Preliminary Issues at the Hearing

A. Beginning the Hearing

Board hearings are recorded. At the outset of the recorded hearing, the Board Chairperson announces the date, name and docket number of the case, and the Board members sitting on the panel hearing the case. The Chairperson asks the parties' representatives to identify themselves for the record. The Chairperson then asks the representatives if there are any preliminary motions or other matters. A common preliminary matter is a confirmation and reading into the record of the exhibits which the parties agree to admit into evidence. If any preliminary motions are made, the Board hears arguments from the parties on their respective positions, and then typically recesses to deliberate on the motions.

Each party then makes an opening statement, with the party with the burden of proceeding (a topic discussed later in this section) giving the first opening statement. The party with the burden of proceeding then begins by calling the first witness.

B. Motions to Amend

The Board Rules of Practice provide that the Board may permit amendment of a grievance, charge, appeal or petition as the Board "deems proper".[1] In deciding whether to permit amendment of grievances, or amendment of employer answers, the Board examines whether amendment would prejudice the employer, or employee or union, or be disruptive to the orderly and efficient processing of cases by the Board.[2]

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[1] Sections 12.7, 22.7, 32.7, 52.7, 62.7, and 72.7, Board Rules of Practice.
[2] Grievance of VSEA, Barnard, et al, 17 VLRB 203, 225 (1994). Grievance of Lawrence, 17 VLRB 360, 368 (1994).

C. Applicability of Rules of Evidence

Unfair labor practice cases are the only cases heard by the VLRB where the Rules of Evidence apply. The statutes administered by the Board provide explicitly that unfair labor practice hearings are governed by the Rules of Evidence.[3] The State Employees Labor Relations Act provides explicitly with respect to grievances that, "unless both parties concerned request that it be formal, hearings shall be informal and not subject to the rules of pleadings, procedure and evidence of the courts of the state".[4] The statutes administered by the Board are silent with respect to unit determination cases and other types of cases which come before the Board for hearing, but as a matter of practice the Board has never applied the Rules of Evidence in these cases.

The introduction of hearsay evidence is the most significant issue arising with respect to whether the Rules of Evidence apply in a particular hearing. Hearsay rules are complicated, and are discussed in a later section to the extent that the Board most often has to address these issues. Suffice it to say at this point that, simply put, it is more difficult to get hearsay evidence admitted when the Rules of Evidence apply as opposed to when they do not apply.

D. Pro Se Litigants and Non-Attorney Representatives

At times, the grievant in a case does not have an attorney or union representative, and represents himself or herself. This creates some special considerations for the Board Chairperson. The *pro se* litigant likely has never appeared before the Board, and is unfamiliar with Board procedures. The *pro se* litigant also likely will not be familiar with how to present evidence to the Board, or respond to the evidence presented by the employer who is represented by an

[3] 3 V.S.A. §965(b), 3 V.S.A. §1030(b), 21 V.S.A. §1622(b), 21 V.S.A. §1727(b).
[4] 3 V.S.A. §928(c).

attorney. The Board Chairperson makes a special effort to ensure that the rights of the *pro se* litigant are protected. This typically results in the Chairperson explaining Board procedures; after swearing in the *pro se* litigant, allowing the *pro se* litigant to provide narrative testimony - i.e., "telling a story" from beginning to end; possibly asking questions of the *pro se* litigant to clarify matters, explaining rulings in more detail, etc.

It is not unusual for non-attorney union representatives to appear before the Board. These representatives become familiar with Board procedures once they have had some experience coming before the Board.

E. De Novo Nature of Board Hearings

Hearings before the Board are *de novo*. A *de novo* hearing means that "the case shall be heard the same as though it had not been heard before."[5] As such, the Board acts as an impartial trier of facts and is not bound by any findings or conclusions made during any earlier proceedings.[6]

The Board has indicated that an employer presents insufficient evidence when it seeks to establish a charge against an employee in a discipline case in reliance on the investigation report submitted by an investigator. Investigation reports are admitted into evidence by the Board to indicate the information that was relied on by management in taking disciplinary action, but they are not admitted to establish the truth of charges against an employee.[7] The Board noted in so concluding that hearings before the Board are *de novo*.[8]

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[5] In re Danforth, 174 Vt. 231, 238 (2002).
[6] Sections 12.14, 22.14, 32.14, 52.14, 62.14, and 72.14, Board Rules of Practice.
[7] Grievance of Farnsworth, 35 VLRB 519, 534 (2020).
[8] Id.

F. Burden of Proceeding

The burden of proceeding is different than the burden of proof, although the two burdens often coincide. The burden of proceeding refers to which party has the burden of presenting their case first. The burden of proof refers to which party has the burden of proving their case by a preponderance of the evidence. The burden of proceeding depends on the type of case which is being heard by the Board.

In grievances, the burden of proceeding generally is on the grievant, including discrimination cases. A significant exception to this rule is that the employer has the burden of proceeding (and burden of proof) in a disciplinary case.[9] In unfair labor practice cases, the burden of proceeding is on the charging party.

In unit determination cases, the burden of proceeding depends on whether the case involves an initial election petition where a bargaining unit is being defined for the first time, or whether a change is being sought in an existing bargaining unit. In initial election petitions, the burden is on the employer seeking to exclude a position from a bargaining unit. Typically, this involves a claim that an employee is either supervisory or confidential. In cases where a change is being sought in an existing bargaining unit, the burden is on the party seeking change to demonstrate that circumstances have changed with respect to duties of a position since the time the position was either excluded from, or included in, the bargaining unit, and convince the Board by a preponderance of the evidence that the unit determination should change.[10]

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[9] See Grievance of Earley and Ibey, 6 VLRB 72, 79 (1983).

[10] Colchester Police Officers' Association and Town of Colchester, 26 VLRB 9 (2003). City of Montpelier and Local 2287, IAFF, 18 VLRB 374 (1995). Burlington Firefighters Association and City of Burlington, 18 VLRB 137 (1995). South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116 (1986). Burlington Fire Officers Association and City of Burlington, 9 VLRB 64 (1986).

The following table summarizes these distinctions:

Type of Case	Burden of Proceeding
Non-disciplinary grievances	Grievant
Disciplinary grievances	Employer
Unfair labor practices	Charging party
Unit issues in initial election petitions	Employer
Bargaining unit changes	Party seeking change

G. Presentation of Case

The party with the burden of proceeding presents their entire case through testimony of witnesses and presentation of exhibits. Each witness called by the party with the burden of proceeding is subject to direct examination by the party with the burden of proceeding, cross examination by the other party, redirect examination by the party who called the witness, and recross examination by the other party.

Once the case of the party with the burden of proceeding is completed, the other party presents its entire case. Each witness called by the party is likewise subject to direct examination, cross examination, redirect examination and recross examination.

Then, the party who proceeded first has the opportunity to present rebuttal if necessary. Rebuttal evidence is presented in Board cases infrequently.

There are occasions when the Board takes witnesses out of order; in these cases, typically both parties agree to taking witnesses out of order.

H. Reliance on Affidavits

Evidence in Board hearings is introduced through the testimony of witnesses and presentation of exhibits. In one state police dismissal case, the employer attempted to introduce into evidence an affidavit of an individual with knowledge of the facts underlying the charges made against the state police officer. The Board declined to admit the affidavit under circumstances where the individual was not present as a witness at the Board hearing. The Board held that any statements made by the individual went "to the heart of the charges" against the officer and that it was "an essential right of due process for a discharged employee to be able to cross-examine a witness providing such crucial testimony".[11]

[11] Appeal of Penka, 21 VLRB 182, 197-198 (1998).