

STATE OF VERMONT
SECRETARY OF STATE
BOARD OF NURSING

IN RE:)
DAVID R. SHADDY) Docket No. M2011-84
License No. 026.0029631)

**DECISION ON APPEAL FROM FINDINGS AND ORDER VACATING
NURSING LICENSE SUSPENSION BY STIPULATION**

This is an appeal from an administrative decision by the Vermont Nursing Board. The appeal was heard by Appellate Officer George K. Belcher. The appeal was taken by the State of Vermont acting through the prosecuting attorney, Gabriel M. Gilman, Esq., who was on the brief and made oral argument. David Shaddy is the Appellee and he appeared pro se. He filed an Appellee's brief and participated on his own behalf in oral argument.

Procedural Facts

The registered nursing license of Mr. Shaddy was suspended by stipulated order of the Vermont Nursing Board. The stipulation arose after charges had been filed alleging that Mr. Shaddy had diverted drugs from his nursing employment with the Brattleboro Retreat. The stipulation was agreed between State Prosecuting Attorney, Edward G. Adrian, Esq., representing the State of Vermont on February 28, 2011 and David R. Shaddy on February 23, 2011. The stipulation was approved and ordered by the Chairperson of the Vermont Nursing Board on April 12, 2011. The stipulation read in part,

This Stipulation is neither an admission of liability by the Respondent [Mr. Shaddy] nor a concession by the State of Vermont that its charges are not well founded. To avoid delay, uncertainty, inconvenience, and expense of protracted litigation of the charges above, the Parties reach a full and final Stipulation pursuant to these understandings and the Order below. The Respondent does not dispute that the State could prove these charges by a preponderance of the evidence if this matter went to a hearing and agrees that the conditions below are necessary to protect the public. [Stipulation, Page 3, Para. (b)]

On or about May 1, 2012 Mr. Shaddy filed a petition requesting that the stipulated order be vacated or amended and that record be sealed or expunged. The thrust of the petition was that Mr. Shaddy had been misled by his attorneys in the negotiation of the stipulation (see paragraphs 12-18 of petition to the Vermont Board of Nursing). He further claimed in the petition that he was innocent of the drug diversion. On June 11, 2012, the Vermont Nursing Board held a hearing on his petition. On the following day the Board granted Mr. Shaddy's motion to vacate the stipulation and consent order. It dismissed without prejudice the charges which had previously been filed against Mr. Shaddy's license. The Board did not order that the record be expunged. The State of Vermont appealed and filed a statement of 12 questions concerning the appeal.

In order to understand the issues in this case it is essential to have in mind what the Nursing Board decided and the reasoning given for its decision. The Board decision states in part,

The Board considered all the documents submitted by the parties. The threshold issue is whether the Board has authority to grant Mr. Shaddy relief from the Stipulation and Consent Order. We take Mr. Shaddy's motion as one for relief under V.R.C.P. 60 (b)(6). Under Rule 60(b)(6) we may grant relief for "any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time...." Mr. Shaddy explained how the collateral consequences of the Stipulation and Consent Order became obvious to him over time. He explained his efforts, eventually successful, to have his name removed from a federal exclusion list. We found Mr. Shaddy's testimony in the hearing to be well-organized and credible. "Any other reason" is a mixed question of fact and law. As we are permitted, we conclude that Mr. Shaddy has shown a good reason for his request for relief.

Based on our review of the evidence submitted and the nature of Mr. Shaddy's claim that the Stipulation and Consent Order represented a miscarriage of justice, we conclude that his request to vacate was made within a reasonable period of time.

Mr. Shaddy's arguments about the validity of the underlying charges in this case made in his original letter to the Board and in his Motion to Vacate and Dismiss (May 25, 21012) are strongly supported by the documentation he provided at the hearing. The documents in evidence leave the Board with no confidence that it was Mr. Shaddy and not someone else who diverted the Adderral he was charged with diverting as set forth in the State's Specification of Charges or in the Stipulation and Consent Order. *On what we have seen in this hearing, the evidence against Mr. Shaddy is insufficient.* [See page 2 of the Findings of Fact, Conclusions of Law, and Order, emphasis added.]

