (R. D. & O.) at 2. Following a preliminary investigation of the May 1998 complaint, OSHA found that Rhode Island had not violated the SWDA employee protection provision. R. D. & O. at 2. Migliore requested a hearing before an administrative law judge on that complaint, with which the two complaints she filed later in 1998 were consolidated. *Id.* The Administrative Law Judge (ALJ) issued a lengthy decision on August 13, 1999, finding against Rhode Island and awarding equitable relief as well as pecuniary damages to Migliore. In that decision the ALJ rejected Rhode Island's argument that the action was barred by the doctrine of sovereign immunity. On August 26, 1999, Rhode Island appealed the ALJ's decision to the ARB.

On February 1, 2000, Rhode Island filed with the United States District Court for the District of Rhode Island a request for injunctive relief from OSHA's investigation and the Department of Labor's adjudication of four whistleblower actions, including two complaints filed by Migliore.[1] Rhode Island based its request on the State's sovereign immunity. Letter from Deborah A. George, Rhode Island Dep't of Envtl. Mgmt., to Clerk of U.S. Dist. Ct. dated Feb. 1, 2000, and appended documents. On March 30 and April 10, 2000, the district court issued orders temporarily enjoining adjudication of the four complaints. Those orders were effectively finalized by a decision issued on September 29, 2000, *Rhode Island v. United States*, 115 F. Supp. 2d 269 (D.R.I. 2000), enjoining the Department of Labor's adjudication of the complaints. The district court did not grant Rhode Island's request for an injunction prohibiting OSHA from investigating complaints filed against Rhode Island under the SWDA. *Id.* at 279.

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[1] Before the Board in this appeal are Migliore's three consolidated complaints that the ALJ decided on August 13, 1999. In pursuing injunctive and declaratory relief in the Federal courts, the Respondent cited four complaints: the first is comprised of the three consolidated complaints Migliore filed in 1998, and which the ALJ addressed in his August 13, 1999 recommended decision; the second is an additional complaint that Migliore filed on August 31, 1999; the third and fourth complaints are those filed by two of Migliore's co-workers. Complaint of Rhode Island Dep't of Envtl. Mgmt. filed with U.S. Dist. Court Feb. 1, 2000 at 3-4. The Federal court decisions in this matter accordingly refer to the earlier complaints Migliore filed that are the subject of the ALJ's August 13, 1999 decision and the complaint Migliore filed on August 31, 1999, in addition to those filed by her two co-workers. *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 38-39 (1st Cir. 2002) (citing *Rhode Island v. United States*, 115 F. Supp. 2d 269, 270-71 (D.R.I. 2000)). The complaint Migliore filed in August 1999, and the complaints of her co-workers, although before the Federal courts, are not before us in this appeal.

The U.S. Attorney General, Migliore and the other complainants named in the district court decision appealed that ruling to the United States Court of Appeals for the First Circuit. *See Rhode Island Dep't of Envtl. Mgmt. v. United States,* 304 F.3d 31, 45 n.5 (1st Cir. 2002). In its final decision issued August 30, 2002, the court of appeals determined that the sovereign immunity question was properly brought before it and the district court under an exception to the exhaustion of administrative remedies requirement and pursuant to the courts' "nonstatutory review" authority. 304 F.3d at 40-45. The court of appeals also agreed with the district court that the doctrine of sovereign immunity precluded Migliore and the other named complainants, as private parties, from pursuing their complaints filed with DOL. However, the court of appeals modified the lower court's ruling, stating:

> The governing regulations provide that the Secretary may, at any time, intervene in the proceedings before the ALJ as a party or amicus. 29 C.F.R. § 24.6(f)(1). Generally speaking, if the United States joins a suit after it has been initiated by otherwise-barred private parties and seeks the same relief as the private parties, this generally cures any Eleventh Amendment or sovereign immunity defect, and the private parties may continue to participate in the suit. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 913 (8th Cir. 1997), *aff'd*, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999); *Seneca Nation of Indians v. New York*, 178 F.3d 95, 97 (2d Cir. 1999) (per curiam). Thus, our holding does not preclude the Secretary from intervening in the enjoined proceedings and removing the sovereign immunity bar. *See Ohio Envtl. Prot. Agency [v. U.S. Dep't of Labor]*, 121 F.Supp.2d [1155] at 1167 [(S.D. Ohio 2000)]. To the extent the district court's injunction does not permit the Secretary to take such action, we modify the injunction accordingly.[ ]

304 F.3d at 53-54 (footnote omitted).[2]

The Assistant Secretary for Occupational Safety and Health is the Secretary's designee pursuant to the regulations governing the investigation and adjudication of whistleblower complaints at 29 C.F.R. Part 24. 29 C.F.R. § 24.1(c) (2003). Following the conclusion of appellate proceedings in the Federal courts, the Assistant Secretary filed requests with the Board to continue its stay of the proceedings in the case to permit the Assistant Secretary until May 15, 2003, to notify the Board whether or not the Assistant Secretary would seek to intervene in this case before the Board. Asst.

