

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE**

MARGARET E. REYES,	)	
	)	
Employee/Grievant,	)	
	)	<b>DOCKET No. 12-09-559</b>
v.	)	
	)	
DEPARTMENT OF FINANCE,	)	<b>DECISION AND ORDER</b>
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 10:30 a.m. on March 7, 2013 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** Martha K. Austin, Chair, John F. Schmutz, and Victoria D. Cairns, a quorum of the Board under *29 Del. C. §5908(a)*.

**APPEARANCES**

W. Michael Tupman  
Deputy Attorney General  
Legal Counsel to the Board

Deborah Murray-Sheppard  
Board Administrator

Laura L. Gerard  
Deputy Attorney General  
on behalf of the Department of Finance

### **BRIEF SUMMARY OF THE EVIDENCE**

The Board heard legal argument on the motion by the Department of Finance (DOF) to dismiss the appeal for lack of standing. DOF attached to its motion: Step Three Grievance Decision dated August 15, 2012; Merit Appeal to the MERB (received by the Board on September 4, 2012); and e-mail dated January 25, 2013 from Margaret Reyes to Joe Borelli (copied to Mary Jane Donnelly and Tim Winstead).

The employee/grievant, Margaret E. Reyes (Reyes), did not file a written response to the motion to dismiss. Reyes did not appear for the hearing.

### **PRELIMINARY ISSUES**

DOF moved to continue the hearing because the parties were engaged in “global” settlement talks to resolve not only this grievance but other disputes. The Board denied the agency’s motion for a continuance. The Board is reluctant to keep cases on its docket indefinitely while the parties discuss, but may never reach, a potential settlement.

Early on the morning of the hearing, Reyes sent an e-mail to the Board Administrator asking for a continuance because of the recent stormy weather in Sussex County. The Board denied her motion for a continuance because Reyes did not cite a more specific reason why she could not travel to Dover. The Board notes that both Reyes and the Board’s legal counsel live in Lewes, and the Board’s legal counsel had no trouble driving to Dover because of felled trees or closed highways.

### **FINDINGS OF FACT**

The jurisdictional facts are not in dispute.

Reyes was a Gaming Inspector with the DOF Lottery Office. On February 14, 2012, the DOF gave Reyes a written reprimand for taking an unauthorized extended meal break on January 25, 2012 while working at the Harrington Raceway and Casino.

Reyes grieved the written reprimand. In a Step Three Grievance Decision dated August 15, 2012, the hearing officer denied her grievance. On September 4, 2012, Reyes appealed to the Board.

By e-mail dated October 14, 2012, Reyes advised the Lottery Office: "I would like to take this opportunity to put in my letter of resignation. Please consider this email my 2 weeks notice."

The Board finds as a matter of fact that Reyes voluntarily resigned from the Lottery Office while her appeal to the Board of her written reprimand was still pending.

### **CONCLUSIONS OF LAW**

The Board concludes as a matter of law that Reyes' appeal is moot because there is no longer any actual case or controversy.

In *Grievance of Boocock*, 553 A.2d 572 (Vt. 1988), a Vermont State Trooper (David Boocock) was dissatisfied with his annual performance evaluation and appealed to the Vermont Labor Relations Board. Eight days after he filed his appeal, before any hearing was held, Boocock resigned from the State Police. A short time later Boocock started to work for the federal government.

The Labor Relations Board dismissed Boocock's appeal for lack of jurisdiction because his grievance did not present an actual controversy. "[T]he potential harm to [Boocock] which may have been caused by an adverse performance evaluation had been eliminated since he had obtained satisfactory employment in the federal service, and there was no indication the evaluation at issue

here affected his procuring employment.” 553 A.2d at 574.

In *Grievance of Moriarty*, 588 A.2d 1063 (Vt. 1991), the Vermont State Police transferred a Lieutenant (John Moriarty) to another duty station. Moriarty appealed to the Vermont Labor Relations Board claiming the transfer was disciplinary rather than administrative. While the appeal was pending, Moriarty resigned from the State Police and a few weeks later took a new job as a security supervisor at a nuclear power plant.

Moriarty claimed that his appeal before the Labor Relations Board was not moot because: (1) the label attached to the transfer might affect his future employment prospects; and (2) he might apply for re-employment with the State Police if his appeal was successful.

“The general rule is that a case becomes moot ‘when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.’” 588 A.2d at 1064 (quoting *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980)).

“A controversy must remain alive through the course of appellate review.” *Moriarty*, 588 A.2d at 1064. “Even though there was once an actual controversy, a change in the facts can render an issue or entire case moot.” *Id.*

“In the absence of a specific job pursuit, no actual controversy existed” because Moriarty was now working at the nuclear power plant “with no apparent plans to leave.” *Id.* at 1065. Moriarty’s new employment “‘removed the threat of actual injury to his legal interests.’” *Id.* (quoting *Boocock*, 553 A.2d at 575 n.3).

Moriarty claimed that he might seek re-employment with the State Police. “The mere possibility that one might seek re-employment is not, however, sufficient to transform a nonjusticiable controversy into a justiciable one.” *Moriarty*, 588 A.2d at 1065. “Moriarty concedes that he does not have any legal right to re-employment. Moreover, he has failed to explain why

his application for re-employment would be treated more favorably by the State Police if he should succeed with his appeal. In these circumstances, Moriarty is merely ‘speculating about the impact of some generalized grievance.’” *Id.* (quoting *Boocock*, 553 A.2d at 574).<sup>1</sup>

Reyes voluntarily resigned from the Lottery Office while her appeal to the Board of her written reprimand was still pending. She did not present any evidence to the Board that the written reprimand impeded her ability to find other employment. “The mere possibility” that Reyes might seek re-employment with the State is not “sufficient to transform a nonjusticiable controversy into a justiciable one.” *Moriarty*, 558 A.2d at 1065.<sup>2</sup>

The Board concludes as a matter of law that it does not have subject matter jurisdiction over Reyes’ appeal because her grievance is moot.

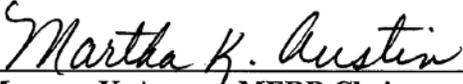
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<sup>1</sup> *But see Van Valkenburg v. Paracelsus Healthcare Corp.*, 606 N.W.2d 908, 912 (N.D. 2000) (several doctors voluntarily resigned their medical staff privileges at the hospital; their claims for damages for breach of contract were not moot, even though “a favorable decision will not enable them to practice at the Hospital’s emergency department without renewing their privileges. . . . A viable damage claim defeats a mootness challenge.”). The North Dakota Supreme Court distinguished “employment” cases like *Moriarty* “because those cases do not involve claims for damages.” 606 N.W.2d at 912.

<sup>2</sup> The Board notes that not every appeal pending before the Board becomes moot when the grievant voluntarily resigns from the agency. For example, there would still be an actual controversy if the grievance was over a suspension without pay.

**ORDER**

It is this **12th** of March, 2013, by a vote of 3-0, the Decision and Order of the Board to dismiss Reyes' appeal for lack of subject matter jurisdiction. Because there is no longer any actual case or controversy, her grievance is moot.

  
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MARTHA K. AUSTIN, MERB Chairwoman

  
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JOHN F. SCHMUTZ, MERB Member

  
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VICTORIA D. CAIRNS, MERB Member

## APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date:           **March 12, 2013**

Distribution:

Original: File

Copies:   Grievant  
          Agency's Representative  
          Board Counsel  
          HRM/OMB

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