EFiled: Jul 13 2018 03:07PM EDT
Transaction ID 62239078
Case No. N17A-12-004 JAP

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

FRANCIS CHUDZIK,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N17A-12-004 JAP
	)	
DEPARTMENT OF LABOR AND MERIT EMPLOYEE RELATIONS BOARD,	)	
	)	
Appellees.	)	
	)	

Upon Appeal from the Merit Employee Relations Board,
AFFIRMED

MEMORANDUM OPINION

This is an appeal from the Merit Employee Relations Board. Francis Chudzik appeals the Board's November 13, 2017 decision dismissing Chudzik's grievance against his employer, the Department of Labor. The Board found that Chudzik's grievance, which claimed he was retaliated against by the Department of Labor because he had filed a prior grievance, was moot and dismissed the case. For the reasons that follow, the Board's decision is **AFFIRMED**.

BACKGROUND

Francis Chudzik is employed as a supervisor by the Delaware Department of Labor's Office of Labor Law Enforcement. In February 2016, as the result of an internal investigation, Chudzik was reprimanded in writing and involuntarily transferred from the Office of Labor Law Enforcement to the Office of Workers' Compensation. Chudzik filed a grievance claiming that the Department of Labor violated Merit Rule 10.6 when it transferred him.[1] In August 2016, the Office of Management and Budget ("OMB") found that Chudzik's transfer was in violation of Merit Rule 10.6 and granted his grievance request with respect to the transfer, but denied the request to remove the written reprimand from his file. Chudzik appealed the denied portion of his grievance to the Board. The Board ultimately granted Chudzik's grievance to remove the written reprimand from his file.

Around the same time, in August 2016, Chudzik was asked to sit as an interviewer on a panel assigned with hiring a new employee.

---

[1] The Merit Rules were adopted under the statutory authority granted in 29 *Del. C.* § 5914, and "apply to initial probationary, Merit and limited term employees." Merit Rule 1.1. Merit Rule 10.6 provides: "Transfer. To promote the efficiency of the service, *unrelated to employee performance*, employees may be transferred to another position for which they meet job requirements in the same paygrade within the same agency with or without competition." Merit Rule 10.6 (emphasis added).

However, on September 1, 2016, he was notified that the Director of Administration, Vanessa Phillips, did not approve him to sit on the panel. In the same month, Chudzik registered to attend training on the grievance and disciplinary process for employees, which was required for all supervisors. In October 2016, the day before the training was to occur, he was removed from it at the direction of Ms. Phillips.

Chudzik then filed a grievance with the OMB. The grievance alleged that Ms. Phillips retaliated against Chudzik in violation of 29 *Del. C.* § 5931(c)[2] and Merit Rule 18.1[3] by removing him from mandatory training and the interview panel because he filed a prior grievance. OMB Deputy Director, Amy Bonner, issued a written decision on March 9, 2017. The Deputy Director found that the Department of Labor did not act in retaliation when removing

---

[2] 29 *Del. C.* § 5931(c) provides: "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."

[3] Merit Rule 18.1 provides:

> To promote positive working relationships and better communications, employees and their supervisors shall informally meet and discuss employee claims of Merit Rule or Merit law violations prior to filing a formal grievance. Merit employees have the right to use this grievance procedure free of threats, intimidation or retaliation, and may have union or other representation throughout the process.

Chudzik from the interview panel because there was evidence in the record showing that interview panel members are subject to change when the Director of Administration determines another person would better serve a subject matter or diversity requirement. The OMB Deputy Director also held that there had been no retaliation against Chudzik in his removal from the training course, but recommended that certain practices relating to removing employees from training was retaliatory across the board and should cease:

> [T]here is evidence to support that Mr. Chudzik was not singled out, but rather was subjected to the same practices as other employees. While the Department was able to demonstrate that Mr. Chudzik was not the only employee subjected to the denial of Grievance and Discipline training as a direct result of an active grievance, I find this practice of prohibiting employees with active grievances to attend Grievance and Discipline training to be retaliatory in nature and recommend that it cease immediately. . . . For all the reasons set forth above, I believe the Department is not in violation of 29 Del. C. §5931(c) and Merit Rule 18.1.[4]

After the OMB's decision, the policy of removing employees with a pending grievance from training was eliminated.[5]

On March 29, 2017, Chudzik appealed to the Board. Soon after, in May 2017, Chudzik completed the grievance and disciplinary training that he had previously been denied. In response to

---

[4] R. at 6 (Deputy Director's March 9, 2017 Decision).

[5] R. at 24 (March 22, 2017 Letter Indicating Termination of Policy).