[2] In the footnote omitted from the excerpted passage, the First Circuit court noted its agreement with the district court that OSHA was "not enjoined from receiving complaints, conducting its own investigations on such complaints, and making determinations as to liability under 29 C.F.R. § 24.4(d)(1)." *Rhode Island*, 304 F.3d at 54 n.13.

Secretary's Resp. to Show Cause Order and Suggestion to Continue Stay dated March 11, 2003, at 1-2, 4-5; Asst. Secretary's Supp. Resp. to Show Cause Order and Suggestion to Continue Stay dated March 26, 2003, at 2. On April 2, 2003, Rhode Island filed a response, objecting to the Assistant Secretary's suggestion that the Board continue the stay and also moving to "dismiss the within action pending before the ARB." Objection to the Asst. Secretary's Suggestion to Continue Stay and Motion to Dismiss the Appeal at 1-4. Rhode Island urged that "even an attempt" by the Assistant Secretary to intervene at this stage "would be an act of contempt of the First Circuit's ruling." *Id.* at 2.

In May and June 2003, the parties filed further pleadings with the Board concerning the intervention question, although the Assistant Secretary did not actually file a motion to intervene in this case before the Board. In an Order issued on July 11, 2003, we denied the Assistant Secretary's request that the Board rule on the threshold issue of the Assistant Secretary's authority to intervene in this case, in the absence of a motion to intervene having been filed. ARB Order dated July 11, 2003, at 4. We did, however, afford the Assistant Secretary 30 days in which to file a motion to intervene, and provided Rhode Island 15 days thereafter in which to respond if such motion were filed. *Id.* at 5. We also denied Rhode Island's motion that the Board stay these proceedings for the purpose of allowing the State to return to the Federal courts to seek further injunctive relief. *Id.* at 4. We also deferred ruling on Rhode Island's motion to dismiss this case with entry of judgment in the State's favor, pending resolution of the question of whether the Assistant Secretary would move to intervene. *Id.*

The order issued January 29, 2004, by the United States District Court

On August 22, 2003, Rhode Island filed with the United States Court for the District of Rhode Island a motion for enforcement of the injunction the United States Court of Appeals for the First Circuit entered in August 2002. Motion to Enforce the Permanent Injunction Entered Herein filed with U.S. Dist. Court Aug. 22, 2003, C.A. No. 00-44-T; *see* Plaintiff's Memorandum of Law in Support of Its Motion to Enforce the Permanent Injunction Entered Herein filed Sept. 22, 2003, C.A. No. 00-44-T. Rhode Island argued that the ARB's July 11, 2003 Order allowing briefing on the issue of whether the First Circuit's *Rhode Island* decision permitted the Assistant Secretary to intervene in the case before the ARB violated the appellate court's decision in *Rhode Island.* Plaintiff's Memorandum of Law at 1-3. On October 23, 2003, the District Court issued an Order Granting Plaintiff's Motion to Stay the ARB's July 11, 2003 Order "directing the plaintiffs to file a brief," pending issuance of a final ruling by the court on Rhode Island's motion to enforce the injunction. *Rhode Island v. United States*, C.A. No. 00-44T, Oct. 23, 2003, Order Granting Plaintiffs' Motion to Stay.

On January 29, 2004, the district court issued an order granting Rhode Island's motion to enforce the injunction against further proceedings before the ARB in the instant case. The court agreed with Rhode Island that the First Circuit's August 2002 decision permitted the Secretary to cure the sovereign immunity defect only by

intervening "at or before the ALJ stage." *Rhode Island v. United States*, 301 F. Supp. 2d 151, 156 (D.R.I. 2004).[3]

We accordingly dismiss the proceedings before us and vacate the ALJ's R. D. & O. as void for lack of jurisdiction.

CONCLUSION

The proceedings before the ARB in the above-captioned case are hereby **DISMISSED** and the Recommended Decision and Order of the Administrative Law Judge in the above-captioned cases is hereby **VACATED.**

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[3] The court did, however, deny Rhode Island's motion that the Secretary be enjoined from intervening at or before the ALJ stage in any of the three other whistleblower proceedings that were also addressed by the court's order. *Id.*; *see* n.1, *supra.*