VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 08-29
JOEL DAVIDSON	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board in this grievance is whether to grant Grievant Joel Davidson's motion for permission to file an interlocutory appeal of the Board's March 26, 2009, and April 30, 2009, decisions in this matter.

In this grievance, Grievant contends that the State of Vermont Department of Public Safety ("Employer") has discriminated against him due to his successful pursuit of a grievance which resulted in his reinstatement to employment pursuant to a decision of the Labor Relations Board. 29 VLRB 105 (2007). Grievant asserts that the Employer has discriminated against him by the following improper actions: 1) failing to reinstate him to his pre-dismissal position as Curriculum Coordinator, 2) failing to allow him to attend professional career development trainings, 3) refusing to promote him; 4) failing to provide him overtime opportunities and pay commensurate with his pre-termination levels and/or commensurate with other employees; 5) failing to assign him to the Employer's lab team, even though he worked on a similar team prior to his termination; and 6) failing to properly compensate him in a manner that makes him whole for his wrongful discharge.

On March 26, 2009, at the first day of the hearing on the merits of this grievance, the Labor Relations Board denied a motion filed by Grievant on March 25, 2009, to compel discovery of e-mail records requested by Grievant. The Board denied the motion given the extent of the requested materials, and given that the motion could have and

should have been filed at an earlier time due to the merits hearing scheduled for March 26. Grievant filed a motion to reconsider this decision. The Board issued an order on April 30, 2009, denying the motion.

Also, on April 30, 2009, the Board issued a decision sustaining the Employer's objection to the admissibility of evidence on the response made by Employer Attorney Howard Kalfus on June 25, 2007, to the question of Attorney Susan Edwards inquiring when Grievant could expect to go back to work. Edwards served as Grievant's attorney in the grievance contesting Grievant's dismissal. In applying the provisions of 3 V.S.A. Section 924(b), the Board excluded the evidence on the grounds that the offered testimony related to statements occurring during compromise negotiations and Grievant had not made a sufficient showing that the evidence is relevant to demonstrating bias or prejudice of a witness. 30 VLRB 150.

Grievant filed an interlocutory appeal motion concerning these decisions on May 14, 2009, 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." The Employer opposes the motion for permission to file an interlocutory appeal. The Labor Relations Board heard oral argument on the motion on May 20, 2009, in the Board hearing room in Montpelier. Prior to the oral argument, Grievant filed with the Board an Offer of Proof with respect to the issue involved in the decision of the Board sustaining the Employer's objection to the admissibility of evidence.

In deciding whether to grant Grievant'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, 300-304 (1982). Grievance of Palmer, 25 VLRB 136, 137-139 (2002). Piecemeal appellate review causes unnecessary delay and expense, and wastes scarce judicial resources. Id.

Whether a question of law is controlling is not defined by whether the question governs the outcome of the litigation. Id. This factor requires a practical application that focuses upon the potential consequences of the order at issue. Id. 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 Board decisions cannot be said to involve questions of law that are "controlling" since reversal of either of the decisions will not result in savings of

resources to either the court system or the litigants, and will not significantly narrow the range of issues, claims or defenses at the hearing. The decisions involve exclusion of potential evidence related to the question of whether the Employer discriminated against Grievant due to his successful pursuit of a grievance which resulted in his reinstatement to employment pursuant to a Board decision. Whether the Board decisions are reversed or sustained, there is no savings of resources or significant narrowing of issues, claims or defenses. The case would have to be remanded to the Board in either event for a full merits hearing involving Board consideration of all the evidence to determine whether the Employer discriminated against Grievant as alleged. The potential evidence that has been excluded would only contribute to a Board determination whether discrimination occurred. Also, 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. In re Pyramid, 141 Vt. at 305. Palmer, 25 VLRB at 138-139. The Board must consider not only the time saved at hearing, but also the time expended on appeal. Id.

We note that, with respect to interlocutory appeal of the Board decision denying Grievant's motion to compel discovery, orders denying or directing discovery ordinarily are not subject to interlocutory review. Castle v. Sherburne Corp., 141 Vt. 157, 162-163 (1982). Ley v. Dall, 150 Vt. 383, 384-385 (1988). The rationale behind this rule is that, even if such orders can be said to raise controlling questions of law, they will rarely have

the potential to materially advance the termination of the litigation. Id. On the contrary, interlocutory appeals from discovery orders will usually lead to piecemeal review and its attendant delays. Id.

We conclude that interlocutory appeal of either of the Board decisions at issue 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 orders in this case excluded potential evidence. The reversal of either of the orders on interlocutory appeal obviously will not save hearing time. If the Board decision sustaining the Employer's objection to the admissibility of evidence on the response made by Attorney Kalfus to Attorney Edwards's question is reversed, the hearing will be prolonged with respect to taking the previously excluded evidence. If the order denying the motion to compel discovery is reversed, the potential exists for prolonged hearing time should production of the requested records result in additional relevant evidence.

Also, interlocutory appeal in either case will substantially lengthen the time it takes to bring this case to resolution due to the significant time it takes for Supreme Court review of a matter which will result in remand to the Board no matter what the Court decides. Further, 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 Grievant's motion for permission to file an interlocutory appeal of the Board's March 26, 2009, and April 30, 2009, decisions in this matter is denied.

Dated this 22nd day of May, 2009, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Acting Chairperson

/s/ Leonard J. Berliner

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Leonard J. Berliner

/s/ James C. Kiehle

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James C. Kiehle