

Appeal of Board Decision

A. Generally

Board decisions generally may be appealed directly to the Supreme Court on questions of law.¹ Appeals are from final orders issued by the Board in a case. In one case, the Supreme Court dismissed an appeal by the State of a Board decision for failure to appeal from a final order. The Court indicated that “(t)o be final and appealable an order must end litigation on the merits or conclusively determine the rights of the parties, leaving nothing for the court to do but execute the judgment.” The Court noted that the State would have an opportunity to file a timely notice of appeal once the Labor Relations Board issued a final order in the matter.²

The Vermont Rules of Appellate Procedure govern the appeal of Board decisions.³ A Board decision is appealed by filing a notice of appeal with the Board normally within 30 days of issuance of the Board decision.⁴ If the 30th day falls on a weekend day or a state or federal legal holiday, the appeal period runs until the end of the next day which is not a weekend day or a state or federal legal holiday.⁵ The appeal must be accompanied by the fee required by statute.⁶ The Board then transmits the notice of appeal and fee to the Clerk of the Supreme Court. The appellant is required to serve a notice of appeal upon the Clerk of the Supreme Court and upon the representative of the other party to the appeal.⁷

¹ 3 V.S.A. §1003, 3 V.S.A. §1043, 21 V.S.A. §1623, 21 V.S.A. §1642(a), 21 V.S.A. §1729(c), 33 V.S.A. §3616(a). See Chapter 10, supra, for a discussion of cases before the Board for which the normal right of appeal to the Supreme Court does not attach.

² In re Grievance of Revene, Unpublished Decision, Supreme Court Doc.No. 2005-111, June 21, 2005.

³ V.R.A.P. 1, 13.

⁴ V.R.A.P. 1, 3, 4.

⁵ V.R.C.P. 6(a), V.R.A.P. 26(a).

⁶ V.R.A.P. 3(b); 32 V.S.A. §1431.

⁷ V.R.A.P. 3(b).

The Board may extend the time for filing the notice of appeal: 1) if request is made within 30 days of the expiration of the appeal period; and 2) excusable neglect or good cause exists.⁸ The two grounds of good cause and excusable neglect reflect different standards. Good cause refers to situations in which there is no fault on the moving party's part. In such occasions, the need for an extension is usually occasioned by something that is not within control of the movant.⁹ Excusable neglect assumes fault on the part of the movant. Vermont Supreme Court precedents establish a hard line and a strict application of the excusable neglect concept, and focus on the factor of the reason for delay, including whether it was within the reasonable control of the movant.¹⁰

Filing with the Board a timely motion for reconsideration of the Board decision terminates the running of the time for filing a notice of appeal.¹¹ In such cases, the time for appeal commences to run upon issuance of the Board decision on the motion for reconsideration.¹²

The notice of appeal needs to specify the party taking the appeal, the Board Order appealed from, the fact that the appeal is to the Supreme Court; and it has to be signed by the appellant or the appellant's attorney.¹³ After the appeal is filed, the parties are required to file with the Clerk of the Supreme Court docketing statements on a form prescribed by the Clerk.¹⁴ The appellant's docketing statement needs to be filed and served within 10 days of the taking of the appeal, and the appellee's statement needs to be filed and served within 10 days thereafter.¹⁵ Once an appeal is

⁸ V.R.A.P. 4(d)(1). Grievance of von Turkovich, 34 VLRB 149 (2017); *Affirmed*, 2018 VT 57, ___ Vt. ___ (2018). Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB 317 (1995).

⁹ Grievance of von Turkovich, 34 VLRB at 150 - 151.

¹⁰ Grievance of von Turkovich, 34 VLRB at 150 – 154; 2018 VT 57, ¶ 5 and ¶ 6.

¹¹ V.R.A.P. 4.

¹² Id.

¹³ V.R.A.P. 3(d).

¹⁴ V.R.A.P. 3(e). The contents of the form are set forth at the end of V.R.A.P. 3.

¹⁵ V.R.A.P. 3(e).

filed, the other party to the case may file a cross- appeal within 14 days of the filing of the appeal.¹⁶

The party appealing the Board decision generally is required to order from the Board, within ten days after filing the notice of appeal, a transcript of “all parts of the (Board hearing) which are relevant to any issues being raised by the appellant on appeal”.¹⁷ The appellant is required to send one-half the estimated cost of the transcript to the Board at the time the transcript is ordered.¹⁸

The normal mode of judicial review in Vermont is by appeal after final judgment. Interlocutory appeal of Board decisions is appropriate only under narrowly defined circumstances if the Board “finds that the order or ruling involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.”¹⁹

Although the Board often is not involved in the proceedings on appeal before the Supreme Court, on a few occasions the Board has filed an *amicus curiae* brief. This is specifically authorized by the Vermont Rules of Appellate Procedure.²⁰

In ruling on appeals of Board decisions, the Court has recognized that certain judgments of the Board are subject to deference due to its expertise as the regulatory body on labor relations disputes.²¹ The Board’s expertise in its areas of jurisdiction is presumed, and substantial deference is accorded the Board’s constructions.²² The Court presumes that the actions of the Board as an administrative body are correct,

¹⁶ V.R.A.P. 4.

