



In the Matter of:

CURTIS C. DICK,

ARB CASE NO. 2019-0004

COMPLAINANT,

ALJ CASE NO. 2018-STA-00054

v.

DATE: July 23, 2020

**UNITED SERVICES AUTOMOBILE
ASSOCIATION (USAA) and CONTRACTED
DRIVER SERVICES, INC. (CDS),**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER DISMISSING INTERLOCUTORY APPEAL

This case arises under the whistleblower provisions of the Surface Transportation Assistance Act of 1982 (STAA).¹ On October 30, 2018, Complainant Curtis Dick filed a Petition for Review regarding the Department of Labor Administrative Law Judge's Ruling on Respondent USAA's Motion for Summary Decision, issued on October 3, 2018 (D. & O.).² Although the D. & O. dismissed Complainant's claims against Respondent USAA, it did not address Complainant's

¹ 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2019) (the STAA's implementing regulations).

² *Dick v. USAA and CDS*, ALJ No. 2018-STA-00054 (ALJ Oct. 3, 2018) (Ruling on Respondent USAA's Motion for Summary Decision).

claims against Respondent CDS, which remain pending before the ALJ.³

On June 9, 2020, the Administrative Review Board (ARB or Board) issued an Order to Show Cause (Order). The Order instructed Complainant to respond within thirty (30) days why the Board should not dismiss his Petition for Review as an interlocutory appeal.^{4,5}

Shortly thereafter, the Office of Congresswoman Eddie Bernice Johnson filed an inquiry on Complainant's behalf on June 19, 2020.⁶ On July 1, 2020, the ARB issued a Clarification Order in Response to Congressional Correspondence (Clarification Order). The Clarification Order informed the parties of the Board's past practices involving potential interlocutory appeals, the effects of interlocutory appeals, and provided Complainant an additional thirty days to respond to the original Order to Show Cause. Complainant filed his Response to Board's Order to

³ The same day, the ALJ issued a second order and denied Respondent CDS' Motion to Dismiss. *Dick v. USAA and CDS*, ALJ No. 2018-STA-00054 (ALJ Oct. 3, 2018) (Ruling on Respondent Contracted Driver Services' Motion to Dismiss). Following October 3, 2018, Complainant filed several motions, pleadings, and other documents before the Office of Administrative Law Judges (OALJ) and the ARB. On August 28, 2019, the Board issued an order where it permitted authorized representatives from OALJ to photocopy the administrative file to use while adjudicating the remaining matters between Complainant and CDS. *See Dick v. USAA and CDS*, ARB No. 2019-0004, ALJ No. 2018-STA-00054, slip op. at 2 (ARB Aug. 28, 2019) (Interim Administrative Order Clarifying Issues and Parties on Appeal and Order Denying Expedited Review (Interim Order)). Since the Interim Order, the ALJ issued two orders staying the remaining proceedings between Complainant and CDS due to judicial efficiency concerns. *See* 2018-STA-00054 (ALJ Sep. 10, 2019) (Order Staying Proceedings); *see also* 2018-STA-00054 (ALJ Oct. 23, 2019) (Ruling on Complainant's Motion to Vacate Order Staying). No orders have been issued by the ALJ since October 23, 2019.

⁴ *Dick v. USAA and CDS*, ARB No. 2019-0004, ALJ No. 2018-STA-00054, slip op. at 3 (ARB June 9, 2020) (Order to Show Cause).

⁵ *See Elliott v. Archdiocese of New York*, 682 F.3d 213, 219 (3d Cir. 2012) (holding "[g]enerally, an order which terminates fewer than all claims pending in an action or claims against fewer than all the parties to an action does not constitute a 'final' order for purposes of 28 U.S.C. § 1291.").

⁶ The Office of Congresswoman Eddie Bernice Johnson's inquiry appears to be a standard form that includes a Privacy Act Release Form and an area for constituents to comment about issues with federal agencies, which Complainant completed regarding the current matter. The inquiry was submitted via email to ECAB-Inquiries@dol.gov, which was later forwarded to the ARB via email on June 22, 2020.

Show Cause (Response) on July 6, 2020.