Chudzik's pending appeal, the Department of Labor filed a motion to dismiss. The Board bifurcated the proceedings at the request of the parties to hear the motion to dismiss separately from the merits of the case. The Board stated that if the motion to dismiss was denied, further proceedings would be held.[6]

The Board held a hearing on the motion to dismiss on September 7, 2017. On November 13, 2017, the Board issued a written order granting the Department of Labor's motion to dismiss. The Board found that Chudzik's grievance was moot:

> The Board, however, agrees with the [Department of Labor] 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 [Department of Labor] eliminated the practices which led to the filing of his initial complaint.
>
> . . .
>
> Since the [Department of Labor] has eliminated the practice, a decision by the Board at this point would amount to no more than an advisory opinion.
>
> For the [Department of Labor] to attempt to discipline Ms. 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.[7]

---

[6] R. at 74-75 (Chairman's Letter Bifurcating the Hearing); *see id.* at 69 (Request to Bifurcate the Hearing).

[7] R. at 207-208 (Board's November 13, 2017 Order).

Chudzik appealed to the Superior Court on February 20, 2018. The Board filed its answering brief on March 12, 2018, and the Department of Labor adopted the Board's brief as its own. Upon review of the opening brief, answer, reply, and the entire record below, this is the Court's ruling.

ANALYSIS

Standard of Review

This Court has statutorily conferred jurisdiction over appeals from the Merit Employees Relations Board.[8] On appeal, the Court reviews a decision of the Board to "to determine whether it acted within its statutory authority, whether it properly interpreted and applied the applicable law, whether it conducted a fair hearing and whether its decision is based on sufficient substantial evidence and is not arbitrary."[9] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[10] Questions of law are reviewed *de novo*.[11] However, the Court does not reweigh the evidence, determine issues of credibility,

---

8 29 *Del. C.* § 10142(a).
9 *Avallone v. Dep't of Health & Soc. Servs.*, 14 A.3d 566, 570 (Del. 2011).
10 *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).
11 *Gibson v. Merit Employee Relations Bd.*, 16 A.3d 937, 2011 WL 1376278, at *2 (Del. 2011) (Table).

or draw its own factual conclusions.[12] A decision that is supported by substantial evidence and is free from legal error will be affirmed unless the Board abused its discretion.[13]

Legal Framework

On appeal, Chudzik contends that the Board erred as a matter of law when it found that his grievance was moot. Under the mootness doctrine, an action will be dismissed if a controversy that is capable of judicial resolution ceases to exist, or if a party has been divested of standing.[14] There are two exceptions to the mootness doctrine: (1) where the issues are capable of repetition but likely to evade review; and (2) where the matter is of significant public importance.[15]

Chudzik's Grievance Is Moot

Chudzik's grievance is moot and was properly dismissed by the Board because he no longer has a real or threatened injury, which is

---

[12] *Norcisa v. Dep't of Health & Soc. Servs.*, 89 A.3d 477, 2014 WL 1258304, at *3 (Del. 2014) (Table).
[13] *Sweeney v. Del. Dep't of Transp.*, 55 A.3d 337, 341-42 (Del. 2012).
[14] *Mitchell v. Bd. of Adjustment of Sussex Cty.*, 706 A.2d 1027, 1029 (Del. 1998); *Gen. Motors Corp. v. New Castle Cty.*, 701 A.2d 819, 823 (Del. 1997).
[15] *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *6 (Del. Ch. Oct. 11, 2006).

necessary to sustain the "actual controversy requirement."[16] When an employee has been wronged under 29 *Del. C.* § 5931 or by a misapplication of the Merit Rules, the Board has the authority to grant any relief that would place the employee "in a position they were wrongfully denied" or otherwise make the employee "whole."[17] This includes the Board's authority to direct the discipline of an individual who violated the statute or Merit Rules against an employee.[18] Here, the grievance is moot because Chudzik has already been made whole.

Chudzik's grievance was based on his removal from an interview panel and from a mandatory training course. Chudzik makes no claim to relief as to the interview panel. As to the training course, on May 26, 2017 he completed the grievance and disciplinary training course he had previously been denied, thus placing him in the

---

16 *Id.*

17 29 *Del. C.* § 5931(a) (emphasis added):
> "The Secretary and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, *or otherwise make employees whole*, under a misapplication of any provision of this chapter or the Merit Rules."

18 29 Del. C. § 5931(c)(2) provides: "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."

position he was in before he was removed from the course. However, Chudzik argues that his grievance is not moot because the Board "could declare that the policy [of removing employees with a pending grievance from training] itself was retaliatory."[19] While the Board could indeed make such a finding if there was an active controversy, doing so here would amount to nothing more than an advisory opinion.

