



In the Matter of:

BEVERLY M. MIGLIORE,

ARB CASE NO. 99-118

COMPLAINANT,

ALJ CASE NOS. 98-SWD-3

99-SWD-1

v.

99-SWD-2

**RHODE ISLAND DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT,**

DATE: July 11, 2003

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER

Background

The Complainant 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. 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 no violation of the SWDA employee protection provision had occurred. 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 issued a lengthy decision on August 13, 1999, finding against the Respondent and awarding equitable relief as well as pecuniary damages to the Complainant.

On February 1, 2000, the Respondent 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 of Migliore's complaints, based on the State's sovereign immunity.¹ Letter from Deborah A. George, Rhode

¹ Before the Board in this appeal are Migliore's three consolidated complaints that were decided by the Administrative Law Judge 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 filed by Migliore in 1998, the second is an additional complaint that Migliore filed on August 31, 1999, and the third and fourth complaints are those filed by two of Migliore's co-workers. Complaint of Rhode Island Dep't of Env'tl. Mgmt. filed with U.S. Dist. Court Feb. 1, 2000 at 3-4. Consequently, the Federal court decisions in this matter refer to two complaints

Continued . . .

Island Dep't of Env'tl. 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 adjudication of the complaints by DOL. The district court did not grant the Respondent's request for an injunction prohibiting OSHA from investigating complaints filed against the Respondent under the SWDA. *Id.* at 279.

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 Env'tl. 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 had properly been before the district court and was properly before it under an exception to the exhaustion of administrative remedies requirement and pursuant to the court's "nonstatutory review" authority. 304 F.3d at 40-45. The court of appeals also agreed with the district court that Migliore and the other named complainants, as private parties, were precluded by the sovereign immunity doctrine from pursuing their complaints filed with DOL. However, the court of appeals modified the lower court's ruling, stating:

[O]ur holding does not preclude the Secretary from intervening in the enjoined proceedings and removing the sovereign immunity bar. *See Ohio Env'tl. Prot. Agency*, 121 F.Supp.2d at 1167. 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.

On February 28, 2003, this Board issued an Order directing the Complainant to show cause, no later than March 19, 2003, why it should not grant the Respondent's motion for dismissal of this appeal with entry of judgment for the Respondent pursuant to the appellate court's decision in *Rhode Island*. Currently pending before the Board are the following motions and related pleadings filed by the Complainant Migliore, the Respondent and the Assistant Secretary for OSHA.

filed by Migliore, in addition to those filed by her two co-workers. *Rhode Island Dep't of Env'tl. 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, although before the Federal courts, is thus not before us in this appeal.

The motions and related pleadings

On March 11, 2003, the Assistant Secretary filed a response to the February 28 show cause order, requesting that the Board continue the stay of these proceedings that has been in effect since February 2000, when the Respondent initially filed the court action for declaratory and injunctive relief that culminated in the decision by the court of appeals in *Rhode Island*. Asst. Secretary's Resp. to Show Cause Order and Suggestion to Continue Stay. In support of his motion, the Assistant Secretary stated that the Complainant had filed a petition for writ of certiorari with the United States Supreme Court. *Id.* at 1-2, 4-5. The Assistant Secretary also cited 29 C.F.R. § 24.6(f)(1) and the *Rhode Island* decision regarding his authority to intervene in a case such as this, to prosecute the case on the Complainant's behalf. *Id.* at 2-3, 5, 7. In a March 26 supplemental response to the show cause order, the Assistant Secretary stated that the Supreme Court had denied the Complainant's petition as untimely. The Assistant Secretary requested that he be given until May 15 to apprise the Board of his decision whether to intervene in this case, and, if he did choose to intervene, to advise the Board whether he wished to file additional briefing on that issue. Asst. Secretary's Supp. Resp. to Show Cause Order and Suggestion to Continue Stay at 2.

On May 6, the Assistant Secretary filed a motion requesting that the Board resolve the threshold issue of whether the Assistant Secretary has authority to intervene in this case before the Assistant Secretary determines whether to do so. The Assistant Secretary also asks that the Board issue a briefing schedule limited to the question of whether the Assistant Secretary has authority to intervene, and to hold in abeyance the Assistant Secretary's March 26 request that he be given until May 15 to apprise the Board of whether he wishes to intervene in the case. Motion of the Asst. Sec'y for Briefing on the Issue of His Authority to Intervene at 3-4. Without awaiting a ruling by the Board on the briefing question, on May 15 the Assistant Secretary filed a brief supporting his authority to intervene in this matter before the Board.

The Respondent filed responses to the Assistant Secretary's motions on April 2 and May 14. In each filing, the Respondent objects to the Assistant Secretary's motion and contends that the court of appeals' decision mandates that the Board immediately dismiss this appeal and enter judgment in favor of the Respondent. Resp. Objection to the Asst. Secretary's Suggestion to Continue Stay and Motion to Dismiss the App. at 1-4; Resp. Objection to the Asst. Secretary's Motion for Briefing on Issue of His Authority to Intervene and Conditional Request for a Stay at 1-4. The Respondent further asserts that the Board will be acting in contempt of the court of appeals if it entertains the Assistant Secretary's motion to schedule briefing of the intervention issue. Resp. Objection to the Asst. Secretary's Suggestions to Continue Stay and Motion to Dismiss the App. at 2. If the Board does not dismiss the appeal at this time, the Respondent requests that the Board stay these proceedings while the Respondent returns to the Federal courts to seek an injunction against further proceedings in this appeal. Resp. Objection to the Asst. Secretary's Motion for Briefing on Issue of His Authority to Intervene and Conditional Request for a Stay at 4.