DISCUSSION

The Administrative Review Board's delegated authority includes the consideration and disposition of interlocutory appeals, "in exceptional circumstances, provided such review is not prohibited by statute."⁷ Although the Board may accept interlocutory appeals in "exceptional" circumstances, it is not the Board's general practice to accept petitions for review of non-final dispositions issued by an ALJ. 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 in stages before the final order.⁸ When a party seeks interlocutory review of an ALJ's non-final order, the ARB has elected to look to the interlocutory review procedures providing for certification of issues involving a controlling question of law as set forth in 28 U.S.C. § 1292(b).⁹

The first step in the interlocutory appeal process is to have the ALJ certify the interlocutory issue for appellate review.¹⁰ But even if a party has failed to obtain interlocutory certification, the ARB would consider reviewing an interlocutory order meeting the "collateral order" exception that the Supreme Court recognized in *Cohen v. Beneficial Indus. Loan Corp.*,¹¹ if the decision appealed belongs to that "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

⁷ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020) at 5(b)(69).

⁸ See e.g., *Gunther v. Deltek*, ARB Nos. 2012-0097, -0099; ALJ No. 2010-SOX-00049, slip op. at 2 (ARB Sept. 11, 2012); *Welch v. Cardinal Bankshares Corp.*, ARB No. 2004-0054, ALJ No. 2003-SOX-00015, slip op. at 2-3 (ARB May 13, 2004).

⁹ *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0138, ALJ No. 2005-SOX-00065, slip op. at 5-6 (ARB Oct. 31, 2005); *Plumley v. Federal Bureau of Prisons*, 1986-CAA-00006, slip op. at 2-3 (Sec'y Apr. 29, 1987).

¹⁰ *Johnson v. U.S. Bancorp*, ARB No. 2011-0018, ALJ No. 2010-SOX-00037, slip op. at 4 n.15 (ARB Mar. 14, 2011).

¹¹ 337 U.S. 541 (1949).

consideration be deferred until the whole case is adjudicated.”¹² 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.”¹³

Complainant did not ask the ALJ to certify this case for appeal as provided in 28 U.S.C. § 1292(b). Therefore, to consider this interlocutory appeal, the Board would have to determine that the order met the collateral order exception. Complainant did not address the collateral order exception requirements in his Response. Instead, he argues the following in support of interlocutory review:

Because the ALJ will not proceed in any manner (including Complainant’s Motion for Summary Decision”) regarding the CDS matter, until the “Board issues a Decision on the appeal with the USAA matter. The “Board” should “Review” the appeal. . . . If the “Board” fails to “review” the appeal, that would mean that it was fruitless to have granted the Complainant the right to have an appeal.¹⁴

Moreover, Complainant also contends that the facts and actions of each respondent are “separate, and does not effect [sic] the other Respondent’s position or outcome of final disposition in anyway whatsoever.”¹⁵

The ALJ’s order dismissing USAA does not meet the *Cohen* exception creating a collateral final determination. While the ALJ has decided the question whether Complainant was a USAA employee (and has decided that he was not), it is not collateral to his complaint that he is entitled to relief, but instead is integrated with his overall claim against Respondents.¹⁶ Further, Complainant has failed to make any convincing argument that the issue is unreviewable on appeal from a final ALJ order and has failed to cite to any cases supporting this argument. Accordingly, the petition for interlocutory appeal is **DISMISSED** and the case is

¹² *Id.* at 546.

¹³ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

¹⁴ Complainant’s Response to Board’s Order to Show Cause at 2.

¹⁵ *Id.*

¹⁶ *Accord Dempsey v. Fluor Daniel Inc.*, ARB No. 2001-0075, ALJ No. 2001-CAA-00005, slip op. at 2 (ARB May 7, 2002) (stating “[b]ecause the R. D. & O. did not dispose of the case on its merits, but only decided the initial issue whether Dempsey was a covered employee, Fluor Daniel’s appeal is interlocutory.”).

REMANDED to the ALJ to continue the hearing and decision of this case on its merits.

SO ORDERED.

FOR THE ADMINISTRATIVE REVIEW BOARD:



Aubrey Gordon
General Counsel

NOTE: Questions regarding any case pending before the Board should be directed to the Board's staff. Telephone: (202) 693-6200; Facsimile (202) 693-6220