VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 03-2
THOMAS REVENE	)	

MEMORANDUM AND ORDER

This case is on remand from the Vermont Supreme Court to allow the Labor Relations Board to consider the request of Thomas Revene ("Revene") and the State of Vermont Department of Public Safety ("Employer") that the Board vacate the decision issued by it in this matter on December 16, 2004. 27 VLRB 282 (2004).

This case involved a dismissed state police trooper presenting the defense of post-traumatic stress disorder to charges made against him, and requesting that he be reinstated to his position. In the December 16, 2004, decision, the Board majority of Members Carroll Comstock and John Zampieri concluded that the employer had not met its burden of establishing by a preponderance of the evidence a false statement charge and charges of untruthfulness against Trooper Revene stemming from an incident in which he was held at gunpoint. The majority decided that the employer did establish one charge of conduct unbecoming against Revene based on a telephone conversation he had with a dispatcher. The majority ultimately determined that just cause did not exist for Revene's dismissal, and ordered that Revene be reinstated in a paid leave status pending an independent medical examination of him by a psychiatrist to determine whether he was fit for duty. The majority also remanded the matter to the employer to determine the appropriate discipline to impose on Revene due to the conduct unbecoming offense. Member Richard Park dissented from the majority decision.

The Employer appealed this decision to the Vermont Supreme Court. Pending appeal, Revene and the Employer entered into an agreement to settle all issues in dispute

in the appeal. Pursuant to the agreement, the parties agreed to the entry of an order by the Vermont Supreme Court dismissing the appeal. The dismissal of the appeal was contingent on the Court entering an order vacating the Board's December 16, 2004, order. On September 14, 2006, the Court issued an Entry Order remanding this case to the Board to allow the Board to consider the parties' request for vacatur.

In the entry order, the Court cited U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994). In U.S Bancorp Mortgage, the Court held that "mootness by reason of settlement does not justify vacatur of a judgment under review." 513 U.S. at 29. The Court further stated:

> This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course. . . (T)hose exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur-which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations we have discussed. Id.

The "policy considerations" discussed by the Court in U.S. Bancorp Mortgage concerned the need to "take account of the public interest" when equitable relief is contemplated. Id. at 26. The Court stated that "precedents are presumptively correct and valuable to the legal community as a whole", and that "(t)hey are not merely the property of private litigants and should stand unless . . . the public interest would be served by a vacatur." Id.

Revene and the Employer assert that the exceptional circumstances identified by the Court in the U.S. Bancorp Mortgage case exist in this case, and an order should be entered vacating the December 16, 2004, decision of the Board. The parties cite a United States Second Circuit Court of Appeals decision, Major League Baseball Properties v.

Pacific Trading Cards, 150 F.3d 149 (1998), as persuasive guidance on what constitutes exceptional circumstances.

In that case, involving an issue of trademark infringement, the Second Circuit determined that exceptional circumstances existed which made vacatur of a lower court opinion and order appropriate. The court indicated that the victor in the lower court strongly desired a settlement to avoid serious financial consequences that would result if settlement was not achieved. Id. at 152. The court further indicated that the loser in the lower court was agreeable to a settlement but needed a vacatur to settle due to a concern about the effect of the district court's decision in future litigation with alleged trademark infringers. Id. The court noted that "the victor in the district court wanted a settlement as much as, or more than, the loser did." Id. The court stated that the "only damage to the public interest from such a vacatur would be that the validity of (trademarks) would be left to future litigation". Id. The Second Circuit concluded that these facts met the exceptional circumstances test of U.S. Bancorp Mortgage. Id.

The parties assert that exceptional circumstances likewise exist in this case to justify vacatur of the Board decision. The parties indicate that, like the victor in the lower court decision in the Major League Baseball case, Revene desires a settlement as much, or more than, the Employer because the settlement benefits Revene in more ways than financial. The parties state in their joint memorandum in support of their request for vacatur: "If (Revene) were to prevail in the appeal he would, of necessity, have to return to his former employment as a State Trooper. Given the history between the State and (Revene) as chronicled in the record, an employment relationship between the parties would be deleterious to both sides."

The parties further contend that, similar to the Second Circuit case, the Employer has valid concerns that the Board's reliance on the diagnosis of Revene's post-traumatic stress disorder as a factor that mitigated Revene's conduct in this case will seriously undermine future disciplinary actions taken by the Employer. Finally, the parties assert that vacating the Board's order will serve the public interest by eliminating the negative consequences on law enforcement of Revene returning to employment with the Employer.

