Disposition of Cases Prior to Full Evidentiary Hearing on the Merits

Many cases filed with the Board are settled or withdrawn prior to hearing. Further, as discussed in Section 4, the Board has discretion whether to issue unfair labor practice complaints and hold hearings with respect to unfair labor practice charges. This results in many unfair labor practice cases being dismissed by the Board without an evidentiary hearing. In addition to the Board dismissing unfair labor practice cases in this manner, there are various other cases which are closed by Board order prior to a full evidentiary hearing on the merits. The Board may close cases in this manner either prior to any evidentiary hearing, after an evidentiary hearing limited to whether the Board has jurisdiction, or after only one of the parties has presented their case on the merits.

A. Disposition Prior to any Evidentiary Hearing

A method by which cases are closed by Board decision prior to any evidentiary hearing is through filing a motion for summary judgment pursuant to Rule 56 of the Vermont Rules of Civil Procedure, which has been incorporated into Board Rules of Practice.[1] Summary judgment may be granted only if there exists "no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law".[2] The moving party has the burden of proving that there is no genuine issue as to any material fact, and the non-moving party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists.[3]

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[1] Sections 12.1, 22.1, 32.1 52.1, 62.1, and 72.1, Board Rules of Practice.
[2] V.R.C.P. 56(a).
[3] Hodgdon v. Mount Mansfield Co., 160 Vt. 150, 158-59 (1992). Price v. Leland, 149 Vt. 518, 521 (1988). Appeal of Vermont Troopers Association and Hatch, 34 VLRB 1 (2017). Grievance of VSEA, Nottingham, et al, 26 VLRB 258-59 (2003). Grievance of Cray, 25 VLRB 93, 94 (2002). Grievances of Choudhary, 15 VLRB 118, 179-80 (1992).

Before granting summary judgment, the Board provides the party opposing the motion a reasonable opportunity to show the existence of a fact question.[4] To defeat a motion for summary judgment, an issue of fact in dispute must be both genuine and material; that is, the evidence is such that a reasonable factfinder could return a verdict for the non-moving party.[5] In deciding if there is a genuine issue of material fact, the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue exists.[6]

In most of the cases in which the Board has granted summary judgment motions, the result has been that the case has been dismissed.[7] However, in one case, the Board concluded that the party filing the case with the Board was entitled to summary judgment as a matter of law where there was no genuine issue as to material fact, and granted the remedy requested.[8]

The doctrines of *res judicata* and collateral estoppel may be at issue in summary judgment cases. In Vermont, the rule barring subsequent litigation of claims arising out of a cause of action that was previously litigated is recognized under the doctrines of collateral estoppel and *res judicata*. Both doctrines have as their final goals the elimination of repetitive litigation and respose to litigants.[9]

Under the doctrine of *res judicata*, a judgment bars a subsequent hearing only if the parties, subject matter and causes of action are identical or substantially identical.[10] The cause of action is the same if the same evidence will support the

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[4] Kelly v. Town of Barnard, 155 Vt. 296, 299-300 (1990). Hatch, 34 VLRB at 2. Choudhary, 15 VLRB at 180.
[5] Anderson v. Liberty Lobby, 477 U.S. 242 (1986). Hatch, 34 VLRB at 2. Choudhary, 15 VLRB at 180.
[6] Messier v. Metropolitan Life Ins. Co., 154 Vt. 406, 409 (1990). Hatch, 34 VLRB at 2.-3
[7] Choudhary, *supra.* Montpelier Education Association v. Montpelier Supervisory District Board of School Commissioners, 18 VLRB 401 (1995). Grievance of Monti, 10 VLRB 246 (1987).
[8] Grievance of VSEA (Re: Refusal to Provide Information), 15 VLRB 13 (1992).
[9] Grievances of Choudhary, 15 VLRB 118, 176 (1992).
[10] Id. VSEA v. State of Vermont (Re: No-Solicitation Policies), 33 VLRB 457, 458-459 (2016).

action in both instances. A party will be barred from subsequent litigation as to all claims and issues that were previously litigated and those issues which could have been litigated in a prior action.[11]