¹⁷ V.R.A.P. 10(b)(1).

¹⁸ Sections 12.19, 22.19, 32.19, 52.19, 62.18, 72.18, Board Rules of Practice.

¹⁹ V.R.A.P. 5(b)(1). In re Hill, 149 Vt. 86 (1987). In re Pyramid Co., 141 Vt. 294, 300 (1982). Grievance of Palmer, 25 VLRB 136 (2002).

²⁰ Rule 29, Vermont Rules of Appellate Procedure.

²¹ International Association of Firefighters Local 2287 v. City of Montpelier, 133 Vt. 175, 178 (1975). In re Grievance of Kelley, 2018 VT 94, ___ Vt. ___ (2018).

²² In re Grievance of Carlson, 140 Vt. 555, 560 (1982).

valid and reasonable, with a clear and convincing showing required to overcome the presumption.²³

The Court also has held that the credibility of witnesses and the weight to be given their testimony was primarily a question for the special expertise of the Board.²⁴ The Court is bound by the principle that regardless of inconsistencies or even substantial evidence to the contrary, if credible evidence supports a finding, then it must stand.²⁵ The Court will not substitute its own judgment for that of the Board on questions of the credibility of witnesses.²⁶

In reviewing challenges to Board rulings on admission of evidence during hearings, the Court has indicated a reluctance to reverse Board judgments. The Court has held that due process concerns are the primary factor in reviewing evidentiary determinations made by the Board. The Board's evidentiary determinations will be upheld "(u)nless the Board unduly or unfairly restricts the presentation of evidence so as to deprive a party of a meaningful opportunity to be heard".²⁷ The Court presumes that the actions of the Board are reasonable, and employs a clear and convincing evidence standard in order to overcome this presumption of validity.²⁸

The Court also has indicated that it will not substitute its judgment for that of the Board on questions of fact.²⁹ The Court will not disturb findings made by the Board absent a showing that the findings were clearly erroneous.³⁰

The Court further has noted that the construction of a collective bargaining agreement is a matter within the presumed expertise of the Board, and the Court will

²³ International Association of Firefighters Local 2287 v. City of Montpelier, 133 Vt. at 178.

²⁴ Ohland v. Dubay, 133 Vt. 300, 303 (1975).

²⁵ Id.

²⁶ Local 300, IBEW v. Burlington Electric Light Department, 133 Vt. 258, 260 (1975).

²⁷ Grievance of Merrill, 151 Vt. 270, 276 (1988).

²⁸ Id.

²⁹ Id.

³⁰ In re Grievance of Young, 134 Vt. 569, 570 (1976).

accord the Board's determination substantial deference on appeal.³¹ Similarly, the Court has indicated that the Board is afforded a large measure of informed discretion in determining which individuals should be excluded from bargaining units, and that the Board's decision will not be overturned unless shown to be clearly erroneous.³²

In reviewing decisions by the Board to not issue unfair labor practice complaints, the Court recognized that the Board has discretionary authority to issue or to decline to issue an unfair labor practice complaint. The Court will reverse a decision by the Board not to issue a complaint only if the Board has abused its discretion.³³ In one case, the Court concluded that the Board did not abuse its discretion when it declined to use its limited resources to issue a complaint on a matter where a significant question existed whether the Board could grant any meaningful relief. The Court stated that “(w)hen the Board's jurisdiction is clearly discretionary, as it is here, it is not arbitrary or capricious for the Board to allocate limited resources to those cases it considers deserves them.”³⁴

B. Stay of Board Orders Pending Appeal

The statutes administered by the Board provide that a Board order “shall not automatically be stayed pending appeal”, and that the Board “may stay the order or any part of it”.³⁵ Stay requests must be filed within 10 days of the date the decision is appealed.³⁶ If the Board denies a stay, then a stay may be requested from the Vermont Supreme Court.³⁷

³¹ In re Grievance of Vermont State Colleges Faculty Federation, 138 Vt. 299, 301 (1980).

³² Firefighters of Brattleboro, Local 2628 and Town of Brattleboro, 138 Vt. 347, 350-352 (1980).

³³ Hinesburg School District v. Vermont-NEA, 147 Vt. 558, 560 (1986).

³⁴ VSEA v. State of Vermont (re: Health Care), 161 Vt. 600 (1993).

³⁵ 3 V.S.A. §§1003 and 1043; 21 V.S.A. §1642(b); 21 V.S.A. §1729(d); 33 V.S.A. §3616(b).

³⁶ Sections 12.20, 22.20, 32.20 52.20, 62.19, and 72.19, Board Rules of Practice.

³⁷ Id.

In determining whether to grant a stay, the Board and the Court apply the following three-part test: 1) whether the party seeking the stay will suffer irreparable harm if the stay is not granted, 2) whether the issuance of the stay will substantially harm the other party, and 3) by what result will the interests of the public best be served.³⁸

The Board has applied this three-part test in various contexts. In four cases, the Board denied employer requests to stay Board orders reinstating employees pending appeal, but granted employer stay requests of the parts of the Board orders that the employees be granted back pay.³⁹

The Board denied an employer request for a stay of a Board order that the employer conduct a non-discriminatory review of the classification and assignment to pay grade of an employee's position, which review could result in the employee obtaining a wage increase.⁴⁰ In another case involving payment of monies resulting from a Board order, the Board concluded that a Board order requiring payment of monies to sixteen employees presented sufficient recoupment problems for the employer, in the event the Board order was reversed, so that the Board order should be stayed pending appeal.⁴¹

In two cases, the Board declined to stay Board orders certifying unions as bargaining representatives of employees even though the parties would have to expend a substantial amount of time and resources negotiating contracts, and any contracts reached could result in additional expenditures of public monies.⁴² The Board determined that these factors were outweighed by the public interest in the

³⁸ Grievance of McCort, 16 VLRB 248, 249-51 (1993).

³⁹ Id. Appeal of Revene, 28 VLRB 71 (2005). Appeal of Revene, 28 VLRB 78 (2005). Grievance of Camley, 25 VLRB 147 (2002). Grievance of Gregoire, 18 VLRB 217 (1995).

⁴⁰ Grievance of Lowell, 15 VLRB 436 (1992).

⁴¹ Grievance of VSEA (Re: Refusal to Pay Standby Pay), 15 VLRB 139 (1992).

⁴² VSCFF, AFT Local 3180, AFL-CIO and Vermont State Colleges, 11 VLRB 1 (1988). Teamsters Local 597 and University of Vermont, 19 VLRB 326 (1996).

effectiveness of collective bargaining rights, which may well be frustrated if the Board granted a stay of the order of certification.⁴³

In another representation case, the Board declined to stay an order providing that the Board would proceed toward conducting an election in which municipal employees would vote on whether they wished to continue to be represented by their exclusive bargaining representative. The Board stated that a stay would mean the employer “will be obligated to bargain with a union that may no longer be supported by a majority of employees”, and “employees will be blocked from exercising their democratic rights on whether they wished to be represented by a union”. The Board concluded that the “interests of the public are not well served by this gridlock”.⁴⁴

The Board declined to stay an order in another case where it determined that three school administrative assistants were not confidential employees and were appropriately included in a bargaining unit represented by an association.⁴⁵ The Board elected to stay its order that correctional facility management rescind its policy of shifting employees from their post assignment after a certain period of time only with respect to transferring employees from high security to other posts.⁴⁶

Seven Board decisions concerning stays were appealed to the Supreme Court. The Court affirmed the Board decision in all seven cases.⁴⁷

⁴³ VSCFF and Vermont State Colleges, 11 VLRB at 5-6.

⁴⁴ Decertification Petition re: Green Mountain Transit Agency, 27 VLRB 195, 200 (2004).

⁴⁵ Harwood Union High School District and Harwood Education Association/Vermont-NEA/NEA, 22 VLRB 147 (1999).

⁴⁶ Grievance of VSEA (Re: Post Assignments), 12 VLRB 30 (1989).

⁴⁷ VSCFF, AFT Local 3180, AFL-CIO and Vermont State Colleges, Unpublished decision, Sup. Ct. Doc. No. 87-224 (April 5, 1988). Grievance of McCort, Unpublished decision, Sup. Ct. Doc. No. 93-370 (April 5, 1994). Grievance of Gregoire, Unpublished decision, Sup. Ct. Doc. No. 95-228 (June 5, 1995). Teamsters Local 597 and University of Vermont, Unpublished decision, Sup.Ct. Doc. No. 96-254 (Nov. 13, 1996). Greenia v. Department of Corrections, Unpublished decision, Sup.Ct. Doc. No. 00-004 (February 23, 2000). Camley v. Department of Corrections, Unpublished decision, Sup.Ct.Doc.No. 2002-176 (August 2, 2002). Appeal of Revene, Unpublished decision, Sup.Ct.Doc.No. 2005-290 (August 29, 2005).