MAJORITY OPINION

We conclude that the parties have not demonstrated exceptional circumstances warranting vacatur of our December 16, 2004, decision in this matter. The assertion by the parties that return of Revene to employment "would be deleterious to both sides" given the history between the State and Revene falls well short of demonstrating exceptional circumstances. Such an assertion could be made in many dismissal cases in which an employer is required against its wishes to reinstate an employee who contested the lack of just cause for termination of employment. Some compelling rationale beyond a mere assertion would have to be produced by the parties to distinguish this case from other dismissal cases.

We also disagree with the parties' contention that "the Employer has valid concerns that the Board's reliance on the diagnosis of Revene's post-traumatic stress disorder as a factor that mitigated Revene's conduct in this case will seriously undermine future disciplinary actions taken by the Employer." The Board's reliance on a diagnosis of post-traumatic stress disorder to mitigate an employee's conduct is not new in this case.

In Grievance of Towle, 17 VLRB 21 (1994), the Board concluded that the State Department of Corrections had a reasonable basis for dismissing a male employee for engaging in the sexual act of fellatio with a female employee on several occasions on duty, but taking no disciplinary action against the female employee. This was because the female employee was diagnosed as suffering from post-traumatic stress disorder and dissociative disorder, rendering her incapable of truly consenting to the sexual acts in which she engaged with the male employee. Id. at 42-44. The Vermont Supreme Court affirmed this decision of the Board. 164 Vt. 145, 151 (1995).

Accordingly, there is precedent in our jurisprudence other than this case in which the Board has relied on a diagnosis of post-traumatic stress disorder to mitigate an employee's conduct and justify disciplinary action not being taken against an employee. Given this precedent, we disagree with the parties that there is a "valid concern" that our reliance on a diagnosis of post-traumatic stress disorder will "seriously undermine" future disciplinary actions taken by the Employer. As is clear by the Towle case, a diagnosis of post-traumatic stress disorder is a legitimate consideration in appropriate cases with respect to any category of employees, including state troopers.

We further disagree with the assertion by the parties that vacating the Board's order will serve the public interest by eliminating the negative consequences on law enforcement of Revene returning to employment with the Employer. We considered the public interest in crafting the remedy in our December 16, 2004, decision, that Revene be reinstated in a paid leave status pending an independent medical examination by a psychiatrist to determine whether he was fit to return to duty. In providing the rationale for such a remedy, we stated: "It protects the interests of (Revene) in ensuring that the effects of the traumatic incident on him are recognized. It also protects the interests of the

Employer and the public in ensuring the fitness for duty of a trooper responding to critical incidents." 27 VLRB at 343.

We note that we do not find the Major League Baseball case, which is relied on by the parties in making their exceptional circumstances argument, to be persuasive guidance in this matter. In its Major League Baseball decision, the Second Circuit Court of Appeals stated: "Under trademark law, MLB must defend its mark against all users or be subject to the defense of acquiescence." The defense of acquiescence under trademark law is what inhibited Major League Baseball from reaching a settlement. The Department of Public Safety and other state government agencies do not have this impediment to settlement. Accordingly, the exceptional circumstances found in the Major League Baseball case are not applicable here.

In sum, the arguments advanced by the parties to support a showing of exceptional circumstances have failed to demonstrate such circumstances. Given the absence of exceptional circumstances, there is no basis to vacate our earlier decision.

The U.S. Supreme Court stated in the Bancorp decision that "(j)udicial precedents are presumptively correct and valuable to the legal community as a whole," and that "(t)hey are not merely the property of private litigants and should stand unless . . . the public interest would be served by a vacatur." 513 U.S. at 26. The Court further stated:

> . . . while the availability of vacatur may facilitate settlement after the judgment under review has been granted and . . . appeal filed, it may *deter* settlement at an earlier stage. *Some* litigants, at least, may think it worthwhile to roll the dice rather than settle . . . if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur. Id. at 27-28. (emphasis in original)

We share this concern articulated by the Court. There is significant potential for damage to Board precedents and our dispute resolution process if our earlier decision in this case is vacated. We decline to set such forces into motion.

Finally, we recognize that the Vermont General Assembly enacted legislation subsequent to our decision concerned with identifying and addressing issues associated with critical incidents and post-traumatic stress disorder. Nonetheless, we do not believe this serves to make our decision unnecessary and without value. Those interested in the genesis of the legislation can reference our earlier decision for an example of a significant critical incidents issue.