Chudzik has already received his required training, and the Department of Labor has eliminated its policy of removing employees with pending grievances from training in light of the OMB's finding that it was retaliatory. Despite Chudzik's contention that he seeks a "declaratory judgment," not an advisory opinion, because it would provide him with a "clear instruction regarding his rights,"[20] there's no underlying remedy to enforce. "The Delaware Supreme Court has emphasized that the declaratory judgment statute must not be used as a means to elicit advisory opinions from the courts,"[21] and thus the Board did not err as a matter of law when it refused to make such a determination.

---

19 Opening Br. at 5.
20 *Id.* at 5-6.
21 *Energy Partners*, 2006 WL 2947483, at *7.

Chudzik also argues that his grievance is not moot because the Board has the authority to discipline Ms. Phillips under 29 *Del. C.* § 5931. However, Ms. Phillips no longer works for the State of Delaware. Accordingly, she is not subject to discipline. Although it is conceivable that Ms. Phillips could at some point reapply to State employment, placing a letter of reprimand in her employment file as Chudzik has suggested will go no further in making him whole now. A contrived future injury is not the same as a real, threatened injury necessary to defeat the mootness doctrine.[22] Thus, given that Ms. Phillips no longer works for the State, the Board properly noted that attempting to discipline her now would present practical problems and due process concerns, and otherwise moots Chudzik's argument for discipline against her.

Finally, Chudzik argues that his grievance is not moot because, according to him, the Board acted in bad faith and he "is entitled to attorney's fees incurred in the course of vindicating his rights."[23] What this boils down to is a claim that the grievance is not moot

---

[22] *See id.* at *6 (stating "The 'actual controversy' requirement is the foundation for the mootness doctrine, [and] provides for dismissal of [the] litigation if the alleged threatened injury no longer exists.").

[23] Opening Br. at 6-7.

simply because the Board could award him additional relief on top of what he already received. But, attorney's fees could have only been awarded had Chudzik successfully argued his grievance on the merits,[24] and even then, such relief is not guaranteed.[25] As the Board noted, and this Court agrees, attorney's fees do not create their own legally cognizable interest for Chudzik to bootstrap his mootness arguments.

Chudzik's Grievance Does Not Fall Under A Mootness Exception

Alternatively, Chudzik contends that his grievance falls under an exception to the mootness doctrine because his allegations are capable of repetition. His argument is without merit. Here, Chudzik simply repeats his prior argument; that the Board should find that the practice of removing employees with grievances from training is retaliatory because there is nothing to prohibit future abuses of the same nature. While the court may be more likely to find the exception applies in a case where the employee received the training but the violating policy was still in place, that is not the case here. The policy

---

[24] *Brice v. Department of Correction*, 704 A.2d 1176 (Del. 1998) (holding generally that the Board has ancillary jurisdiction to award attorney's fees).

[25] The Board notes in its decision that it has never awarded attorney's fees to a prevailing grievant upon a finding of bad faith by the employing agency. R. at 208.

has been eliminated and any denial of employee participation in training or interview panels based on that employee's pending grievance has ceased. Accordingly, Chudzik's grievance is moot for the reasons discussed above. Because Chudzik was already made whole, he no longer has any injury or legally cognizable interest in the outcome, and his grievance was properly dismissed as a matter of law.

Chudzik Is Not Entitled To A Hearing On The Merits

Chudzik's final argument on appeal is that the OMB Deputy Director's decision was "factually and legally" wrong such that "it should not be permitted to stand" and the Court should remand to the Board for a full hearing on the merits to correct the OMB's findings.[26] The Court notes that even if the OMB erred in its conclusions of law, such error does not change the outcome of this case because the Board properly dismissed the case on independent procedural grounds.

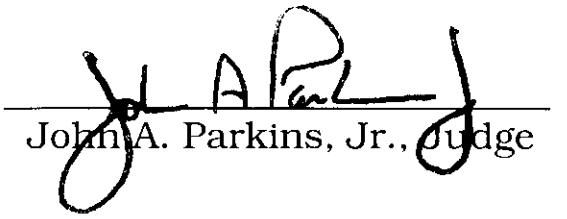
---

[26] Opening Br. at 8.

CONCLUSION

For the foregoing reasons, the decision of the Merit Employee Relation's Board is **AFFIRMED**.

Dated: July 13, 2018



John A. Parkins, Jr., Judge

oc: Prothonotary

cc: Anthony N. Delcollo, Esquire, Offit Kurman, P.A., Wilmington, Delaware
Rae M. Mims, DAG, Department of Justice, Dover, Delaware
Kevin R. Slattery, DAG, Department of Justice, Wilmington, Delaware