The State of Vermont has raised issues which fall into three general areas. First, issues were raised concerning the admission of evidence by the Board. (See Questions 7-12 of the Appellant.) Second, the State raised issues surrounding the use and application of V.R.C.P. 60(b)(6) including the standard used by the Board in application of this rule. (See Questions 3-5.) Finally, the Appellant raised issues whether sufficient facts were properly found to justify the ultimate decision. These issues will be addressed below.

Before discussing the specific issues of the case, it is worthwhile to review the statutory criteria used in appeals from administrative bodies. The review is based upon the record created before the board. Reversal or remand is only possible if "substantial rights of the appellant have been prejudiced" because the board's findings, inferences conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the board; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the evidence on the record as a whole; (6) arbitrary or capricious; or (7) characterized by an abuse of discretion or clearly unwarranted exercise of discretion. See 3 VSA Sec. 130a(b). The discretion of the trier of fact in a Rule 60(b)(6) motion is broad and granted great deference. It has been said that a motion to set aside a judgement for hardship under VRCP 60(b)(6) is not subject to appellate review unless it clearly and affirmatively appears on the record that discretion was withheld or abused. Adamson v. Dodge, 174 Vt. 311, 816 A.2d 455 (2002).¹ An entity, vested with discretion, abuses that discretion when it behaves as if it

¹ The Adamson case stands for the proposition that great deference is due the trial court in ruling on Rule 60(b)(6) motions, but the facts of that case involved the trial court refusing to upset a divorce decree which the appellant was trying to vacate. In its decision the Vermont Supreme Court stated:

The trial court found that the stipulation was "negotiated over many months with the input of a mediator." The final form of the stipulation included terms more favorable to father than those found in earlier drafts. The court found father to be a highly intelligent, educated man, who was not subjected to any pressure or threats and had "every opportunity to read over the

has no other choice than the one it has taken, or when it makes a decision for which there is not adequate support. Bennington Housing Authority v. Bush, 2007 VT 60, 933 A.2d 207 (2007).

The Evidence before the Board

In pre-hearing conferences, Mr. Shaddy identified several items he wanted to be considered by the Nursing Board. Exhibit A was a partial copy of the Stipulation and Consent Order (the Stipulation and Consent Order was admitted in its entirety by agreement). Exhibit B was an email from Mr. Shaddy's attorney to Mr. Shaddy dated February 3, 2011 (which was significantly redacted). An objection was made by the State unless the State was given an opportunity to respond at a subsequent hearing date. (See State's Response to Hearing Exhibits dated 4 June, 2012). Exhibit C was a drug screen report dated April 24, 2012. This was objected to as irrelevant to the issue of vacating an order made in April of 2011.

In addition to Exhibits A, B, and C. Mr. Shaddy presented to the Board two large packets of papers. One is entitled "Memorandum of Undisputed Factual Evidence." This document is 14 pages long and is dated May 25, 2012. The memorandum alleged facts and events. It also contained factual conclusions. The second packet is entitled "Addendum to Memorandum of Undisputed Factual Evidence." This document contains approximately 195 pages of records, transcript segments from depositions, and segments of trial transcripts. The State filed a written objection to these two packets prior to the hearing. The State objected that the packets essentially constituted a request for admission under VRCP 36 (which process is not available under the Administrative Rules for the Office of Professional Regulation (Rule 2.4)). The State also objected that the evidence in the packets could only be considered if the Board vacated the stipulation and, thus, the evidence was "premature" to the issue before the Board. The State also objected on the ground that some of the material came from a criminal trial of Mr. Shaddy which was under an order of expungement under 13 VSA Sec. 7041(e) and therefore should not be considered. Finally, the State objected to evidence being offered which had already been stipulated by Mr. Shaddy to have been sufficient to prove a charge of unprofessional conduct.

At the close of the hearing Attorney Adrian representing the State, stated, "[W]e just want to reiterate, although Mr. Shaddy's entitled his memorandum of undisputed factual evidence as such, we obviously dispute it. Now's not the time and place for the state to put forward its case on - - on the facts themselves, but I just wanted to make sure that was clear on the record." Page 59-60 of transcript.

The Board's order however is clear that, "The Board considered all the documents submitted by the parties." See Order, Page 2. As such, the record and the quoted Findings of Fact show that the evidence which was subject to the objections was admitted and considered. This was manifest error for the following reasons.

stipulation, ask questions, and obtain legal representation." He voluntarily signed the stipulation agreeing to a generous financial package for the benefit of his former wife and four children. Interests of finality require that relief from a previous judgment should be granted only in extraordinary circumstances. Riehle v. Tudhope, 171 Vt. 626, 627, 765 A.2d 885, 887 (2000) (mem.).

First, it was made clear both at the hearing and in the order that, “The email from his [Mr. Shaddy’s] attorney [Exhibit B] was received with the understanding that if the Board was inclined to give it any weight, the prosecution would be given an opportunity at a later date to offer any evidence it wished in response.” See Order, Page 2 and Transcript, page 8. If the board considered “all the documents submitted by the parties” then it was obligated to give the State an opportunity to present evidence in response to Exhibit B. The Board did not do so. If Exhibit B was objectionable on privilege or other grounds, it should neither have been admitted nor “considered” without allowing a further hearing.

Second, the Board appears to have admitted substantive evidence improperly because the Board invisibly shifted into consideration of the merits of the case, before it had decided whether grounds existed to vacate the earlier judgement. It decided that the charges were dismissed and it stated, “Because our decision is based only on the *factual merits of the charge* against Mr. Shaddy, we do not address his claims of duress or undue influence.” See page 3 of Order, emphasis added. Under the Vermont Administrative Procedure Act, 3 VSA Sec. 810, the rules of evidence as applied in civil cases in the superior courts of the state shall be followed. There is a relaxation of the rules of evidence in administrative proceedings “when necessary to ascertain facts not reasonably susceptible to proof under those rules.” *Id.* Evidence is ordinarily taken from sworn witnesses in open court or by sworn affidavits or depositions. See VRCP 43 (a) and (e). See also Simpson v. Rood, 175 Vt. 546, 830 A.2d 4 (2003). In this case, Mr. Shaddy’s “Memorandum of Undisputed Factual Evidence” was not sworn. Moreover, the second packet of almost 200 pages of transcript excerpts, documents, and one photograph did not meet the most elementary evidentiary standards. There was no foundation laid for the voluminous material. The declarants and authors of the material were not available to be cross-examined. Mr. Adrian had not been a party to the depositions. See Transcript of hearing, page 54. (See also Nichols v. Brattleboro Retreat, 2009 VT 4, 970 A.2d 1249 (2009) requiring a finding that witnesses are unavailable before admitting deposition testimony. No such finding was made.) It was obvious that Mr. Adrian did not feel the need to object to each and every item since he made his understanding clear that this was not a merits hearing, but only a hearing on whether grounds existed to vacate the stipulation.

Moreover, there was never a ruling made by Board counsel during the hearing upon the admission or exclusion of the evidence of the voluminous material contained in the memorandum. Had such a ruling been made during the hearing, it is possible that the State could have moved for a continuance to meet the evidence. The failure by the Board to make a definitive ruling on the evidence during the hearing is contrary to the usual evidentiary procedure. See. VRE 103.

Most importantly, admission of the excerpts from the criminal depositions and criminal trial allowed Mr. Shaddy to select only those sections of the transcript which benefited him. The State was precluded from independently gathering and introducing countervailing evidence, or even securing the entire deposition or trial transcript due to the order of expungement. The State made this objection clearly in writing before the hearing. The admission of such broad evidence which supported one side, without

allowing an opportunity for response, was an error which prejudiced the State.² The Board stated that, “The evidence in support of Mr. Shaddy’s request is compelling.” Page 3 of Findings and Order. It is unknown from the order which items of evidence were so compelling. One must ask whether such evidence, even if admissible, would be “compelling” if countervailing evidence had been allowed and considered.

One final point about the evidence must be made. The charges in this case alleged that Mr. Shaddy diverted the drug Adderall on January 20, 2008, and that there was evidence that Mr. Shaddy was the only nurse who had unobserved access to the medication storage place during the time period of the tampering. While the charges included allegations about prior incidents of missing medication, the only allegation that Mr. Shaddy diverted the drug was for the incident on January 20, 2008. Mr. Shaddy’s “Memorandum of Undisputed Evidence” raised issues about whether he worked on shifts when the same drug had been tampered with on two earlier occasions earlier in November of 2007 but these incidents were not the primary allegation of unprofessional conduct before the Nursing Board. As to the evidence concerning his exclusive access to the drug storage area on January 20, 2008, he produced some evidence, which if admitted, would show that another nurse or nurses may have had access to the drug storage area alone. He concluded that other incidents of tampering were done with a “modus operandi” and that his evidence, if admitted, supported the conclusion that Wendi Bedard, RN, was the only person who could have tampered with the medication. See Memorandum, Paragraph 27. He went on to allege that Registered Nurses Wendi Bedard, Beth Rivera, Margaret Athey all actively “lied”. *Id.* Para. 32. He alleged that the Brattleboro Retreat Pharmacist “intentionally misled” the State investigator to implicate him and to exclude Nurse Bedard. *Id.* Para. 30(c).