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Carroll P. Comstock

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John J. Zampieri

DISSENTING OPINION

I respectfully dissent from the majority opinion. I conclude that exceptional circumstances exist in this case warranting vacating the December 16, 2004, decision. In so concluding, my reasoning differs somewhat from that of the parties. The exceptional circumstances leading to vacatur are evident from the remedy ordered by the Board majority in this matter in our December 16, 2004, decision. The Board majority recognized that, in ordering the reinstatement of Revene, there was a question as to Revene's fitness for duty as a result of the trauma triggered from a confrontation with a dangerous individual in which Revene was held at gunpoint. As a result, the Board majority ordered that Revene be reinstated in a paid leave status pending an independent medical examination by a psychiatrist to determine whether Revene was fit to return to duty. 27 VLRB at 342-43.

Given exceptional circumstances, the Board majority fashioned an unusual remedy taking into account the interests of Revene, the Employer and the public. The fact

that the parties have been able to fashion an acceptable settlement given these exceptional circumstances strikes me as beneficial not only to the parties but to the public interest. The significant question as to Revene's fitness for duty, and the consequent public safety implications, has been resolved through a settlement agreeable to both parties in which Revene will not return to employment as a trooper.

The fact that the settlement requires the vacating of the December 16, 2004, decision does not damage the public interest with respect to diminishing the value of Board precedents. In their joint memorandum in support of their request for vacatur, the parties indicate that the precedent in this case that is of concern is the Board's reliance on the diagnosis of Revene's post-traumatic stress disorder as a factor that mitigated Revene's conduct.

As the majority opinion states, the Board's reliance on a diagnosis of post-traumatic stress disorder to mitigate an employee's conduct is not new to this case. The Towle case discussed by the majority indicates that there is precedent in our jurisprudence other than this case in which the Board has relied on a diagnosis of post-traumatic stress disorder to mitigate an employee's conduct and justify disciplinary action not being taken against an employee. This is a legitimate consideration in appropriate cases with respect to any category of employees, including state troopers. As a result, the vacating of the earlier decision in this case will not cause damage to our precedents.

Finally, I note that a development subsequent to the December 16, 2004, decision has increased my readiness to grant the request for vacatur. In our earlier decision, we observed that it was evident given the experience of this case that the Employer could not rely simply on offering troopers involved in a traumatic event with voluntary referral to professionals to assist them in coping with the effects of the event. 27 VLRB at 343 –

345. The Board panel was unanimous in expressing the view that the Employer needed to consider a more aggressive approach in the future to ensure that employees quickly received the professional help needed to cope with a traumatic incident. Id.

I am heartened that, after our decision, the Vermont General Assembly recognized the potential effects of critical incidents on public safety employees, and enacted legislation establishing a committee to work with the Commissioner of the Department of Public Safety on identifying and addressing issues associated with critical incidents and post-traumatic stress disorder. *Act No. 112, An Act Relating to Post-Traumatic Stress Disorder and State Police Officers (2006) (codified at 3 V.S.A. Section 1004a).* The legislation demonstrates an ongoing commitment to assist public safety employees involved in traumatic events. The more aggressive approach we sought in our earlier decision has been enacted into law, diminishing the need for the decision to serve as guidance in the future. The Vermont General Assembly is a better forum to address this significant public policy issue than through a single contested case at the Board. By vacating the earlier decision, the decision would not lose any potential value it might have to this broader forum in learning facts of a specific case.

In the final analysis, I believe that vacating the earlier decision of the Board is consistent with the statutory purpose of our governing statute, the State Employees Labor Relations Act, to "provide orderly and peaceful procedures" for resolving labor relations disputes. 3 V.S.A. Section 901. The vacating of the decision results in an orderly and peaceful resolution of this case on terms acceptable to the parties. To the contrary, the consequences of not vacating the decision are unknown. It is uncertain whether the parties will be able to otherwise resolve this matter on mutually acceptable terms, or whether the result will be a Supreme Court decision with a winner and loser. The

certainty created by vacating the decision better meets the statutory purpose than the uncertainty of not vacating.

Based on the foregoing reasons, I would grant the joint request of Thomas Revene and the State of Vermont Department of Public Safety to vacate the decision issued by the Board in this matter on December 16, 2004.

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Richard W. Park, Acting Chairperson

ORDER

Based on the foregoing reasons, it is ordered that the joint request of Thomas Revene and the State of Vermont Department of Public Safety to vacate the decision issued by the Labor Relations Board in this matter on December 16, 2004, is denied.

Dated this 30th day of November, 2006, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Carroll P. Comstock

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John J. Zampieri