UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	ORDER OF THE
	:	VICE COMMANDANT
vs.	:	DISMISSING RESPONDENT'S
	:	INTERLOCUTORY APPEAL
ERIC NORMAN SHINE	:	NO. 2644

On November 23, 2003, Eric Norman Shine (Respondent) filed an Appeal of Administrative Law Judge (ALJ) Parlen McKenna's Order dated November 20, 2003, denying his Motion for recusal/disqualification of the ALJ. On appeal, Respondent asserts that the ALJ should be recused "due to numerous, if not enormous conflicts of interest, which are clear in the manner by which these very proceedings have and continue to be taken place, both in form and function and lack thereof." [Respondent's Appeal of Judge McKenna's November 20th, 2003, 'Order Denying Respondent's Motion for Recusal' (Respondent's Appeal) at 4]

The ALJ Docketing Center forwarded Respondent's Appeal on November 24, 2003. In addition to forwarding Respondent's Appeal, the Docketing Center forwarded Respondent's Motion for Recusal of Judge Parlen L. McKenna (filed by and through his attorneys of record), the Coast Guard's reply to that Motion, and Judge McKenna's Order Denying Respondent's Motion for Recusal. Based upon a review of those documents, I find that Respondent's Appeal is not ripe for review.

Respondent's appeal is taken pursuant to 46 C.F.R. § 5.507(c). After a thorough review of the applicable law and the documentation submitted with Respondent's appeal, I find his reliance on 46 C.F.R. § 5.507 to be misplaced. In his Order Denying Respondent's Motion for Recusal, the ALJ properly noted both that "Title 46 CFR Part 5 was amended in 1999 and a majority of the adjudicative procedures were consolidated in 33 CFR Part 20" and that "[a]s part of the amendment, 46 CFR § 5.1 and 46 CFR § 5.507 were removed and are no longer good law." [Order of the ALJ Denying Respondent's Motion for Recusal at note 2.] Pursuant to the 1999 Amendments to the Coast Guard's Rules of Practice, Procedure, and Evidence for Administrative Proceedings, withdrawal/disqualification of a sitting ALJ must now be taken pursuant to 33 C.F.R. § 20.204. [Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard, 64 Fed. Reg. 28,054 (1999)].

In relevant part, 33 C.F.R. § 20.204(b)(2) states that "[i]f an ALJ denies a motion to disqualify herself or himself, the moving party may, according to the procedures in subpart J of this part, appeal to the Commandant **once the hearing has concluded.**" [Emphasis added] On appeal, Respondent acknowledges that a hearing has not yet occurred in his case stating: "[t]he…Hearing…was most recently to occur on September 23, 2003 after the August 26th-27th, 2003 pre-conference, and…has…since been moved as the record will reflect to 'sometime in December.'" [Emphasis omitted] [Respondent's Appeal at 13] Based upon the requirements set forth in 33 C.F.R. § 20.204, as discussed above, Respondent may properly appeal the ALJ's Order only after the hearing in the matter has concluded and the ALJ has issued his decision in the

matter. Therefore, since a hearing has not yet concluded in the matter and because the ALJ has not issued a final decision, Respondent's appeal is not properly before me.

Indeed, even if the instant case involved an issue properly committed to the initial jurisdiction of the federal courts, I believe the result would be the same. With few exceptions, "[a]n interlocutory appeal does not lie from the denial of a motion to disqualify a district judge." Wyatt v. Rogers, 92 F.3d 1074, 1080 (8th Cir. 1996); U.S. v. Gregory, 656 F.2d 1132, 1136 (5th Cir. 1981); In re Corrugated Container Antitrust Litig., 614 F.2d 958, 960-61 (5th Cir.) *cert. denied*, 449 U.S. 888, 101 S.Ct. 244, 66 L.Ed.2d 114 (1980). To that end, the courts have acknowledged that there is, generally, "a firm judicial policy…against interlocutory or 'piecemeal' appeals." U.S. v. Gregory, 656 U.S. 1132, 1134, (5th Cir. Unit B, 1981). In Firestone Tire & Rubber Co. v. Risjord, the Supreme Court stated that this practice "emphasizes the deference the appellate courts owe to the trial judge…[and]…promot[es] efficient judicial administration." While I acknowledge that appellate review of orders denying motions for recusal is taken pursuant to a statute[1] in the federal courts, and the appellate review at issue here is taken pursuant to a regulation not issued under that statute, I believe the federal court's policy disfavoring interlocutory appeals of orders denying recusal supports my interpretation of the Coast Guard's regulation and would prevail under judicial scrutiny.

CONCLUSION

For the reasons discussed above, I find that Respondent's appeal is not ripe. As a result, I will decline to exercise jurisdiction and DISMISS the appeal without prejudice to

Respondent's ability to bring a new appeal on the same issues that he has raised in the current appeal at such time as those issues become ripe.

ORDER

Respondent's appeal of the order of the ALJ, dated at Alameda, California, on November 20, 2003, is **DISMISSED**

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T. J. BARRETT
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this __2nd_ of _February , 2004.

[1] Appeals seeking review of orders granting or denying motions to recuse are typically taken pursuant to 28 U.S.C. §§ 1291, 1292, and 1651.