

## Hearsay

Hearsay evidence is testimony in a hearing of a statement made outside of the hearing, and the statement is offered to prove the truth of the matters asserted. Included within the meaning of hearsay is testimony given by a witness who relates, not what the witness knows personally, but what others have told the witness or what the witness has heard second-hand. The most obvious and frequent hearsay issues arise when a question calls for, or a witness testifies to, statements made by another person outside of a hearing. Some examples are:

- What did Carol tell you about the incident?
- What did John say to you at the time?
- Harry told me that . . .

The nature of hearsay evidence shows its weakness, in that it does not derive its value primarily from the credibility of the witness, but rests largely on the truthfulness and competence of other persons who have relayed information to the witness.<sup>1</sup> There also are perception and recollection problems in that there may be questions concerning how accurately the witness is transmitting the actual statement made.

The knowledge of hearsay evidence rules is most important in the Board's unfair labor practice proceedings in which the Rules of Evidence apply. This is because, under the Rules of Evidence, hearsay evidence is not admissible unless it falls within one of the many exceptions which provide for admissibility of hearsay evidence.<sup>2</sup> Knowledge of hearsay rules is less crucial in grievances, unit determination cases and other non-unfair labor practice hearings before the Board because the Rules of Evidence do not apply in such proceedings. Nonetheless, even

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<sup>1</sup> Black's Law Dictionary, 6th Ed., p.722.

<sup>2</sup> Vermont Rules of Evidence, Rule 802.

in these non-unfair labor practice proceedings where hearsay may be allowed into evidence, the doubts about the trustworthiness and reliability of hearsay evidence results in the Board needing to scrutinize hearsay evidence more closely with respect to how much weight should be given such evidence.

There are numerous exclusions from, and exceptions to, the hearsay rule. There is no intent here to exhaustively discuss each of these exclusions and exceptions. Instead, the exclusions and exceptions discussed herein are those which the Board most often is called upon to apply. Also, although these exclusions and exceptions technically are more important in unfair labor practice proceedings, they often are invoked by parties and the Board in other proceedings when admissibility questions arise.

The following types of evidence generally are allowed into evidence in Board proceedings as exclusions from, or exceptions to, the hearsay rule:

a) Statements not offered to prove the truth of the matter asserted - These are statements which do not go to the truth of the matter asserted, but are offered only to prove they were made. They may be offered to show the effect on the person who heard the statement for reasons such as notice, knowledge, motive or good faith. For example, an employee reprimanded for leaving work early may offer a statement made to him by a co-worker that “Sally Supervisor just told me we all could leave early today” to show that he was operating on that statement in good faith when he left work early. The statement is not offered to show that the supervisor actually said employees could leave work early, but to indicate that the co-worker actually made the statement to the employee who relied upon it.

Such statements also may be offered to provide circumstantial evidence of the speaker of the statement’s state of mind. For example, an employee contesting a dismissal for physically abusing a patient in a mental hospital may offer testimony through another witness that the patient told the witness on one occasion “Get these

attacking soldiers away from me”. The statement is not offered to show that soldiers actually were attacking the patient, but to provide circumstantial evidence that the patient suffered from delusions.

b) Prior inconsistent statements by a witness - These are prior statements by a witness made under oath which are inconsistent with the testimony by the witness at the hearing,<sup>3</sup> and are offered to cast doubt on the version of events relayed by the witness at the hearing. These typically involve prior statements given by a witness while under oath, such as in a deposition. For example, a correctional officer contesting a disciplinary action for pushing an inmate into a wall testifies at the Board hearing that the inmate took a swing at the officer, and the officer was acting in self-defense when he pushed the inmate. This testimony is in conflict with a statement given by the officer in a deposition prior to the hearing that he pushed the inmate after the inmate yelled at him and swore at him, and the inmate did not attempt to physically attack him. The prior statement can be introduced as a prior inconsistent statement.

c) Prior consistent statements by a witness - These are prior statements by a witness which are consistent with the testimony by the witness at the hearing, and are offered to rebut a charge against the witness of recent fabrication or improper influence or motive.<sup>4</sup> For example, a witness testifies in favor of a grievant during the Board hearing, then the employer introduces evidence to show that the grievant put some pressure on the witness before the hearing to testify favorably. The grievant then could introduce into evidence a statement made by the witness prior to the alleged improper influence which is consistent with the witness’s testimony at the hearing.

