BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

FRANCIS CHUDZIK,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 17-03-668**
v.	)	
	)	**DECISION AND ORDER OF DISMISSAL**
DEPARTMENT OF LABOR,	)	
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on September 7, 2017 in the Public Service Commission Hearing Room, Suite 100, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Jacqueline Jenkins, Ed.D, and Victoria Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Anthony Delcollo, Esq.
Offit Kurman P.A.
on behalf of the Grievant

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of Labor

BRIEF SUMMARY OF THE EVIDENCE

The Department of Labor ("Agency") offered and the Board admitted into evidence eleven documents marked for identification as Exhibits A-K.

The employee/grievant, Francis Chudzik ("Chudzik"), offered and the Board admitted into evidence fourteen exhibits marked for identification as Exhibits 1 – 14.

On July 11, 2017, the Agency filed a Motion to Dismiss the complaint for mootness and failure to state a claim upon which relief can be granted. On July 28, 2017, Chudzik filed an Answer in Opposition to Agency's Motion to Dismiss.

On September 7, 2017, the Board heard legal argument from the parties on the Agency's Motion to Dismiss.

FINDINGS OF FACT

The jurisdictional facts are not in dispute. On or about March 29, 2017, Chudzik filed a Merit Rule appeal, alleging the Department of Labor had violated Merit Rules 18.1 and 2.0, and 29 Del.C. §5931(c) by retaliating against him due to the exercise of his right to file a grievance under the Merit Rules. Specifically, Chudzik asserted that, because he had a pending grievance, he was prohibited from attending a mandatory, departmental Grievance and Discipline training and had also been removed from an interview panel on which he had been asked to sit by the hiring manager. Chudzik alleged both of these actions were taken by the former Agency Director of Administration, Vanessa Phillips ("Phillips").

Chudzik previously filed a disciplinary grievance contesting a written warning and transfer which was issued in February, 2016.[1] Chudzik was advised on October 26, 2016 (the day before

[1] That grievance which was the subject of a prior MERB decision. See *Grievant v. Dept. of Labor*, MERB Docket 16-09-655 (February 1, 2017).

the scheduled Grievance and Discipline class) that he was being removed from the class list because he had an "open grievance against the department."[2] On or about August 30, 2016, Phillips declined to approve Chudzik to serve on the interview panel for a Tax Operations Supervisor position (for which he had been recommended by the hiring manager).[3]

Chudzik filed a complaint pursuant to 29 Del.C. §5931(c) with the Director of State Labor Relations and Employment Practices on October 28, 2016. His complaint was investigated by the OMB Deputy Director of Human Resources who issued her findings of fact and conclusions on March 9, 2017.[4] She found the failure to approve Chudzik to participate on an interview panel for which he had been recommended was based on both job and diversity related reasons. She also found, "… the practice of prohibiting employees with active grievances to attend Grievance and Discipline training to be retaliatory in nature," and recommended the practice cease immediately.

Thereafter, the Deputy Secretary of Labor responded to the OMB Deputy Director's findings by letter dated March 22, 2017, in which she stated:

> I am writing in follow-up to your decision related to the matter involving Francis Chudzik. We appreciate your consideration of our position and we will adhere to your recommendation. I have reviewed the matter with my staff and want to assure you that the practice of denying Grievance and Discipline training for employees with active grievances against the Department has ended. Additionally, an employee's active grievance is not to be a consideration as to his or her ability to serve on an interview panel.[5]

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[2] Grievant Exhibit 4. The email from Phillips further stated: "…This practice has been applied equitably in every case, so please be advised that the postponement of your registration is not about **your** particular grievance. Once your case is closed, you will be allowed to attend the class to satisfy the requirement for supervisors and managers. You will not be penalized for the delay."

[3] Grievant Exhibit 9; Agency Exhibit E.

[4] Grievant Exhibit 2; Agency Exhibit A.

[5] Grievant Exhibit 6; Agency Exhibit K.

Phillips voluntarily resigned her position and left State service effective January 4, 2017.[6]

Chudzik attended and completed the Discipline and Grievance training at issue in this matter on or about May 26, 2017.[7]

CONCLUSIONS OF LAW

Chudzik claims the Agency retaliated against him for filing a grievance under the Merit Rules over a written reprimand by not allowing him: (1) to attend a mandatory training session on October 27, 2016; and (2) to serve on interview panels. He claims the Agency violated 29 Del.C. §5931(c), which provides:

> **(c) No state employee shall be discharged, threatened or otherwise retaliated against with respect to the terms or conditions of their employment due to the exercise of their rights under the grievance and complaint procedure established under subsection (a) of this section.**
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> **(1) An employee who alleges a violation of this subsection may file a written complaint directly to the Department of Human Resources. The employee and the Secretary or designee may agree to meet and attempt an informal resolution of the complaint, and/or the Secretary or designee shall hear the complaint and issue a written decision within 45 days of the complaint's receipt. Such decision shall be final and binding on the employee's appointing authority.**
>
> **(2) Where such decision finds that an individual engaged in conduct prohibited by this subsection, the appointing authority shall initiate appropriate disciplinary action consistent with that decision.**
>
> **(3) If the complainant employee is not satisfied with the Secretary or designee's decision, the employee may submit a written appeal to the Merit Employee Relations Board (MERB) within 20 calendar days of receipt of that decision. Such appeal shall**

[6] Exhibit F to Agency's Motion to Dismiss.

