

VERMONT LABOR RELATIONS BOARD

APPEAL OF:)	
)	DOCKET NO. 95- 9
TERRY MCFALL)	

MEMORANDUM AND ORDER

At issue is whether this appeal should be dismissed as untimely filed. On February 16, 1995, Terry McFall ("Appellant") filed an appeal with the Vermont Labor Relations Board. Appellant filed an amended appeal on March 13, 1995. The appeal as amended was filed pursuant to 3 V.S.A. Section 1102(c). The appeal arose from a decision by the Attorney General not to defend Appellant in a civil action filed in Windsor Superior Court by Joan Lawrence- Studebaker against Appellant, James Huckins-Ross and the State of Vermont Department of Social and Rehabilitation Services. The Attorney General based the decision not to defend Appellant on the grounds that the alleged acts of Appellant did not occur within the scope of his official duties.

On April 5, 1995, the Attorney General filed an Answer to the appeal and a Motion to Dismiss. The Attorney General contends that the Board should dismiss the appeal for lack of jurisdiction because the appeal was not filed within the period provided by the Rules of Practice of the Board. Section 42.1 of the Rules states:

The Board shall hear and make final determination on appeals by employees pursuant to 3 V.S.A. Section 1102 (c) . . . provided that such appeal is filed within 30 days after receipt of notice of the determination of the attorney general.

The Board promulgated this rule pursuant to 3 V.S.A. Section 1102(c), which provides in pertinent part that the "employee may appeal the determination of the

attorney general to the state labor relations board in accordance with the rules of the board”.

Appellant was notified of the Attorney General’s determination not to provide representation for him by a letter mailed December 29, 1994. In the letter, Assistant Attorney General Michael McShane informed Appellant:

If you disagree with the determination of the Attorney General, you may appeal to the Vermont Labor Relations Board (VLRB) . . . The appeal must be filed with the VLRB within 30 days of receipt of this letter. The requirements of the appeal process are set out in Article 42 at page 57 of the enclosed booklet. Rules of Practice of the Vermont Labor Relations Board.

Appellant filed his appeal with the Board on February 16, 1995, 49 days after the Attorney General’s notification of denial of representation was mailed to him. In his appeal, Appellant expresses recognition that his appeal “is past the appeal date”, but requests that the Board consider his appeal because “(t)his appeal letter is late due to the recent illness and hospitalization of my mother and the death of my grandfather, both of whom I moved to Alabama to care for”.

We conclude that this appeal should be dismissed as untimely filed. The Board historically has strictly enforced time deadlines for filing actions with the Board, and has dismissed actions as untimely filed if they did not meet the filing requirements of Board Rules or statutes. Vermont State Employees’ Association v. State of Vermont, Department of Public Safety, 6 VLRB 217 (1983). Grievance of Baron, 8 VLRB 57 (1985). Grievance of Amidon, 9 VLRB 204 (1986). Grievance of Monti, 10 VLRB 246 (1987). Grievance of Harrington, 14 VLRB 166 (1991). The Vermont Supreme Court has upheld Board decisions dismissing cases as untimely

filed. Grievance of Gadwah (Unpublished Decision, Supreme Court Docket No. 251-81, 1982; *Affirming* unpublished VLRB decision in VLRB Docket No. 81-18). Grievance of Roy, 147 Vt. 403 (1986); *Affirming* unpublished VLRB decision in VLRB Docket No. 81-83. Grievance of Baron (Unpublished Decision, Supreme Court Docket No. 85-173, 1988); *Affirming* 8 VLRB 57.

There has been only one case in which the Board has declined to dismiss a case filed after the filing deadline. Grievance of Mason, 15 VLRB 428 (1992). In that case, the employee sent a grievance to the Board by certified mail five days before the deadline, but it was not received by the Board until the day after the deadline. The Board concluded that it would be unfair and unreasonable to dismiss the case as untimely filed where the employee had made a good faith effort to ensure that the grievance be received by the deadline, and was entitled to reasonably presume that the Board would receive the grievance by the deadline. Id. at 431-32.

Here, Appellant made no good faith effort to ensure that the Board receive his appeal by the deadline since he sent it to the Board after the deadline had passed . Further, Appellant had no basis to assume that there would be an automatic extension of time as a result of his family difficulties. Under the circumstances, Appellant had an obligation to at least contact the Board in advance of the filing deadline so as to employ appropriate diligence to safeguard his own interests, and not simply do nothing. Roy, 147 Vt. at 405. Appellant's failure to take any action to preserve his appeal rights until after the deadline passed defeats his claim for an exception to the normal filing requirements.

Finally, in response to a concern raised by the Attorney General in the Motion to Dismiss, we note that the fact that the Executive Director of the Board requested Grievant to amend his appeal to conform to the Board Rules of Practice in no way constituted a determination by the Board that Grievant's original appeal was timely filed. Such requests for amended appeals are designed to ensure that the contents of appeals meet the requirements of our Rules before the opposing party has to file a response to the appeal, and place no hindrance on the ability of the opposing party to raise an issue of jurisdiction on timeliness grounds.

NOW THEREFORE, based on the foregoing reasons, it is hereby ORDERED that the Attorney General's Motion to Dismiss is GRANTED and the Appeal of Terry McFall is DISMISSED.

Dated this 22nd day of June, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Charles H. McHugh
Charles H. McHugh, Chairman

/s/ Catherine L. Frank
Catherine L. Frank

/s/ Louis A. Toepfer
Louis A. Toepfer