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<sup>3</sup> Vermont Rules of Evidence, Rule 801(d)(1).

<sup>4</sup> Vermont Rules of Evidence, Rule 801(d)(1).

d) Admission by opposing party - These involve statements or acts of an opposing party made prior to the hearing which are inconsistent with the position the opponent is taking at the hearing.<sup>5</sup> For example, if a party is taking a position at a hearing which conflicts with the position asserted by the party in a letter prior to the hearing, the admission made by the opponent in the letter would be admitted into evidence.

e) Business records - These are records of acts, incidents, conditions, opinions or a diagnosis which are made at or near the time, and such records are kept in the course of regularly conducted business.<sup>6</sup> This probably is the most frequently employed documentary exception to the hearsay rule. Examples would be a log sheet kept in a correctional facility to record inmate headcounts, or time cards of employees.

f) Public records - These are public records of public agencies setting forth the agency's regularly conducted and regularly recorded activities, reports which the agency was mandated to prepare, or generally findings from an investigation required to be done under authority of law.<sup>7</sup> This exception to the hearsay rule includes such things as decisions of the Board and annual reports of government entities.

g) Learned treatises - The Board may take official notice<sup>8</sup> of statements contained in published treatises on a particular issue, or such statements may come into evidence through the direct examination or cross-examination of an expert witness.<sup>9</sup>

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<sup>5</sup> Vermont Rules of Evidence, Rule 801(d)(2).

<sup>6</sup> Vermont Rules of Evidence, Rule 803(6).

<sup>7</sup> Vermont Rules of Evidence, Rule 803(8).

<sup>8</sup> Official notice is discussed later in Section XI of this Section.

<sup>9</sup> Vermont Rules of Evidence, Rule 803(18).

h) Prior Testimony - If a person is deemed unavailable as a witness<sup>10</sup>, testimony given by that person as a witness in another proceeding, or through a deposition in the same case which is being heard by the Board, is not excluded by the hearsay rule if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony in the prior proceeding or deposition.<sup>11</sup>

i) Recorded recollection - This concerns a memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, and such memorandum or record is shown: 1) to have been made by the witness when the matter was fresh in the witness's memory, and 2) to reflect the witness's knowledge correctly. The memorandum or record typically is read into evidence as opposed to being received as an exhibit.<sup>12</sup> For example, a supervisor who has suspended an employee for persistent tardiness is unable to recall while testifying the specific dates the employee was tardy, and how tardy the employee was on those days. However, the supervisor kept a record of the dates and times of late arrival as they occurred. The supervisor may read the dates and times recorded into the record once the supervisor verifies that the record was accurate when made.

j) Refreshing Recollection - Refreshing recollection is not actually an exception to the hearsay rule, but it is similar to the recorded recollection exception and often confused with it, so it is discussed at this point. This applies when a witness knew certain facts at one time, but now has forgotten them, and a written document or other object is used to refresh the memory of the witness at the hearing. Such refreshing of memory is appropriate if the following elements are present: 1) the

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<sup>10</sup> "Unavailability" is defined in Rule 804(a) of the Vermont Rules of Evidence.

<sup>11</sup> Vermont Rules of Evidence, Rule 804(b).

<sup>12</sup> Vermont Rules of Evidence, Rule 803(5).

witness knew certain facts but has forgotten them, 2) the witness indicates that a certain object will help refresh his or her memory, 3) the witness looks at the object, 4) the witness indicates “now I remember”, and 5) the witness testifies from memory without objection. The actual evidence in this case is the testimony, and the party refreshing memory is not allowed to introduce the object into evidence. The opposing party, however, is entitled to inspect the object, examine the witness with respect to it, and introduce into evidence those portions of the document which relate to the witness’s testimony.<sup>13</sup>

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<sup>13</sup> Vermont Rules of Evidence, Rule 612.