The doctrine of collateral estoppel, which is a more limited concept than *res judicata*, estops a party from relitigating those issues necessarily and essentially determined in a prior action.[12] A party who has litigated, or who has had an opportunity to litigate, a matter in a former action should not be permitted to relitigate the same issue against the same adversary.[13] The elements of collateral estoppel, or issue preclusion, are: 1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; 2) the issue was resolved by a final judgment on the merits; 3) the issue is the same as the one raised in the later action; 4) there was a full and fair opportunity to litigate the issue in the earlier action; and 5) applying preclusion in the later action is fair.[14]

In addition to summary judgment motions, there are other ways in which cases may be closed by Board decision prior to any evidentiary hearing. The Board has dismissed cases due to lack of progress, or failure to proceed, on the part of the person or organization that filed the case. The Board has dismissed cases if requested to take action beyond the Board's authority, as the Board only has such adjudicatory jurisdiction as is conferred on it by statute.[15] For example, the Board dismissed two cases on the pleadings because the Board was being asked to issue a declaratory judgment, which was beyond the authority granted the Board.[16] In another instance,

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[11] Id.
[12] Id.
[13] Grievance of Cochran, 26 VLRB 118, 123 (2003). Vermont State Colleges Faculty Federation, AFT, VFT, Local 3180, AFL-CIO) v. Vermont State Colleges, 17 VLRB 1, 11 (1994).
[14] Gallipo v. City of Rutland, 173 Vt. 223, 236-237 (2001). Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265 (1990). Grievance of Cochran, 26 VLRB at 124.
[15] In re Grievance of Brooks, 135 Vt. 563, 570 (1977).
[16] Hinesburg School District v. Vermont-NEA, et al, 9 VLRB 1 (1986). New England Police Benevolent Association v. Town of Thetford, 35 VLRB 515, 517-518 (2020).

the Board dismissed a case subsequent to its own inquiry, in the absence of any motion, based on lack of jurisdiction over the employer and employees involved in the case.[17]

The Board also can dismiss a case based on a motion to dismiss, prior to an evidentiary hearing, if the pleadings provide sufficient basis to rule on such a motion.[18] In practice, however, most motions to dismiss have been acted upon only after the presentation of some evidence at an evidentiary hearing.

B. Disposition After Jurisdictional Hearing

Upon the filing of a motion to dismiss, the Board at times bifurcates the hearing process on a case so that evidence is presented on the motion to dismiss prior to the introduction of any evidence on the merits of the case. The Board then rules on the motion. If the Board grants the motion, the case is dismissed. If the Board denies the motion, a hearing is conducted on the merits.

The Board has granted motions to dismiss on various grounds after motion hearings, among them the following: 1) the Board lacked jurisdiction over the subject matter involved in the case;[19] 2) the requirement of an actual controversy between the employee and the employer is not met for such reasons as the employer already has granted the remedy requested by the employee or the remedy is no longer applicable;[20] and 3) the case was untimely filed with the Board.[21]

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[17] Petition of National Organization of Legal Service Workers, District 65, U.A.W. (Re: Defender General Employees), 16 VLRB 65 (1993).
[18] Grievance of Monti, 10 VLRB 246, 248 (1987). Grievance of von Turkovich, 34 VLRB 56 (2017).
[19] e.g., Grievance of Rogers, 18 VLRB 109 (1995).
[20] e.g., Grievance of Rennie, 16 VLRB 1 (1993).
[21] e.g., Grievance of Boyde, 18 VLRB 518 (1995).

C. Disposition After Only One Party Has Presented Case on the Merits

On a few occasions, the Board has dismissed cases at the completion of the employee's case, and prior to the employer presenting their case, based on a motion to dismiss filed by the employer.[22] The Vermont Supreme Court has indicated that a "motion to dismiss under such circumstances is equivalent to a motion for a directed verdict, and in deciding such motion, the Board must view the evidence in the light most favorable to the nonmoving party, excluding all modifying evidence".[23] The Board cannot grant the motion "if there is any evidence fairly and reasonably tending to justify a decision in favor of the nonmoving party".[24]

[22] Grievance of Smith and VSCFF, AFT Local 3180, AFL-CIO, 12 VLRB 44 (1989). Grievance of Gobin, 14 VLRB 40 (1991).
[23] In re Grievance of Gobin, 158 Vt. 432, 433 -34 (1992).
[24] Id. at 434.