[7] Chudzik's Training Transcript indicates he attended and completed the "Fundamentals of Employment and Labor Relations Practices", on May 26, 2017. Agency Exhibit J. This course is referred to colloquially by these parties as "Grievance and Discipline training."

be handled and processed in the same manner as other appeals heard by the MERB. [8]

The Agency filed a motion to dismiss the grievance as moot. According to the Agency, the only remedy authorized by Section 5931(c) is to "initiate appropriate disciplinary action" against "an individual engaged in conduct prohibited by this subsection." The Agency denies that Phillips retaliated against the grievant. The Agency concludes that because Phillips no longer works for the Agency, she cannot be disciplined by the Agency; therefore the grievance is moot.

"'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.'"[9] "'A controversy must remain alive throughout the course of appellate review.'"[10] "'Even though there was once an actual controversy, a change in the facts can render an issue or entire case moot.'"[11]

Chudzik claims the grievance is not moot because he has a legally cognizable interest in the outcome. At the very least, he argues, "the Board could overturn the decision of [Human Resource Management] . . . which would provide relief to Mr. Chudzik in the form of declaratory judgment. Mr. Chudzik would be vindicated through such a finding, that his rights were violated . . ." Or, the Board could "order that a letter [of reprimand] be added into Phillips' employment file." Lastly, Chudzik claims he has a legally cognizable interest in a potential award of attorney's fees for the cost of pursuing this complaint.

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[8] In his Merit Appeal form to the Board, the grievant cited not only 29 *Del. C.* §5931(c) but also Merit Rule 18.1 which provides: "Merit employees have the right to use this grievance procedure free of threats, intimidation or retaliation . . ." The Board will not consider Merit Rule 18.1 because the grievant did not file a timely Step 1 grievance pursuant to Merit Rule 18.6 ("within 14 calendar days of the date of the grievance matter or the date they could reasonably be expected to have knowledge of the grievance matter").

[9] *Reyes v. Department of Finance*, MERB Docket No. 12-09-559, at p.4 (Mar. 12, 2013) (quoting *Grievance of Moriarty*, 588 A.2d 1063, 1064 (Vt. 1991)).

[10] *Id.*

[11] *Id.*

This a legal issue of first impression for the Board. The issue turns on whether the remedy created by 29 Del.C. §5931(c) is exclusive or cumulative to other, previously available remedies. "Where a statute prescribing a remedy does not create a new right or liability, but merely provides a new remedy for an independent right or liability already existing, the general rule is that the remedy thus given is not regarded as exclusive but as merely cumulative of other existing remedies, and does not take away a pre-existing remedy . . ."[12]

Section 5931(c) does not explicitly state that the remedies contained within it are exclusive to all others. The legislature enacted §5931(c) on July 7, 2005.[13] Ten years earlier, however, in 1994 the legislature amended the statute to make it clear in subsection (a) that the Board has the authority to "'otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules.'" [14] "[T]he General Assembly intended for the MERB to exercise broad remedial powers under section 5931(a)."[15] Read together with subsection (a), subsection (c) does no more than prescribe one remedy (disciplinary action) on top of the Board's pre-existing broad remedial powers. That remedy is cumulative, not exclusive, to redress a claim of retaliation under the Merit Rules. The Board believes that the legislature intended to combat retaliation in the workplace in an expansive rather than a restrictive scheme.

The Board, however, agrees with the Agency that Chudzik no longer has a legally cognizable interest in the outcome of his grievance because he has already been made whole. Chudzik received the training he was denied and the Agency eliminated the practices which led to

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[12] *Goldman v. Home Mutual Insurance Co.*, 22 Wis.2d 334, 340-41 (Wis. 1964) (citing 1 C.J.S. *Actions* §6.c. *Accord Gandy v. Wal-Mart Stores, Inc.*, 872 P.2d 859 (N.M. 1994) (state anti-discrimination statute did not preempt common law tort action for retaliatory discharge; "no language in the Human Rights Act stating that its remedies are intended to be exclusive").

[13] *See* 75 *Delaware Laws* c.103, s.1 (143rd General Assembly).

[14] *Avallone v. DHSS*, 14 A.3d 566, 571 (Del. 2011) (en banc).

[15] *Id.*

the filing of his initial complaint.

Chudzik counters that the Deputy Director's March 9, 2017 decision is only a recommendation and not enforceable like a decision by the Board ordering the Agency to discontinue a retaliatory practice. Since the Agency has already eliminated the practice, a decision by the Board at this point would amount to no more than an advisory opinion.

For the Agency to attempt to discipline Phillips at this point would raise a host of practical and due process concerns, while serving little purpose. And the Board does not believe that Chudzik can rely on potential attorney's fees to bootstrap a legally cognizable interest in the outcome of his grievance.[16]

The Board concludes as a matter of law that the grievance is now moot because the grievant no longer has a legally cognizable interest in the outcome.

ORDER

It is the **13th** day of **November, 2017**, by a unanimous voter of 3-0, the Decision and Order of the Board to grant the Agency's motion to dismiss and to dismiss this grievance because the grievant no longer has a cognizable interest in the outcome; consequently, the grievance is moot.

W. MICHAEL TUPMAN, MERB CHAIR

JACQUELINE D. JENKINS, EDD, MERB Member

VICTORIA D. CAIRNS, MERB Member

[16] The Board notes that since the Supreme Court's decision in *Brice v. Department of Correction*, 704 A.2d 1176 (Del. 1998) (en banc)(holding that the Board has "ancillary equitable jurisdiction" to award attorney's fees), the Board has never awarded attorney's fees to a prevailing grievant upon a finding of bad faith by the agency.