VERMONT SUPERIOR COURT
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CIVIL DIVISION

Case No. 22-CV-02455

Tyler Marston v Vermont Parole Board

Opinion and Order on Cross-Motions for Summary Judgment

Petitioner Tyler Marston has sought Rule 75 review of the Vermont Parole Board's interlocutory decision to continue his parole violation hearing. The Board did so after learning within minutes of the start of the hearing that Mr. Marston was not waiving his confrontation rights, though the Department of Corrections apparently intended to rely principally on hearsay evidence that Mr. Marston could not confront. The effect of the continuance was to give the DOC another opportunity to present witnesses and give Mr. Marston an opportunity to exercise his confrontation rights. The second hearing occurred within days of the first, the DOC presented several witnesses, and the Board found that parole conditions had been violated. The Board revoked his parole.

Mr. Marston claims that the Board had no discretion to grant a continuance and that, as a matter of law, the Board should have been ruled on the record that the DOC was prepared to develop at the first hearing. The "second bite at the apple," as he characterizes it and argues, violated his Due Process Rights. The parties have filed cross-motions for summary judgment addressing this matter.

I. Standard

Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(1), shows that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. Vt. R. Civ. P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994) (summary judgment will be granted if, after adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of the case on which the party will bear the burden of proof at trial). The Court derives the undisputed facts from the parties' statements of fact and the supporting documents. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413, 427. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts, affidavits, or other evidence to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628 (1991). Speculation is insufficient. *Palmer v. Furlan*, 2019 VT 42, ¶ 10, 210 Vt. 375, 380.

II. Undisputed Facts

The material facts are undisputed. Over a week before the hearing, counsel for Mr. Marston, Annie Manhardt, Esq., sent his Probation Officer (PO) an e-mail indicating that Mr. Marston "does not plan to waive his right to confront witnesses at his hearing next week." The PO's response to this e-mail does not expressly acknowledge the nonwaiver of confrontation rights or its implications. In another e-mail exchange with Attorney Manhardt the day before the hearing, the PO

indicated that she did not intend to call any witnesses. Neither party mentioned Mr. Marston's confrontation rights in this exchange.

At the hearing, the DOC was represented by the PO alone; counsel for the DOC was not present. The PO was not prepared to present testimony from live witnesses other than herself and appeared to intend to rely largely on hearsay evidence.

Attorney Manhardt immediately made clear to the Board that Mr. Marston had not waived his confrontation rights. The Board chair indicated that it had never received any such notice of nonwaiver. There is no indication in the record that Attorney Manhardt notified the Board or counsel for the DOC of the nonwaiver prior to the hearing. Whether the PO subjectively was aware of the nonwaiver and its implications prior to the hearing is undeveloped in the record.

The Board chair then said that there was a prior "agreement" with the Prisoner's Rights Office that the Board and the DOC would receive notice when parolees intended to press their confrontation rights rather than waive them. Attorney Manhardt objected that she was unaware of any such agreement.[1] It is

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[1] Attorney Manhardt also objected that the Board had no legitimate interest in knowing about any such waiver or nonwaiver prior to the hearing in any event, that its only role was to apply the appropriate standards and burdens to the evidence presented by the DOC. This was in response to the Board chair's comment that knowing in advance of any waiver or nonwaiver would have helped the Board plan for the hearing. The point is eminently reasonable, particularly in light of any subjective expectation that notice of nonwaiver would have been given. At a minimum, any tribunal needing to accommodate live testimony from six or seven witnesses, as at the second hearing in this case, versus one, as at the first, has practical issues to consider, such as how much time to plan for the hearing as well how to arrange for remote testimony and deal with witness availability. Nothing in

unnecessary to dwell on whether there was some such agreement, or at least some historical practice, among the Board, the DOC, and the PRO (and the record on this issue has not been developed). The record is clear that the Board, Mr. Marston, and the DOC all clearly had quite different expectations coming into the hearing with regard to the need for live witnesses, and the Board's response was to continue the hearing.

At the second hearing, mere days later, the DOC presented live testimony from several witnesses, and the Board revoked Mr. Marston's probation.

III. Analysis

Mr. Marston urges that the DOC had the burden of proof at the first hearing, it chose to not present testimony from live witnesses (other than the PO herself), and it should be stuck with that decision. In doing so, he essentially likens this case to one in which the DOC fully presents its case; fails to persuade the Board; and the Board, rather than finding against the DOC, spontaneously gives the DOC a do-over or retrial, so the Board can arrive at the decision it likes. That is not at all a fair characterization of this case, however.

The record is unclear as to why the PO did not come to the first hearing prepared to present live witnesses. She did not explain why on the record, except to say that she did not recall the relevant e-mail from Attorney Manhardt. In any event, the Board treated the lack of live witnesses and Mr. Marston's desire to

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the record indicates that the Board had any idea what to expect in these regards when the first hearing began other than what it may have presumed based on historical practice or the alleged agreement.

confront witnesses as some type of misunderstanding or unexpected event, all of which obviously would have left the record fundamentally undeveloped had the hearing not been continued. In those circumstances, it determined on its own motion to continue the hearing. The PO had presented her own testimony for only a few minutes by that time, and there was no other testimony presented. The Board never determined that the evidence was "closed," there is no indication that it ever weighed the evidence, it never made findings of fact, and it never improperly applied burdens or standards to any effect.

This case is not so much about Mr. Marsten's confrontation rights or whether, regardless of any agreement or historical practice, he had any proactive obligation to assert his nonwaiver of confrontation rights. In fact, as to confrontation, continuing the hearing preserved his confrontation rights by ensuring his ability to question witnesses. Rather, the straightforward issue is whether in the confusing circumstances of the first hearing the Board had authority to continue the proceeding.[2]

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[2] Mr. Marston also seeks a "declaratory judgment holding that a parolee's right to confront witnesses at his violation hearing is presumed in every case unless knowingly, intelligently, and voluntarily waived by the parolee." The Court declines to address the matter in this case. The record has not been fully developed by the parties as to the nature of any supposed "agreement" with the PRO, if any, as to providing pretrial notice of a litigant's intention regarding her confrontation rights and whether such an agreement with counsel is somehow inappropriate. Further, contrary to Mr. Marston's suggestion, on this record, the Board did not seek to impose on him any mandatory waiver of his confrontation rights. Obviously, there was pretrial confusion as to whether Mr. Marston intended to assert or waive his confrontation rights at hearing. When his position became clear, the Board granted a continuance to protect Mr. Marston's confrontation rights. There is no

The record is clear that the Board's decision to continue the hearing was nothing more than an interlocutory procedural decision it made to manage the litigation before it, rather than some attempt, as Mr. Marston implies, to rescue the DOC from a poor tactical decision. Parole violation hearings are informal. *See Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) ("What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior."). No doubt that informality contributed greatly to the confusion in this case.

Informality aside, the Board has a policy in its manual as follows:

> The Board may continue a matter if it does not have enough information upon which it can reach a reasoned and rational decision. This continuance can be until the next available date for such proceedings or until a date when the deficiency can reasonably be expected to be remedied.

Vt. Parole Bd. Manual ch. 10, § III.A. The policy obviously is intended to support the Board's need to be "informed by an accurate knowledge of the parolee's behavior." *Morrissey,* 408 U.S. at 484. The conduct of the Board here was in furtherance of that interest.

Mr. Marston argues that the above policy does not apply to violation hearings and otherwise is, in essence, self-serving. The Court disagrees. The provision appears in Section III of Chapter 10 of the Manual, which addresses "deliberation

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basis for any inference that the Board intended to impose unilaterally upon Mr. Marston some presumption of waiver in violation of the law.

and voting." It appears to be intended to apply regardless of the context in which the Board may be deliberating or voting. Section I, which addresses deliberation, specifically applies to the "parole interview, review or rescission [violation] hearing." Section III addresses decisional options after Section I deliberation, so it only makes sense that it applies at violation hearings.

Moreover, the ability to make basic, procedural decisions that aid accuracy is not "self-serving" in some way that is unfair to parolees. Instead, it enables the Board to fulfill better its mission to render "just decisions by balancing victim needs, the risk to public safety, while promoting offender accountability and success," none of which it can very well do without accurate information. Vt. Parole Bd. Manual, Mission Statement.

Even if that provision did not exist or apply, the Court would approve of the Board's exercise of discretion with regard to the continuance. Courts have intrinsic authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962). At least absent a statutory directive to the contrary,[3] administrative agencies conducting quasi-judicial hearings also have some need to exercise their discretion for the same reasons. "No principle of administrative law is more firmly established than that of

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[3] The Court notes that, by statute, the violation hearing is required to occur "promptly" following the parolee's detention. 28 V.S.A. § 552(b). The Manual generally requires a final hearing within 30 days of arrest. Vt. Parole Bd. Manual, ch. 15, § VI(B)(1). There is no allegation in this case that the very brief continuance ordered by the Board violated those standards in some manner warranting relief.

agency control of its own calendar. . . . [Practical problems, such as c]onsolidation, scope of the inquiry, and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts." *City of San Antonio v. C. A. B.*, 374 F.2d 326, 329 (D.C. Cir. 1967) (footnotes omitted); *see also* 2 Charles H. Koch, Jr., *Admin. L. & Prac.* § 5:41 (3d ed.) (whether to grant or deny a continuance is in the "sound discretion of the administrative judge").

Here, the Board's decision was in keeping with such principles. Indeed, had one of Mr. Marston's witnesses failed to appear, and the DOC objected to a continuance, the Board would also have had discretion to continue the case to allow him to procure her attendance. In this instance, the Board listened to both sides' arguments for and against the continuance. Granting or denying a continuance under such circumstances falls well within the discretionary authority of the Board.

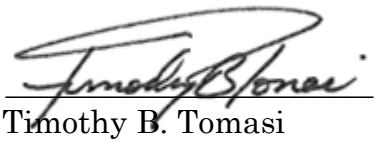
At all events, while the continuance did allow there to be a full hearing on the merits in this matter, Mr. Marston does not describe any unfair prejudice resulting from the Board's continuance decision. Nor does the record support any inference of prejudice.

The Court concludes that the Board acted well within its discretion by continuing Mr. Marston's parole violation hearing. It is unnecessary to address the other issues raised by the parties.

Conclusion

For the foregoing reasons, Respondent's summary judgment motion is granted, and Mr. Marston's is denied. The ruling of the Board is affirmed.

Electronically signed on Wednesday, January 11, 2023, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge