Board Decision

After the briefs are filed, the Board panel that heard the case deliberates. A written decision containing findings of fact, an opinion and an order is then prepared, and issued. In cases dismissed by the Board prior to a hearing, the Board typically issues a Memorandum and Order which articulates the reasons why the Board is dismissing the case.

Board decisions are published on an annual, two-year or three-year basis in bound volumes. They also are available for review on the Board website. The decisions are indexed in a cumulative subject index, and are relied upon as precedents for future cases.

The closing of a hearing in a case does not necessarily mean the parties are foreclosed in all circumstances from presenting further evidence. The Board Rules of Practice provides that "motions 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".[1]

In applying the provisions of this section, the Board has not granted motions to reopen in the absence of new information coming to light since the hearing which was not known at the time of the hearing.[2] 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.[3]

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[1] Sections 12.17, 22.17, 32.17, 52.17, 62.16, and 72.16, Board Rules of Practice.
[2] Grievance of Gregoire, 18 VLRB 205, 207-208 (1995). Hartford Career Fire Fighters Association and City of South Burlington, 6 VLRB 337, 338 (1983). Chittenden South Supervisory Teachers' Association v. Chittenden South Supervisory School District Board of School Directors, 5 VLRB 332 (1982).
[3] Burlington Police Officers Association v. City of Burlington, 22 VLRB 5, 12 (1999).

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.[4] Due diligence is the measure of prudence, activity, or careful attention to be properly expected from, and ordinarily exercised by, a reasonable and prudent person under the particular circumstances of a case.[5]

One case presented 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 diligence concerning the newly discovered evidence. The Board adopted the standard of examining the evidence offered by the moving party and determining whether it would affect the decision reached. If so, the Board would grant the motion to reopen. In the case before the Board, the Board determined that the employer had presented insufficient evidence to affect the decision, and the Board thus denied the motion to reopen.[6]

Once the Board issues a decision, a party may request that the Board reconsider its decision pursuant to Rule 59(d) of Vermont Rules of Civil Procedure, which states: "A motion to alter or amend the judgment shall be filed not later than 28 days after entry of the judgment." Rule 59(d) gives the Board broad power to alter or amend a judgment.[7]

Once a motion to alter or amend a judgment is filed, the Board has the authority to make any appropriate modification or amendment, even with respect

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[4] Grievance of Jacobs, 31 VLRB 204, 223-226 (2011). Grievance of Lilly, 23 VLRB 129, 136 (2000).
[5] Grievance of Jacobs, 31 VLRB at 224.
[6] Grievance of Camley, 24 VLRB 185 (2001).
[7] *Reporter's Notes to Rule 59.*

to issues not raised in the motion.[8] The Board acts within its power under this rule whether its action is viewed as the correction of a mistake or inadvertence, or an appropriate reconsideration of an important part of the judgment.[9] This gives the Board a last opportunity to ensure the completeness and accuracy of its decision in part to avoid an appeal and its attendant delay.[10] The Board may reconsider issues previously before it and generally may examine the correctness of the judgment itself.[11]

The motion to alter allows the Board to revise its initial judgment if necessary to relieve a party against the unjust operation of a record resulting from the mistake or inadvertence of the Board and not the fault or neglect of a party.[12] The narrow aim of Rule 59(e) is to make clear that the Board possesses the power to rectify its own mistakes in the period immediately following the entry of a judgment.[13]

In practice, few motions for reconsideration are filed with the Board. In one case, the Board amended its judgment to adjust a remedy which it had ordered because it agreed with the employer that the original remedy had gone beyond making the employee whole.[14] In another matter, the Board rejected a motion based on an alleged undisclosed conflict of interest of the Board Chairperson. The Board held that the Chairperson had no conflict on interest in the matter because there was no opportunity for him for private gain, financial or otherwise, deriving from his involvement in the case.[15]

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[8] Drumheller v. Drumheller, 2009 VT 23, 185 Vt. 417, 972 A.2d 176 (2009).
[9] Id.
[10] Id.
[11] In re Robinson/Keir Partnership, 154 Vt. 50, 573 A.2d 1188 (1990).
[12] Northern Security Insurance Co. v. Mitec Electronics, Ltd., 2008 VT 96, 184 Vt. 303, 965 A.2d 447 (2008).
[13] Id.
[14] Grievance of VSEA, Whitney et al, 19 VLRB 304 (1996).
[15] Grievance of Summa, 34 VLRB 342 (2018).

Also, the Board may, on its own initiative, amend or set aside a decision pursuant to the provisions of its governing statute, which provides that "until a transcript of the record in a case is filed in a court . . . the board at any time upon reasonable notice and in such manner as it considers proper may modify or set aside wholly or partially a finding made or order issued by it".[16] The Board has invoked this statutory provision rarely, having exercised the authority to modify or set aside a decision on its own initiative on only one reported occasion. The Board amended a decision pursuant to this statutory provision because it had been based on an erroneous representation made by the employer at the hearing in the case. [17]

The Board also may relieve a party from a final judgment due to mistake, inadvertence, surprise, excusable neglect, newly discovered evidence which could not have been discovered earlier by due diligence, fraud, or "any other reason justifying relief from the operation of a judgment".[18] The power to grant relief from a final judgment on such grounds rests solely in the sound discretion of the Board.[19] This rule is designed to give the Board flexibility to serve the ends of justice.[20]

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[16] 3 V.S.A. §924(b).
[17] Grievance of McCort, 16 VLRB 248 (1993); *Affirmed*, Unpublished Decision, Supreme Ct. Docket No. 93-370, April 5, 1994.
[18] V.R.C.P. 60(b), as incorporated by Sections 12.1, 22.1, 32.1, 52.1, 62.1, and 72.1 of Board Rules of Practice.
[19] Gosh v. Morey, 149 Vt. 93 (1987). Grievance of Merrill, 13 VLRB 119, 123 (1990); *Affirmed in pertinent part*, 157 Vt. 150 (1991).
[20] Id.