The Use of Discovery in Board Proceedings

A. Generally

Discovery consists of the pre-hearing devices that can be used by one party to obtain facts and information about the case from the other party to assist the party's preparation for the hearing before the Board. The Board has adopted as applicable to its proceedings all the rules of the Vermont Rules of Civil Procedure ("V.R.C.P.") which relate to discovery.[1] Tools of discovery include depositions upon oral and written questions, written interrogatories, production of documents or things, permission to enter upon land or other property, physical and mental examination of persons, and requests for admission.

The scope of discoverable matter is broad. Pursuant to Rule 26(b)(1) of the Vermont Rules of Civil Procedure, which has been adopted by the Board, parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or the expense of the proposed discovery outweighs its likely benefit."[2] "Information within this scope of discovery need not be admissible in evidence to be discoverable."[3]

V.R.C.P. 26(b)(1) was amended in 2017 to adopt verbatim Federal Rule of Civil Procedure 26(b)(1), significantly redefining the scope of discovery under the former Vermont rule.[4] The provisions of F.R.C.P. 26 (b)(1) were inserted to "deal with the problem of overdiscovery. The objective is to guard against redundant or

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[1] Rules 26-37, Vermont Rules of Civil Procedure; Sections 12.1, 22.1, 32.1 52.1, 62.1, and 72.1, Board Rules of Practice.
[2] V.R.C.P. 26(b)(1).
[3] Id.
[4] *See* Reporter's Notes to V.R.C.P. 26 – 2017 Amendment.

disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry."[5] "The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes. . . A party claiming undue burden or expense ordinarily has far better information – perhaps the only information – with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as the parties understand them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery."[6]

In applying these standards in a 2018 grievance proceeding in which a faculty member was contesting his non-reappointment, the Labor Relations Board denied the employer's motion to compel discovery of all personal emails, text messages or other written communications sent or received by the faculty member relating to allegations in his grievance. Given extensive communications already referenced and produced by the grievant, the Board required the employer to explain why this was not sufficient to defend against the claims of the grievant, particularly when the information sought by the employer involved private communications which ordinarily carry a reasonable expectation of privacy. The Board held that the Employer had not made a sufficient showing of the relevance and importance of the information in resolving the issues in the grievance.[7]

The Board also applied these standards in a 2020 decision involving a state police disciplinary appeal. The Board determined that it was appropriate for the

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[5] Federal Advisory Committee's Note to 2015 amendments of F.R.C.P. 26.
[6] Id.
[7] Grievance of Summa, 34 VLRB 197 (2018).

appellant's union representative to have the ability to depose the Director of the State Police with respect to certain matters but that inquiry in some areas was prohibited.[8]

An exception to the scope of discovery is privileged information. Information obtained through the physician - patient relationship or the attorney - client relationship are examples of privileges which may, absent a waiver, result in otherwise relevant information not being discoverable.[9]

The discovery rules are designed so that most discovery takes place between the parties without the involvement of the Board. Parties "have the obligation to make good faith efforts among themselves to resolve or reduce all differences relating to discovery procedures and to avoid filing unnecessary motions".[10] No motions seeking a Board ruling on a discovery issue "shall be filed unless counsel making the motion has conferred with opposing counsel or has attempted to confer about the discovery issues between them in detail in a good faith effort to eliminate or reduce the area of controversy, and to arrive at a mutually satisfactory solution".[11]

B. Discovery Methods

There are many Board cases in which the parties do not engage in formal discovery. If discovery does take place, in practice the discovery methods most used by parties involved in Board proceedings are depositions upon oral examination and requests for production of documents.

