VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 00-37
SCOTT CAMLEY	)	

MEMORANDUM AND ORDER

The issues before the Labor Relations Board in this grievance over the dismissal of Chittenden Regional Correctional Facility employee Scott Camley ("Grievant") are whether to grant a motion to reconsider, and a motion to reopen, filed by the State of Vermont Department of Corrections ("Employer"). On September 6, 2001, the Board issued a decision reducing the dismissal of Grievant to a 30-day suspension and ordered the reinstatement of Grievant to his position as a shift supervisor at the facility. 24 VLRB 119. On September 20, 2001, the Employer filed a motion requesting that the Board reconsider its decision to reinstate Grievant. On October 4, 2001, Grievant filed a response in opposition to the motion. On October 18, 2001, the Employer filed a motion for leave to reopen the hearing in this matter. On October 25, 2001, Grievant filed a response in opposition to the motion.

We first discuss the Employer's motion to reopen the hearing. The Employer moves to reopen to admit the testimony of Rich Rocheleau and Anna Shakett. The Employer contends that the information contained in the transcript of tape-recorded interviews of Rocheleau and Shakett, attached to the motion to reopen, is newly-discovered evidence that squarely contradicts Grievant's testimony at the hearing that he struck inmate Eddy Carrasquillo in the face in an attempt to prevent Carrasquillo from spitting on him. The Employer contends that the testimony of Rocheleau and Shakett proves that Grievant lied to the Employer's investigator about his conduct in this case,

and that Grievant punched Carrasquillo in retaliation for Carrasquillo's assault on correctional officer Thomas Charnley.

Section 12.17 of the Labor Relations Board Rules of Practice provides that "(m)otions for leave to reopen a hearing because of newly-discovered evidence shall be timely made" and that "the Board may, in its discretion . . . reopen a hearing and take further testimony at any time."

Under this provision, the Board consistently has denied motions to reopen if the moving party does not allege new information has come to light since the hearing that was not known at the time of the hearing. Burlington Police Officers' Association v. City of Burlington, 22 VLRB 5, 12 (1999). Grievance of Gregoire, 18 VLRB 205, 207-208 (1995); *Reversed on Other Grounds*, 166 Vt. 66 (1996). Hartford Career Fire Fighters Association and Town of Hartford, 6 VLRB 337, 338 (1983). The Board has indicated it would be prejudicial to the other party, and disruptive to the orderly processing of cases before the Board, to allow the moving party to present evidence on an issue which should have been fully explored at the hearing. Burlington, 22 VLRB at 12. The Board also has indicated that it would not grant a motion to reopen on the basis of newly discovered evidence if, in preparing its case, the moving party had not acted with due diligence with respect to obtaining information that it now sought to admit into evidence through its motion to reopen. Grievance of Lilly, 23 VLRB 129, 136 (2000).

The Employer contends that these precedents do not defeat its motion to reopen because the Employer was not aware of the information provided by Rocheleau and Shakett until September 2001, after the close of the hearing in this matter. As a result, the Employer contends that the testimony of Rocheleau and Shakett satisfies the requirement

of new information that came to light since the hearing that was not known at the time of the hearing.

This case presents the question of what standard to apply when the moving party is seeking to admit newly discovered evidence and there is no indication that the moving party has not acted with due diligence concerning the newly discovered evidence. We have looked to National Labor Relations Board decisions for guidance. The general NLRB standard is to review the evidence the moving party is seeking to introduce and determine whether the Board decision would be altered if the evidence is considered. If the Board determines that the proffered evidence, even if accepted, would not alter the Board's decision, the Board denies the motion to reopen. Exchange Bank and International Association of Machinists, 264 NLRB 822 (1982). Washington Street Foundry and United Brotherhood of Carpenters, 268 NLRB 338 (1983). In one case, the NLRB ordered the reopening of a hearing where the moving party submitted an affidavit of a key witness in the case stating that he had perjured himself in the Board hearing on an issue central to whether an unfair labor practice had been committed. International Union of Electrical, Radio and Machine Workers, 268 NLRB 308 (1983).

