Pre-Hearing Considerations

A. Exhibits

Exhibits are required to be provided to the other party and filed with the Board not less than five days before the first day of hearing. Exhibits which are not pre-filed "shall not be admitted into evidence by the Board except upon good cause shown".[1] Exhibits should be pre-marked for identification. Impeachment exhibits need not be pre-filed.

B. Continuance of Hearings

There is no automatic right to a continuance of a scheduled Board hearing, even if both parties agree to the continuance. After the Board has set a matter for hearing, the grounds for a continuance shall be the same as specified in certain provisions of the Vermont Rules of Civil Procedure.[2] This means that, ordinarily, the only grounds for a continuance will be "the sickness of counsel or parties, the unavoidable absence of a material witness or evidence", or a conflict with a court trial of a party's attorney.[3] Motions for continuance should be accompanied by an affidavit, or a certificate of a party's attorney, stating the reason for the requested continuance and the time when such reason was first known.[4]

C. Subpoenas

Ordinarily, attorneys of parties appearing before the Board issue their own subpoenas in compliance with the provisions of the Vermont Rules of Civil

[1] Sections 12.13, 22.13, 32.13, 52.13, 62.13, and 72.13, Board Rules of Practice.
[2] Rules 40(c)(2) and (d), Vermont Rules of Civil Procedure; Sections 12.11, 22.11, 32.11 52.11, 62.11, and 72.11, Board Rules of Practice.
[3] V.R.C.P. 40(c)(2).
[4] V.R.C.P. 40(d).

Procedure.[5] The Board only becomes involved in the issuance of subpoenas if a party is not represented by an attorney, in which case the party may request that the Board issue a subpoena,[6] or if a party moves to quash a subpoena served by the other party.

The ability of the Board Chairperson and a licensed attorney to compel by subpoena the attendance and testimony of witnesses, and the production of books and records, is specifically authorized by statute.[7] Also, applicable statutory provisions allow for the enforcement of subpoenas, and the vacating and modifying of subpoenas, through superior court proceedings.[8]

Motions to quash subpoenas have led to the Board ruling on whether executive privilege and legislative immunity resulted in the Governor, a Governor's aide and a legislator not being compelled to testify through subpoenas.[9] In the executive privilege case, the Board determined that the Governor and the Governor's Assistant possessed at least a qualified privilege and that, based on the record, this privilege was sufficient to shield them from compulsory process.[10] To overcome the Governor's qualified privilege, the grievant had to make a showing of compelling necessity. He was required to show that without evidence from the executive he was prevented from bringing to the hearing all relevant material evidence which supported his position in the dispute. He also was required to show the evidence he sought from the executive was not available from other sources. The Board determined that the grievant had failed to make the required showing.[11]

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[5] Rule 45, Vermont Rules of Civil Procedure; Sections 12.8, 22.8, 32.8, 52.8, 62.8, and 72.8, Board Rules of Practice.
[6] Id.
[7] 3 V.S.A. §809(h).
[8] 3 V.S.A. §809a, 809b.
[9] Grievance of Morrissey, 6 VLRB 329 (1983). Grievance of Day, 14 VLRB 127 (1991).
[10] Morrissey, 6 VLRB at 331-332.
[11] Id. at 332-336.

In the legislative immunity case, the Board determined whether a state representative had legislative immunity from testifying in a matter concerning alleged comments made by him in a telephone conversation with a newspaper reporter concerning a discussion he had with a department commissioner with respect to eliminating the position of, and terminating, the grievant. The Board looked to precedent of the U.S. Supreme Court in construing the Speech or Debate clause of the U.S. Constitution for guidance in determining the scope of legislative immunity under the Vermont Constitution and Vermont statutes.

The Board interpreted the Court decisions to provide that the Speech or Debate Clause does not reach conduct which attempts to influence the conduct of the executive branch of the government that is not part of the due functioning of the legislative process. In applying this precedent, the Board determined that the state representative did not have legislative immunity from testifying because the discussions he had with the department commissioner did not constitute legislative activities as defined by the U.S. Supreme Court.[12]

The party requesting a subpoena is responsible for having it served and paying any applicable fees. A subpoena may be served by any person who is not a party and is at least 18 years of age.[13] If a party has a sheriff, deputy sheriff or constable serve a subpoena, the party has to pay the officer the service of process fees required by statute.[14] Witnesses testifying at a hearing pursuant to a subpoena are entitled to be paid the attendance and mileage fees set forth in statute.[15]

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[12] Grievance of Day, 14 VLRB 127 (1991).
[13] V.R.C.P. 45(b).
[14] 32 V.S.A. §1591; Sections 12.9, 22.9, 32.9, 52.9, 62.9, and 72.9, Board Rules of Practice.
[15] Id.