The Board used “the documents in evidence” to determine that there was “no confidence that it was Mr. Shaddy and not someone else who diverted the Adderall he was charged with diverting...” (See page 3 of Order) What the above cited “evidence” makes abundantly clear is: (1) that there were issues of credibility which would have to be resolved if there were a hearing on the merits³; (2) that the issues involved in the case were subtle, including “modus operandi” issues, which might have fallen either way had all witnesses been able to testify; (3) the admission of only one side’s evidence on such a complex and subtle case was simply unfair; (4) in the original stipulation Mr. Shaddy admitted that the State could prove its charges as a tactical judgement on his part, weighing the evidence which had been assembled against him and how that evidence might be presented. It is important to understand that the deposition testimony was taken in March of 2009 and the trial testimony was taken in September of 2009. Thus, the bulk

² The deposition transcript segments and trial transcript segments almost exclusively contain examination conducted by counsel for Mr. Shaddy. There is almost none of the cross-examination testimony of the witnesses contained in the packets. Thus, the selected portions of the transcripts were “cherry picked”. While the documents included in the packet are identified by Mr. Shaddy in his memorandum, the authenticity and foundation for these documents was lacking.

³ In the Vermont Supreme Court case which was referenced by Mr. Shaddy on page 48 of the Transcript of the hearing, the Vermont Supreme Court reviewed much of the same evidence and determined that credibility the nurses was at issue, and, therefore, further hearings were required. See David Shaddy v. Department of Labor, 2009 VT. 103, 987 A.2d 311 (2009). “Thus, the strength of the evidence against claimant depended largely on the credibility of other witnesses who themselves had access to the medication room on the days in question.” At p. 314.

of the “evidence” which was presented in the Memorandum was available to Mr. Shaddy long before his stipulation of April of 2011. Page 50, Transcript.

The “evidence” should have been excluded or admitted only after a full evidentiary hearing.

The Standard of VRCP 60 (b)(6)

The pertinent part of VRCP 60 (b) states as follows:

60(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Under the facts of this case the original order was made in April of 2011 and the motion to vacate was not filed within 12 months of the entry of that order. Thus, the grounds for relief under VRCP 60 (b) 1-3 were unavailable.

It has been determined that if a cause for relief is barred under VRCP 60(b) 1-3, then the same grounds cannot be used for a 60(b)(6) finding.

[C]ases also certainly seem to establish that clause (6) and the first five clauses are mutually exclusive and that relief cannot be had under clause (6) if it would have been available under the earlier clauses. This reading seems required also by the language of the rule. Despite a few earlier cases that appeared to overlook this point, there is now much authority that the provisions are mutually exclusive. Wright, Miller and Kane, *Federal Practice and Procedure*, Sec. 2864, P. 362 . See also Perrott v. Johnston, 151 Vt. 464, 562 A.2d 459(1989).

Therefore if Mr. Shaddy's grounds for relief were grounded in his own neglect in making the stipulation, or mistakes by his counsel in formulating the stipulation, those grounds could not form the basis for a 60(b)(6) finding. In fact, Mr. Shaddy testified in the hearing that he had been misled by his attorneys, that he had misunderstood the meaning of the stipulation, that he was pressured into signing the stipulation since his attorneys were refusing to continue their representation of him, and that he signed the stipulation even though he disagreed with it. Mr. Shaddy alleged duress and misrepresentation in his petition to vacate and it was reasonable for the State to understand that these were the primary issues to be addressed at the hearing. Rule 60(b)(6) is not to be used as a substitute for one of the first five sections of V.R.C.P. 60(b). Relief under Rule 60(b)(6) is available only when a ground justifying relief is not encompassed within any of the first five classes of the rule. See Pierce v. Vaughan, 2012 VT 5, 44 A.3d 758 (2012) reversing trial court's grant of Rule 60(b) motion. Under our cases, relief under VRCP 60(b) is ordinarily unavailable to relieve one from the effects of a stipulation freely made. Goshy v. Morey, 149 Vt. 93, 539 A.2d 543

(1987). Courts have held that the movant's hurdle of overcoming a stipulated agreement is "more formidable than if they had litigated and lost." U.S. Steel Corp. v. Fraternal Assn. of Steelhaulers, 601 F.2d 1269, 1274 (3d Cir., 1979). Likewise, Rule 60(b)(6) may not be used to protect a party from tactical decision which in retrospect may seem ill advised. Okemo Mountain, Inc. v. Okemo Trailside Condominiums, Inc. 139 Vt. 433, 431 A.2d 457 (1981). The catchall provision of VRCP 60(b)(6) referring to "any other reason justifying relief" is intended to accomplish justice in extraordinary situations where extraordinary circumstances warrant relief. Donley v. Donley, 165 Vt. 619, 686 A.2d 943 (1996); Town of Washington v. Emmons, 2007 VT 22, 925 A.2d 1002 (mem. 2007).⁴ See also Wright, Miller and Kane, *Federal Practice and Procedure*, Sec. 2857. Extraordinary circumstances rarely exist from a judgment that resulted from a party's deliberate choices. Budget Blinds, Inc. v. White, 536 F.3d 244 (3d Cir., 2008). A party's misunderstanding of a term in a stipulation for settlement that he consciously entered into with advise of counsel, was not a party litigation "mistake" contemplated by the rule allowing relief from final judgement because of mistake. Cashner v. Freedom Stores, Inc. 98 F.3d 572 (10th Cir., 1996). Fault on the part of the person making a Rule 60(b)(6) motion usually means that there are no "extraordinary circumstances". See Wm. Moore, *Moore's Federal Practice*, Sec. 60.48, 3d ed. (2004). Error by counsel is rarely determined to be extraordinary circumstances unless there is gross neglect by counsel. Hawkins v. Lindsley, 327 F.2d 356 (CA2d, 1964). As was held by the U.S. Supreme Court in Ackermann v. U.S., 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1951), the voluntary, deliberate, free, untrammelled choice of a party not to appeal does not constitute extraordinary circumstances under Rule 60(b)(6).

It appears that the Board did not apply the "extraordinary circumstances" rule. The order itself states that "Mr. Shaddy has shown a *good reason* for his request for relief." See Order, Page 2, emphasis added. Towards the end of the hearing the following exchange took place:

Unidentified Female Board Member:

Do we need to decide whether or not we can consider this before we proceed or is it all wrapped up?

Board Counsel:

It's all sort of one big question. I mean, if you find Mr. Shaddy provided you with an *adequate* reason, you can go ahead and decide. (emphasis added). Page 44, transcript.

In deciding Rule 60(b) motions, the policy of the law to favor a hearing of a litigant's claim on the merits, must be balanced against a desire to achieve finality in litigation. See Wright, Miller and Kane, *Federal Practice and Procedure*, Sec. 2857. It is for this reason that many of the cases granting relief from judgements are those which set aside default judgments in favor of allowing a litigant his day in court so that the matter might be heard on the merits. See Childs v. Hart, 131 Vt. 241, 243, 303 A.2d 139, 140-41 (1973); Hahlteich v. Knott, 139 Vt. 588, 433 A.2d 287 (1981); Desjarlai v. Gilman, 143 Vt. at 157, 463 A.2d at 236. In the case of Mr. Shaddy before the Board, the decision overshoots in the other direction. The decision effectively denied the State of Vermont a

⁴ In the Emmons case a *pro se* party stipulated to a judgement and later tried to retract it. The court stated, "The simple failure to raise these issues is not an 'extraordinary circumstance' justifying relief from judgment under Rule 60 (b)(6)."

hearing on the merits of the charges which had been filed, and denied the State the benefit of an agreement validly made with Mr. Shaddy. More importantly, the decision ignored the rule that Rule 60(b) motions “are ordinarily unavailable to those whose tactical choices turn out to be ill advised.” Quoting Goshy v. Morey, *supra* at p. 97. See also Darken v. Mooney, 144 Vt. 561, 481 A.2d 407 (1984); Estate of Emilo v. St. Pierre, 146 Vt. At 424, 505 A.2d at 666 and Cooper v. Savage, 145 Vt. 223, 485 A.2d. 1258 (1984).

In addition to Mr. Shaddy deriving the benefit of his stipulation, there is a certainty that the State will be prejudiced if the stipulation is undone at this late stage. As argued by the State,

The Board’s expansive interpretation of the mandate granted by V.R.C.P. 60 (b) call into question the integrity of each and every consent order negotiated between the State and its professional regulatees; undermines the finality of judgements; threatens the integrity of reciprocal discipline in sister states, invites inconsistent judgments; and exposes mandated reporters, public officials and witnesses for the State to interminable retaliatory litigation... See Appellant’s brief, Page 4

One of the consequences which was raised as an issue in this case was the effect of an expungement by deferred sentence in a collateral criminal matter involving Mr. Shaddy. The record did not show the date which the expungement order took effect under 13 VSA Sec. 7041(e) but it is clear that Mr. Shaddy took the benefit of the expungement which he was likely able to secure by the passage of time while the stipulation was in effect. It is ironic that during his challenge of his own stipulation as being unfair, he was able to use the benefit of the passage of time resulting in the expungement of any criminal record.⁵ One need not speculate to consider the effect of reopening a factual controversy which occurred in the year 2008 where witnesses move, memories fade, and documents and records are destroyed. The Nursing Board findings and order did not address the issue of prejudice to the State. Prejudice to a party is a factor which should be weighed in a finding of extraordinary circumstances. Relief from a judgment may be inappropriate if parties have relied upon it or if circumstances are such that setting it aside would cause prejudice to a party. See Wm. Moore, *Moore’s Federal Practice*, Sec. 60.22, 3d ed. (2004).

The appellate officer could find no case where a stipulated judgement was set aside under Rule 60(b)(6) based upon grounds that one party could not prove its underlying case without a hearing which allowed the non-moving party to present its evidence following notice.

As Rule 60(b) states, “On motion and upon such terms as are just, the court may relieve a party or party’s legal representative from a final judgment, order or proceeding for the following reasons: ...” emphasis added. The rule has been held to prohibit setting aside a judgment and the simultaneous granting of affirmative relief beyond what was granted in the original order. See Wm. Moore, *Moore’s Federal Practice*, Sec. 60.25, 3d

⁵ See Transcript of June 11, 2012 hearing page 56
Mr. Novins: And there was an agreement with the State?
Mr. Shaddy: Yeah
Mr. Novins: And you entered a plea?
Mr. Shaddy: I don’t have to say.

ed. (2004). In Mr. Shaddy's case, the Nursing Board's order could be described as opening the April 2011 judgment and then granting an immediate summary judgment in favor of Mr. Shaddy. In Vermont, our law as stated in Smith v. Smith, 139 Vt. 234, 427 A.2d 378 (1981) held that upon the granting of a Rule 60 (b) motion a new trial was required on the underlying matter. The Smith case was overruled in part in the case of Cliche v. Cliche, 143 Vt. 301, 466 A.2d 314 (1983), where the trial court granted a Rule 60(b) motion and then modified the underlying order. In the Cliche case, however, "a full evidentiary hearing was held on disputed issues at the time of the Rule 60(b) hearing." Id. at 307. In the Shaddy case there was not a full evidentiary hearing on underlying disputed issues.

Finally, one must look at what the Board excluded as grounds for its decision. The Board expressly determined that Mr. Shaddy's arguments of duress and undue influence were not the basis of its decision. (See page 3 of Order). Because of the one-year time limit of Rule 60(b)(1-3) the Board effectively excluded grounds of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, misrepresentation and misconduct by an adverse party. In his testimony before the Board Mr. Shaddy admitted (1) that he was represented by counsel in the negotiation of the stipulation; (2) that he had an opportunity to read the stipulation before signing it; (3) that he was not coerced into signing the stipulation; (4) that the stipulation was modified at the request of his counsel and that compromises were made by both sides in negotiating the stipulation; (5) that the stipulation represented the entire understanding between the parties; (6) that he thought the stipulation was unfair when he made the stipulation but that he signed it anyhow; and (7) that the facts set forth in the stipulation were true. See pages 25-41 of the transcript of the June 11, 2012 hearing.

Mr. Shaddy had the burden of proof at the June 11, 2012 hearing to establish that there were extraordinary circumstances which justified relief from the operation of the judgement. Given his admissions recited above, the inadmissible evidence which was "considered", and the precedents concerning the finality of stipulations, it is clear that the Board's conclusion that there had been a "miscarriage of justice" cannot stand. There were no extraordinary circumstances under the case law as applied to these facts. The decision of the Nursing Board vacating the prior suspension must be reversed as an abuse of discretion, as an error of law concerning the correct legal standard for a Rule 60(b)(6) motion, and as the product of an improper procedure where the merits of a case are considered by only hearing the evidence in defense of the charge without an opportunity for the State to present its evidence. The legal standard for a Rule 60(b)(6) motion is a legal standard and is reviewable upon appeal.

The Lack of Findings of Fact

Under Vermont law, if a Rule 60(b) motion is filed concerning a default judgment a hearing must be held. When a hearing is held, "the decision must state such findings and conclusions as will enable [the appellate authority] to determine the basis for the decision and to show how the court used its discretion." Goshy v. Morey, 149 Vt. 93 at 99. In this case the decision of the Vermont Nursing Board sets forth the position of the parties and some of the testimony of Mr. Shaddy. The Board decision then goes directly to conclusions. The Board concluded that Mr. Shaddy's testimony was "well-

organized,” that his request was made in a “reasonable time,” that the Board had no confidence that it was Mr. Shaddy and not someone else who diverted the drugs, that the evidence against Mr. Shaddy was insufficient, that the evidence in support of his request was “compelling,” and that there had been a “miscarriage of justice.”

The manifest problem with the decision is that the Board did not identify which documentary or testimonial evidence it relied upon. More importantly, it did not make findings of facts to support its conclusions. A recitation of testimony is not a finding of fact and will not, alone support a judgement. Corrette v. Town of St. Johnsbury, 140 Vt. 315; Rutland Country Club v. City of Rutland, 140 Vt. 142 (1981) and Valsangiacomo, v. Page and Campbell, Inc., 136 Vt. 278. (1978). The trier of fact has an obligation to sift the evidence and make a clear statement so that the parties and the appellate authority know what was decided and how the decision was reached. Krupp v. Krupp, 126 Vt. 511 (1967). Where a Rule 60(b)(6) motion is granted but the grounds for granting the motion are not stated with particularity, the matter may be reversed due to the inability of the appellate court to determine whether discretion was used. See Pierce v. Vaughn, 2012 VT 5, 44 A.3d 758 (2012), footnote 3 of opinion. As written, the Board’s order states, “As we are permitted, we conclude that Mr. Shaddy has shown a good reason for his request for relief.” Page 2 of Order. One wonders what that good reason was, particularly since the law required an extraordinary reason. Likewise, when the order states, “On what we have seen in this hearing, the evidence against Mr. Shaddy is insufficient.” Order page 2. Which evidence and what were the facts which justified this conclusion?

Another statement in the Order is that “[Mr. Shaddy] has gone to great lengths to acquire evidence to show his innocence and to be relieved of the consequences of previous orders.” See Order, Page 3.⁶ It is unclear what, if any, evidence supports this statement. What were the previous orders? The Board did report that Mr. Shaddy “...explained his efforts, eventually successful, to have his name removed from a federal exclusion list.” See Page 2 of Order. The decision by the Federal Office of the Investigator General to prosecute an exclusion of Mr. Shaddy from a list of providers was never offered into evidence. In Mr. Shaddy’s petition to vacate he stated, “After a little more than a year, *for whatever reason*, the Federal Office of the Investigator General dropped the charges against me and closed the file on my case.” See petition paragraph 22, (emphasis added). This does not establish innocence.

Similarly, in testimony before the Board, Mr. Shaddy testified under oath,

And the Supreme Court of Vermont has already ruled on this set of --- this whole case that it’s more likely that the person who did all three of those recorded incidents was the person who actually did all three of those incidents, the person who could have. And there’s only one person (inaudible) and it’s not me.⁷

The case of David Shaddy v. Department of Labor, 2009 VT. 103, 987 A.2d 311 (2009) the Vermont Supreme Court found that if a subpoena had been issued by an administrative law judge, then Mr. Shaddy *might have been able* to show that the three incidents were connected.⁸ His testimony before the Board was a flagrant misstatement

⁶ If the evidence which he gathered constituted “newly discovered evidence” then it would have supported an exclusive ground of relief which was time-barred. VRCP 60(b)(2).

⁷ On page 48 of the transcript, Mr. Shaddy identified which Vermont Supreme Court case he referred to .

⁸ “*If claimant could show* that he could not have been responsible for one of the earlier incidents, that evidence would certainly be relevant to the issue of whether he was the perpetrator of the January incidents.” Quoting from Supreme Court decision. Id. (emphasis added)

of the Vermont Supreme Court decision.⁹ Was this part of the evidence used by the Board to conclude that Mr. Shaddy had been successful in establishing his “innocence”? Because there are so few findings of fact which reference the particular evidence admitted, it is impossible to discern what evidence and what facts were used to support the Board’s conclusions. Moreover, the State was not given a fair opportunity to present responsive evidence.

Dismissal Without Prejudice

Although not argued by the parties in their briefs, the appellate authority must address and make clear that the Board did not dismiss the charges leaving the State with no ability to file the charges again. Since the order dismissed the charges “without prejudice,” it is conceivable that the State could simply bring the charges again, secure a new trial and have its day in court. One might argue that this fact avoided any prejudice to the State. While this argument might seem plausible at first blush, the dismissal “without prejudice” does not cure the problems of procedure, evidence, or the legal standard applied by the Board in this case. The State had the right to have the Rule 60(b)(6) motion decided under the principles established under Vermont law. If those rules did not justify vacating the stipulation, then a dismissal without prejudice does not resolve the errant dismissal. The State also had the right to its day in court on the charges as filed. A dismissal without prejudice would deny the State of its right to a fair hearing.

In summary, the appellate officer finds that the hearing on June 11, 2012 and the resultant Finding of Fact, Conclusions of Law and Order were: (1) in violation of Vermont statutory provisions concerning the rules of evidence in administrative proceedings; (2) were made upon unlawful procedure in that both sides of the case were not given fair opportunity to address the evidence and issues which the Board ultimately determined; (3) were made using an incorrect standard for application of VRCP 60(b)(6) as it applied to setting aside stipulated judgements; (4) were made without appropriate findings of fact pursuant to the relevant caselaw; (5) were made without appropriate evaluation of the issues of finality and prejudice to the State; and (6) were the exercise of an abuse of discretion concerning the failure to rule on evidence, failure to make clear to the parties what issues were before the Board so that relevant evidence could be brought to bear on those issues, failure to proceed in a sequence which allowed a reopening of evidence by both sides of the matter rather than simply taking only the evidence from Mr. Shaddy. I find that substantial rights of the Appellant were prejudiced by these errors.

⁹ Moreover, in a subsequent decision in the case referred to by Mr. Shaddy the Vermont Supreme Court in David Shaddy v. Dept. of Labor, No. 2010-231, 2010 WL 7789084 (Vt. Dec. 8, 2010 (unpub. mem.)) the Supreme Court stated, “Upon review of the record we conclude that the evidence was more than sufficient to support the Board’s denial of benefits on grounds that [Mr. Shaddy] was fired for gross misconduct.” This was most likely known to Mr. Shaddy before he testified.

Order

For the reasons stated herein, the Findings of Fact, Conclusions of Law and Order of the Vermont Board of Nursing are reversed and of no further effect. The matter is remanded with the recommendation that if any further proceedings occur in this matter before the Vermont Nursing Board, then the case should be assigned to an independent hearing officer appointed by the Vermont Nursing Board pursuant to 3 VSA Sec. 129(f)

Dated this 12th day of October, 2012.



George K. Belcher
Appellate Officer

10/15/12

Date of Entry

Pursuant to 3 VSA Sec. 130a(c) and Administrative Rules for the Office of Professional Regulation Rule 4.1(B) a party aggrieved by a decision of the appellate officer may appeal to the Superior Court, Civil Division, Washington Unit, which shall review the matter on the basis of the records created before the board and the appellate officer. A written notice of appeal must be filed with the Docket Clerk within 30 days of the date of entry of the order, in the manner provided in the Vermont Rules of Appellate procedure 3 and 4. A check for the court filing fee made payable to the Clerk of the Superior Court, Washington Unit, Civil Division, must accompany the filing. Any request for stay pending appeal should be filed with the Superior Court, Washington Unit.