The NLRB focus on whether the decision would be altered is consistent with a previous ruling by our Board on a motion to reopen; Grievance of Thurber, 12 VLRB 208 (1989). In that case, the Board had upheld the dismissal of a Vermont Veterans Home security worker. VSEA appealed the decision to the Vermont Supreme Court on behalf of the dismissed employee. Eight months after the Board decision, VSEA, with leave of the Supreme Court, moved to reopen the case before the Board. The basis for the motion was that an agreement reached by the State and the VSEA subsequent to the Board decision indicated that the Board's authority in disciplinary matters was more expansive than the

Board's view of its authority at the time of the Board decision. VSEA contended that, had the Board viewed its authority as set forth in the agreement, the Board may have mitigated the dismissal to a lesser penalty. In denying the employee's motion, the Board stated:

> We conclude that, even assuming that the Agreement contemplated the Board reopening and reconsidering a case previously decided, our decision that just cause existed for Grievant's dismissal would be no different as a result of the April 26 agreement. We believe that the State acted reasonably in dismissing Grievant. Thus, we decline to reopen this case. 12 VLRB at 209.

In addition to this case and the NLRB cases, there are Vermont Supreme Court cases on motions to reopen filed under the Vermont Rules of Civil Procedure that provide guidance. The Court decisions have involved the interpretation of V.R.C.P. 59(a), a rule that has been adopted by the VLRB. Section 12.1, VLRB Rules of Practice. Rule 59(a) provides that a court or board "before whom an action has been tried may on motion grant a new trial . . . on all or part of the issues".

In applying Rule 59(a) to proceedings before the Public Service Board, the Court indicated that a motion to reopen filed before the PSB is considered a motion for a partial new trial pursuant to Rule 59(a) of the Vermont Rules of Civil Procedure. In re Petition of Twenty-Four Vermont Utilities, 159 Vt. 339, 356-57 (1992). The Court noted that "such a motion is routinely decided on affidavits so that the court can determine whether new evidence is available that might lead to a different outcome on the issue involved". Id. at 357. In ruling on a PSB decision to not reopen the evidence in the case, the Court first held that it was "within the Board's discretion whether to reopen the evidence". Id. at 356. The Court then went on to state as follows concerning the PSB's use of an affidavit filed in the case to support the decision to not reopen:

> The affidavit showed what the evidence would be on that issue if the Board reopened its taking of evidence. The Board was satisfied that the new evidence would not affect the decision it reached . . . and therefore denied reopening . . . Although intervenors complained generally that they were denied the opportunity to offer evidence on the issue, they submitted no affidavit to show that their evidence would differ from that submitted by petitioners on the specific items of concern to the Board. We see no error in the use of the affidavit. Id. at 357.

Since we have incorporated Rule 59(a) in our proceedings, this decision involving an administrative board lends support to a standard by which the Board, like the NLRB, will examine the evidence offered by the moving party and determine whether it would affect the decision reached. We conclude such a standard is appropriate in our determination whether to grant a motion to reopen.

In applying that standard to this case, we have examined the transcripts of tape-recorded interviews of Rocheleau and Shakett, which are relied upon by the Employer to contradict Grievant's testimony at the hearing that he struck inmate Eddy Carrasquillo in the face in an attempt to prevent Carrasquillo from spitting on him. Upon review of these transcripts, we conclude that the Employer has presented insufficient evidence to affect our decision in this case.

A review of the transcript of the Shakett interview reveals no specific knowledge by her with respect to the events that transpired concerning Grievant's striking Carrasquillo in the face with his fist while Carrasquillo was sitting in a van awaiting transport to another correctional facility. She makes general statements to the effect that Grievant told her that he hit Carrasquillo, and that Grievant bragged about the situation. The vague nature of such testimony concerning an alleged admission by Grievant is insufficient to warrant granting a motion to reopen a hearing. Gardner v. Town of Ludlow, 135 Vt. 87, 92 (1977).

