VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 01-32
SUSANNA PALMER	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board in this grievance contesting a 5-day suspension and removal of duties is whether to grant the Employer's motion for permission to file an interlocutory appeal of the Board's March 29, 2002, decision in this matter. In the decision, the Board granted Grievant's motion to exclude from evidence e-mail correspondence between Grievant and Attorney Stephen Fine on the grounds that the correspondence was protected by the attorney-client privilege. 25 VLRB 81.

The Employer filed the interlocutory appeal motion on April 12, 2002, pursuant to V.R.A.P. 5(b)(1), which provides that the Board "shall permit an appeal to be taken from any interlocutory order or ruling" if the Board "finds that the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation." Grievant filed a memorandum in opposition to the Employer's motion for permission to appeal on April 18, 2002.

In deciding whether to grant the Employer's motion, we rely on guidance provided by the Vermont Supreme Court interpreting V.R.A.P. 5(b)(1). At the outset, it needs to be noted that the normal mode of judicial review in Vermont is by appeal after final judgment, and while this rule provides for a further mode of relief under narrowly defined circumstances, the Court's policy against piecemeal review of any matter is strong and consistent. In re Hill, 149 Vt. 86 (1987). There are weighty considerations that support the normal restriction of appellate jurisdiction to the review of final judgments. In

re Pyramid Co., 141 Vt. 294, 300 (1982). Piecemeal appellate review causes unnecessary delay and expense, and wastes scarce judicial resources. Id.

One consideration in interpreting V.R.A.P.(b)(1) is whether a question of law is involved. Interlocutory appeal is proper for questions of law, not fact. Id. at 304. Simply phrasing a question as turning on a matter of law does not create a question of law for purposes of this rule. Id. A question of law is one capable of accurate resolution by an appellate court without the benefit of a factual record. Id. If factual distinctions could control the legal result, the issue is not an appropriate subject for interlocutory appeal. Id.

Another consideration is whether a question of law is "controlling". Whether a question of law is controlling is not defined by whether the question governs the outcome of the litigation. Id. at 302. This factor requires a practical application that focuses upon the potential consequences of the order at issue. Id. at 303. Since the core purpose of an interlocutory appeal is to avoid unnecessary proceedings before a trial court or board, the criterion that an order raise a controlling question of law would seem, at a minimum, to require that reversal result in an immediate effect on the course of litigation and in some savings of resources either to the court system or to the litigants. Id. At one extreme, an order that preordains the outcome of litigation is certainly controlling. Id. Further down the continuum, an order may be controlling if reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at hearing. Id.

The Employer contends that the Board's order involves two controlling questions of law as to which there substantial ground for a difference of opinion: 1) whether the e-mail correspondence was privileged; and 2) whether Grievant waived the attorney-client privilege by placing the e-mail message into a file that she knew would be open to

inspection by her supervisor. The Employer contends that whether the e-mail correspondence was privileged is a controlling question of law because if Grievant's communication is found not to have been for the purpose of obtaining professional legal services it is not privileged. We disagree. This question is not capable of accurate resolution by an appellate court without the benefit of a factual record probing the circumstances of Grievant's communications with Attorney Fine. Since factual distinctions affect the legal result, the issue is not an appropriate subject for interlocutory appeal.

Similarly, whether Grievant waived the attorney-client privilege requires a factual record of Grievant's actions related to placing the e-mail message in the file. Once again, since an appellate court cannot decide the question of waiver without benefit of a factual record, the issue is not an appropriate subject for interlocutory appeal.

Moreover, the Board order cannot be said to involve a question of law that is "controlling" since reversal of the order will not result in savings of resources to either the court system or the litigants. If the Board order is reversed, the case will have to be remanded for hearing before the Board to determine whether just cause existed for Grievant's suspension due to breach of confidentiality as well as decide claims related to removal of duties from Grievant. If the Board order is sustained, there is no savings of resources since the case will have to be remanded for hearing for the Board to decide claims related to removal of duties from Grievant. In either case, there is a potential for increased expenditure of resources as a second appeal may result if either party is displeased with the Board order on remand.

The additional criterion of 5(b)(1) that "an immediate appeal may materially advance the termination of the litigation" means that an interlocutory appeal is proper

only if it must have at least the potential to materially advance the ultimate termination of the case. Id. at 305. The Board must consider not only the time saved at hearing, but also the time expended on appeal. Id.

An interlocutory appeal here does not have the potential to materially advance the ultimate termination of the case because it will not save hearing time and will substantially lengthen the time it takes to bring this case to termination. The Board order in this case excluded evidence. The reversal of that order on interlocutory appeal obviously will not save hearing time but rather prolong it to take the previously excluded evidence. Also, as indicated above, interlocutory appeal potentially can result in two rounds of appeal rather than one if interlocutory appeal is denied.

In sum, granting permission for interlocutory appeal in this matter would be contrary to the Supreme Court's strong and consistent policy against piecemeal review of any matter. The result would be unnecessary delay and expense, and a waste of scarce judicial resources.

Based on the foregoing reasons, it is ordered that the Employer's motion for permission to file an interlocutory appeal of the Board's March 29, 2002, decision in this matter is denied.

Dated this ____ day of June, 2002, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Catherine L. Frank, Chairperson

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Carroll P. Comstock

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Richard W. Park