Statements Made in Settlement Discussions

The Board, as a matter of practice consistent with federal and state rules of evidence, generally does not permit evidence to be introduced on conduct or statements made in settlement negotiations between the parties in a case before the Board. The Board further does not consider as admissible evidence of settlement proposals made at earlier steps of the grievance procedure. In one case, the Board reasoned:

> "To maintain its purpose of resolving problems between the parties, contractual grievance machinery must be used by the parties in an uninhibited way. Each party must feel free to search for accommodation without fearing that, if its settlement offer is refused, their attempt to solve a problem will be used against them at a later date. The dynamics which lead one side to seek a resolution of a dispute before it reaches this level may have nothing to do with the merits of that side's position."[1]

The Board also generally does not permit the introduction of evidence on conduct or statements made in the course of mediation efforts during collective bargaining contract negotiations.[2] Statements made in mediation as part of contract negotiations need to be distinguished from evidence of bargaining history, which is properly introduced in many unfair labor practice cases and grievances over interpretations of a contract. Bargaining history which comes into evidence typically consists of direct discussions between the parties, bargaining proposals exchanged by the parties, or fact-finding proposals and briefs.

Communications during mediation, particularly communications between parties and the mediator, are not allowed into evidence given the very nature of the mediation process. Mediation is most successful when parties and the mediator are

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[1] Grievance of VSEA on Behalf of the Meat Inspectors, Department of Agriculture, 4 VLRB 144, 160 (1981); *Affirmed*, 141 Vt. 616 (1982).
[2] Vermont Rules of Evidence, Rule 408.

allowed to be creative, and the parties and the mediator actively work to get behind positions to explore interests. This can best be achieved when communications are viewed as confidential, and parties do not have to be concerned about conversations being introduced against them at a later date in a hearing. Thus, as a policy matter, communications during mediation are generally viewed as not admissible.

In addition to these practices of the Board, the State Employees Labor Relations Act was amended in 2006 to specify that "(i)n all proceedings under this chapter, no evidence shall be admitted or considered that relates to conduct or statements made in compromise negotiations, including mediation, unless otherwise agreed to by the parties."[3]

[3] Act No. 194, (2005 Adj.Sess.); 3 V.S.A. §924(a).