In addition, any specific statements made by Shakett concerning Grievant's interactions with Carrasquillo are inconsistent with both the charges against him made by the Employer and the testimony presented by all witnesses at the hearing testifying to Grievant's actions during the incident. In the interview of Shakett, the following exchange occurs between her and Chittenden Regional Correctional Facility Superintendent John Murphy, who is conducting the interview, concerning Shakett's conversations with Grievant:

> MURPHY: Scott, you mentioned that Scott had, would talk about work, did he ever talk about the incident that lead to his firing?
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> SHAKETT: Yup, there were three officers that held the guy and he was going to kick him in the groin but he couldn't get around him . . . Wanted to hit him, kick him, and knee him but couldn't get around the guys, the guards. That was one, he said that he had beat him with his handcuffs . . .
> (Page 20 of transcript of interview)

It is unclear whether Shakett is referring to this alleged incident occurring during the cell extraction of the inmates or later when Carrasquillo was escorted to the van. In any event, this account by Shakett of Grievant trying to kick Carrasquillo in the groin, and beating him with his handcuffs, is not consistent with the testimony offered by any witness at the hearing and is inconsistent with the video of the cell extraction of the inmates shown at the hearing in this matter. In sum, any information provided by Shakett in this matter is either too general to be useful or lacks credence. The proffered evidence by the Employer in this regard does not affect our decision that Grievant struck inmate Eddy Carrasquillo in the face in an attempt to prevent Carrasquillo from spitting on him.

The statements made by Rocheleau in his interview likewise are not sufficient to contradict Grievant's testimony at the hearing that he struck inmate Eddy Carrasquillo in the face in an attempt to prevent Carrasquillo from spitting on him. In the interview of

Rocheleau, the following exchange occurs between him and Murphy, who is conducting the interview, concerning Rocheleau's conversations with Grievant:

> ROCHELEAU: He told me about the case he was involved in when he got suspended or fired or whatever happened, I know he was recently was approved to get his job back but he told me about the incident when he punched a guy in the face.
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> MURPHY: How did he describe the incident?
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> ROCHELEAU: Well, he said it was when, they I guessed grabbed the nurse and had a shank
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> MURPHY: Yeah.
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> ROCHELEAU: And you know they rushed the guy and got him down or whatever and they just kept hitting him and Scott punched him in the face and I guessed he said that he punched him because he was going to spit on him or something.
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> MURPHY: Right.
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> ROCHELEAU: He said he was going to knee him some more but there was another guy, but I can't really remember the other guy that was holding this guy, but that was in the way, that sort of, that's why Scott couldn't get in there to do more than he wanted to.
> (Pages 5 – 6 of transcript of interview)

This version by Rocheleau of Grievant striking Carrasquillo is contrary to the charges against Grievant and the testimony offered by all witnesses at the hearing and contrary to the video of the cell extraction of inmates shown at the hearing. Grievant was charged with striking Carrasquillo when Carrasquillo was seated in the van awaiting transport to another correctional facility, not when Carrasquillo was first restrained by correctional officers to defuse Carrasquillo's hostage attempt. The evidence presented at the hearing concerning Grievant striking Carrasquillo was limited to events that transpired while Carrasquillo was in the van. As a result, no credence can be given to Rocheleau's version of events.

We recognize that, in support of the motion to reopen, the Employer has filed a report of investigator James Cronan concerning an interview he conducted of Rocheleau two weeks after the above-discussed interview Rocheleau had with Murphy. In that report, Cronan states that Rocheleau told him that Camley had admitted he punched an inmate in the face when the inmates were prepared for transportation to the other correctional facility. This apparently different version of events given by Rocheleau does not aid the Employer's motion to reopen. Instead it makes more suspect the reliability of Rocheleau's testimony since his account of events differed over time.

In sum, we conclude that the Employer has presented insufficient evidence to affect our decision in this case, and we deny the motion to reopen. We next consider the Employer's motion that we reconsider our decision in this case. Upon review of the memorandum supporting the Employer's motion, we conclude that the Employer has presented no grounds to cause us to reconsider our decision.

Based on the foregoing reasons, it is ordered that the Employer's Motion to Reconsider, and the Employer's Motion for Leave to Reopen the Hearing, are denied.

Dated this 30th day of November, 2001, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Catherine L. Frank, Chairperson

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Richard W. Park

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Edward R. Zuccaro