Depositions upon oral examination involve a party or parties taking the testimony of a witness outside of, and prior to, the Board hearing through questioning the witness. The deposition is taken under oath in the presence of each

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[8] Appeal of Studin, 35 VLRB 333, 338-40 (2020).
[9] Appeal of Harris, 28 VLRB 82 (2005). Grievance of Palmer, 25 VLRB 81 (2002). Grievance of Towle, 16 VLRB 196 (1993).
[10] V.R.C.P. 26(h).
[11] Id.

party's attorney. A transcript is made of the deposition. The deposition is used in preparation for the Board hearing, and may be used at the hearing for purposes of impeaching the testimony of a witness at the hearing.[12] Depositions also may be used at Board hearings for all purposes where the witness testifies to a lack of memory of the subject matter of the deposition, the witness has been unable to be present at the hearing due to illness or disability, or the party seeking to have the deposition used has been unable to procure the attendance of the witness by process or other reasonable means.[13] In other cases, depositions may be introduced into evidence at Board hearings in lieu of a person's testimony upon agreement of the parties.

Requests for production of documents involve one party serving on the other party a request to produce, and permit the party making the request to inspect and copy, designated documents which are in the custody, control or possession of the party upon whom the request is served.[14]

Written interrogatories and requests for admission are other discovery methods sometimes used by parties. Written interrogatories are a set of written questions about the case before the Board submitted by one party to the other party. The answers to the interrogatories are made under oath.[15] Requests for admission are written statements of fact, or the application of law to fact, which is submitted to the other party, and which that party generally is required to admit or deny. Those statements which are admitted will be treated by the Board as having been established unless the Board permits withdrawal or amendment of the admission.[16]

Other discovery devices are available for use by the parties in Board proceedings. Depositions upon written questions involve a party or parties taking the

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[12] See generally V.R.C.P. 30 and 32; Grievance of Towle, 16 VLRB 196 (1993).
[13] V.R.C.P. 32(a).
[14] See generally V.R.C.P. 34.
[15] See generally V.R.C.P. 33.
[16] See generally V.R.C.P. 36.

testimony of a witness outside of, and prior to, the Board hearing through written questions which have been presented to the other party prior to the deposition.[17] Parties also are permitted to serve on the other party a request to enter upon land or other property in the possession or control of that party for inspection and other purposes.[18] Although parties are permitted the use of these latter two discovery devices, such devices have been used rarely, or not at all, in Board proceedings.

C. Board Involvement in Discovery

Although most discovery takes place without Board involvement, the Board is called upon at times to intervene due to a discovery dispute between the parties. On some occasions, a party seeks a Board order compelling discovery. If a person deposed refuses to answer a question, if a party fails to answer an interrogatory, or if a person fails to produce documents, the discovering party may file a motion for a Board order compelling discovery.[19] Also, the Board becomes directly involved where the physical and mental examinations of persons are sought. When the mental or physical condition of a party, or of a person in the custody or under the legal control of a party, is in controversy, the Board may order the party or other person to submit to a physical or mental examination.[20]

If a party fails to comply with a Board discovery order, the party may be held in contempt. A party also may have to pay the other party's reasonable expenses, lose the ability to use or oppose defenses or introduce certain evidence, have facts established against them, and/or default in a case for failure to obey discovery orders.[21]

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[17] V.R.C.P. 31.
[18] V.R.C.P. 34.
[19] V.R.C.P. 37(a).
[20] V.R.C.P. 35.
[21] V.R.C.P. 37(b), (c), (d), and (e).

On other occasions, a party seeks a Board order limiting discovery or requests that the Board issue discovery protective orders. The frequency or extent of use of specific discovery methods may be limited by the Board on such grounds as being duplicative, unduly burdensome or expensive.[22] The Board also may issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense".[23] Such a protective order may prohibit discovery, limit it, provide that discovery only take place under specified conditions, or provide for the sealing of products of discovery.[24] For example, in one case the Board issued a protective order sealing audit reports on a railway company, which had been completed by an employee grieving to the Board, from the public record pursuant to the trade secret exemption in the Vermont Public Records Act. However, the Board allowed the grievant to seek to have the reports admitted into evidence.[25]

[22] V.R.C.P. 26(b)(1).
[23] V.R.C.P. 26(c). Grievance of Towle, 15 VLRB 506 (1992).
[24] Id. Appeal of Danforth, 27 VLRB 79 (2004).
[25] Grievance of McCort, 15 VLRB 287 (1992).