On June 2, the Complainant filed a response opposing the Respondent's May 14 arguments and requesting that the Board issue an order regarding the intervention process under the *Rhode Island* decision. Opposition to Conditional Request for Stay by the State of Rhode

Island and the Providence Plantations and Concurrent Motion to Issue Order Establishing Procedure, Going Forward. The Complainant asks the Board to rule on issues concerning the intervention procedure permitted under *Rhode Island* and the appeal rights the Complainant would have following a decision on the merits of this appeal by the Board, assuming the Assistant Secretary were to intervene in the case. *Id.* at 2-5. On June 3, the Respondent replied to the Complainant's June 2 pleading, reiterating its contention that any further proceedings before the Board, other than dismissal of the appeal with entry of judgment for the Respondent, would violate the injunctive relief ordered by the court of appeals in *Rhode Island*. The Respondent also reiterates its request that the Board stay these proceedings if the Board decides to rule on the Assistant Secretary's motion for briefing, to allow the Respondent time to return to the Federal courts to seek further injunctive relief.

Rulings

We initially reject the Respondent's argument that we will violate the injunction issued by the Court of Appeals for the First Circuit in *Rhode Island* if we do not immediately dismiss this appeal and enter judgment for the Respondent. The question of whether the Assistant Secretary is permitted to intervene in this appeal under the court's holding is one pertinent to this Board's jurisdiction to hear this matter. It is well-settled that a tribunal can assume jurisdiction for the purpose of determining whether it has jurisdiction to hear a case. *See, e.g., Secretary v. Plessey-Burton, Inc.*, 2 O.S.H. Cas. (BNA) 1302 *5, n.11 (OSAHRC 1974) and cases there cited. Furthermore, an agency that has a colorable claim of jurisdiction in a case has jurisdiction to conduct the proceedings necessary to make a reasoned determination concerning its jurisdiction to fully adjudicate the matter. *See Terr. of Guam v. Sea-Land Serv.*, 958 F.2d 1150, 1154-56 (D.C. Cir. 1992). The *Rhode Island* decision does not negate application of the foregoing principle here. Resolution of the question of intervention by the Assistant Secretary in this appeal pursuant to the court of appeals' decision in *Rhode Island* is necessary to determining the Board's jurisdiction to reach the merits of the Respondent's appeal from the Administrative Law Judge's recommended decision. We thus reject the Respondent's contention that our consideration of the parties' arguments regarding the Assistant Secretary's authority to intervene and cure the sovereign immunity bar would violate the court's *Rhode Island* directive. For the same reasons, we reject the Respondent's motion that we stay these proceedings while the Respondent returns to the Federal courts to pursue injunctive relief against further proceedings here. We will defer ruling on the Respondent's motion to dismiss with entry of judgment in its favor pending a decision by the Assistant Secretary to intervene in this appeal, as we discuss below.

We deny the Assistant Secretary's request that, following briefing by the parties, the Board issue a ruling on the Assistant Secretary's authority to intervene in this appeal. Unless and until the Assistant Secretary files a motion to intervene, the Board does not have before it a justiciable dispute between the Respondent and the Assistant Secretary concerning the latter's authority to intervene under *Rhode Island*. The Board is not bound by the "case or controversy" limitation that applies to the Federal courts, but the policy concerns that militate against the rendering of advisory opinions in Article III courts are also relevant to the question of whether the Board should issue the ruling that the Assistant Secretary requests. *See Williams v. Lockheed Martin Energy Systems*, ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 7-8 n.8 (ARB Jan.

31, 2001); *In re United States Dep't of the Navy*, ARB No. 98-185, slip op. at 2-3 (ARB May 15, 1997).

In view of our denial of the Assistant Secretary's request that we issue a briefing schedule preliminary to a ruling on the intervention issue, as well as his statements indicating that he may decide to file a motion to intervene in this appeal, we will afford the Assistant Secretary an opportunity to file such motion. We hereby allow the Assistant Secretary 30 days from the date of this order in which to file a motion to intervene. If the Assistant Secretary does not file a motion to intervene – or a motion for an extension of time in which to file – within that thirty-day period, we will then proceed to dispose of the case pursuant to the court of appeals' decision in *Rhode Island*.

We decline to address the Complainant's June 2 motions for rulings on the intervention process and the Complainant's appeal rights from a Board decision pursuant to *Rhode Island*. In the absence of a motion to intervene by the Assistant Secretary, those questions are not properly before us at this time.

CONCLUSION

We therefore **DENY** the Respondent's motion to stay these proceedings for the purpose of allowing the Respondent to return to the Federal courts to seek further injunctive relief in this matter. We **DEFER** ruling on the Respondent's motion to dismiss with entry of judgment in the Respondent's favor, pending resolution of the question of whether the Assistant Secretary will seek to intervene.

We **DENY** the Assistant Secretary's motion to issue an order scheduling briefing as a preliminary to a ruling by the Board on the Assistant Secretary's authority to intervene pursuant to the decision of the United States Court of Appeals for the First Circuit in *Rhode Island Dep't of Env'tl. Mgmt. v. United States*. We **ALLOW** the Assistant Secretary **30 DAYS** from the date of this Order to file a motion to intervene. The Respondent is **ALLOWED 15 DAYS** following the filing of such motion in which to file a response.

We **DENY** the Complainant's motion to rule on questions concerning the intervention process and the Complainant's appeal rights from a Board decision under *Rhode Island*.

In all other respects, the February 8, 2000 **STAY** of these proceedings remains in effect.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge