

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 8585

Investigation into Meteorological Tower at 700 Kidder Hill Road in Irasburg, Vermont	
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Order entered: 04/30/2020

ORDER DENYING MOTION FOR RECONSIDERATION

I. INTRODUCTION AND BACKGROUND

In today's order, the Public Utility Commission denies a motion for reconsideration filed by the respondent, Mr. David Blittersdorf, on March 13, 2020.

On January 28, 2020, the respondent filed a motion seeking to compel the Department of Public Service ("Department") to engage in discovery by producing a witness for deposition pursuant to Rule 30(b)(6) of the Vermont Rules of Civil Procedure and also seeking costs of the motion.

On February 7, 2020, the Department filed an opposition to the motion.

On February 28, 2020, the hearing officer assigned to the case issued an order denying the respondent's motion to compel.

On March 13, 2020, the respondent filed his motion for reconsideration of the hearing officer's February 28 denial of his motion to compel.

On March 27, 2020, the Department filed an opposition to the respondent's March 13 motion for reconsideration.

II. DISCUSSION

The respondent advances five basic arguments in support of his motion. First, the respondent contends that the hearing officer made factual determinations that are not supported by the record.¹ Second, the respondent argues that he is entitled to the discovery he seeks because he is exposed to potential penalty amounts in excess of the \$2,500 recommended by the Department.² Third, the respondent claims that the order ignores the Department's responsibility

¹ Motion at 1-2.

² Motion at 2-4.

to produce a witness pursuant to V.R.C.P. 30(b)(6).³ Fourth, the respondent asserts that the hearing officer's order should be reversed because it failed to account for case law on the waiver of privilege and Vermont Rule of Evidence 510, which also addresses waivers of privilege.⁴ Lastly, the respondent claims that the order denying his motion to compel violates his due process rights because it limits his ability to present evidence in his defense.⁵

We address each of the respondent's arguments in turn.

First, we determine that the hearing officer correctly balanced the factors enumerated in V.R.C.P. 26(b)(1) in determining whether the information sought by the respondent was proportional to the needs of the case. We specifically note the hearing officer's discussion of the limited penalty amount proposed by the Department, the fact that it is the respondent that controls access to the relevant facts of this case, and the fact that the information described in the notice of deposition has already been disclosed by the Department in its legal brief filed on December 20, 2019. Rule 26(b)(1) directs courts to consider these factors when making rulings on discovery requests, which often must be done with the information presented prior to the development of an evidentiary record. We find no fault in the hearing officer's reasoning.

Second, the fact that the respondent may be subject to a penalty amount higher than what the Department recommended is irrelevant to his desire to depose a Department staff person. The Department, by virtue of its decision to forgo filing factual testimony, will not be permitted to supplement the factual record of this case and, as a result, has committed itself to a maximum penalty recommendation of \$2,500. Any discovery on the Department would be limited to what factors went into developing its recommended \$2,500 penalty amount, factors that the Department already explained in its December 20, 2019, legal brief. The respondent's concerns about the potential for a greater penalty amount are appropriately addressed in arguments to the Commission.

Third, we find that the hearing officer did correctly account for the Department's obligation to produce a witness for deposition under Rule 30(b)(6). That obligation exists within the mandates of Rule 26, which establishes that discovery must be proportional to the needs of

³ Motion at 4-5.

⁴ Motion at 5-6.

⁵ Motion at 6-7.

the case. Having found that the discovery sought was not proportional to the needs of this case, the hearing officer properly denied the respondent's motion to compel.

Fourth, the case law and evidentiary rule cited by the respondent on waivers of privilege do not support his claim that the Department took any action or made any disclosures that amount to a waiver of privilege. The cases and rule cited stand for the proposition that privileges are waived when otherwise privileged material is either put in issue in a case or is disclosed voluntarily by the person entitled to claim the privilege. There is no basis to conclude that either of those things has happened in this case. The Department's December 20, 2019, filing is legal argument based on factual information that was produced either through discovery or through the pre-filing of testimony by the respondent. And as the hearing officer noted, all the factual information sought by the respondent in his notice of deposition was already produced by the Department in that December 20, 2019, filing. In the U.S. Supreme Court case cited by the respondent, the Court found that work-product protections normally applicable to a report prepared by an investigator working on behalf of defense counsel were waived when the defense placed the investigator on the stand to provide testimony based on the contents of his report.⁶ In this case, the Department has decided to forgo the use of a witness to provide testimony. The respondent's reliance on the cited cases and rule is misplaced and does not support reversal of the hearing officer's decision.

Lastly, we see no basis to conclude that the hearing officer's denial of the motion to compel results in a deprivation of the respondent's due process rights. The respondent faults the hearing officer for accepting the Department's assertion that the Department is not aware or in possession of any facts that are relevant to a penalty determination in this proceeding. The respondent overlooks that the hearing officer stated that the Department, based on its decision to not present a witness, will not be allowed to supplement the factual record on which the Commission's decision will ultimately be based. Therefore, the evidentiary record, once information is offered and admitted into that record, will consist almost entirely of statements made by the respondent in the form of prefiled testimony and responses to discovery.⁷ It is difficult to understand how the respondent, as the person in virtually sole possession of the facts

⁶⁶ *United States v. Nobles*, 422 U.S. 225, 239 (1975).


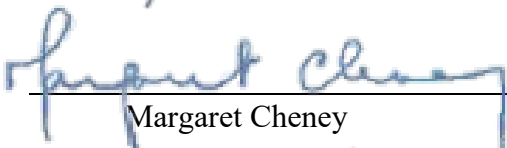

⁷⁷ The respondent is of course free to seek admission of other relevant information into the evidentiary record that he believes will support his case for a presumably lesser penalty than the one recommended by the Department.

that are relevant to a resolution of this case, is denied due process when the case will be resolved on the facts that the respondent presented.

For the reasons discussed above, we find no fault with the hearing officer's analysis in denying the respondent's January 28, 2020, motion to compel. The respondent's March 13, 2020, motion for reconsideration is therefore denied.

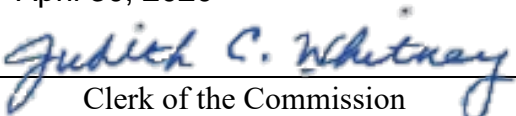
SO ORDERED.

Dated at Montpelier, Vermont, this 30th day of April, 2020.

 _____ Anthony Z. Roisman)	
)	PUBLIC UTILITY
)	
 _____ Margaret Cheney)	COMMISSION
)	
)	OF VERMONT
 _____ Sarah Hofmann)	

OFFICE OF THE CLERK

Filed: April 30, 2020

Attest: 

Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

PUC Case No. 8585 - SERVICE LIST

Parties:

Leslie A. Cadwell, Esq.
Legal Counselors & Advocates, PLC
P.O. Box 827
Castleton, VT 05735
lac@lac-lca.com

(for David Blittersdorf)

Eric B. Guzman
Vermont Department of Public Service
112 State Street
Montpelier, VT 05620
eric.guzman@vermont.gov

(for Vermont Department of Public Service)

Dr. Robert R. Holland
Town of Irasburg
PO Box 88
4328 Route 14
Irasburg, VT 05845
kcf.rrh@gmail.com

(for Town of Irasburg)

James Porter, Esq.
Vermont Department of Public Service
112 State St
Montpelier, VT 05620
james.porter@vermont.gov

(for Vermont Department of Public Service)

Kane Smart, Esq.
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620
kane.smart@vermont.gov

(for Vermont Agency of Natural Resources)