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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Cronin, Petitioner	:	
	:	No. 537 C.D. 2018
v.	:	
	:	Heard: July 18, 2018
Pennsylvania Labor Relations Board, Respondent	:	

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge

MEMORANDUM OPINION AND ORDER

Before the Court for disposition is the application of the Pennsylvania Labor Relations Board (PLRB) to quash the petition for review filed by Michael Cronin (Cronin).

The undisputed material facts are as follows. On February 22, 2017, the Coalition of Graduate Employees, PSEA/NEA (Coalition), filed a Petition for Representation (Petition) with the PLRB pursuant to section 603(c) of the Public Employe Relations Act (PERA),[1] 43 P.S. §1101.603(c).[2] In the Petition, the

[1] Act of July 23, 1970, P.L. 563, *as amended*, 43 P.S. §§1101.101-1101.2301.

[2] This provision provides:

> If a public employer refuses to consent to an election, the party making the request may file a petition with the board alleging that thirty per cent or more of the public employes in an appropriate unit wish to be exclusively represented for collective bargaining purposes by a designated representative. The board shall send a copy of the petition to the public employer and provide for an appropriate hearing upon due notice. If it deems the allegations in the petition to be valid

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Coalition sought an election and exclusive representation of a collective bargaining unit for full-time and part-time graduate employees, including teaching and research assistants and other fellows, of the Pennsylvania State University (PSU).[3] In September 2017, a hearing examiner conducted seven days of hearings, during which the Coalition and PSU presented evidence regarding the appropriateness of a bargaining unit.[4] After the parties filed post-hearing briefs, the hearing examiner issued an order on February 6, 2018, directing PSU to supply to the Coalition the names and addresses of all employees found to be eligible to vote in a secret ballot representation election under Section 605 of PERA, 43 P.S. §1101.605. (PLRB's Application, at ¶¶1-3; Cronin's Answer, at ¶¶1-3.)

On March 23, 2018, Cronin filed with the PLRB a Motion to Intervene or Participate and Advance Request for Review and Stay (Motion). In the Motion, Cronin opposed the Petition, asserting that pursuant to *Philadelphia Association of*

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> and the unit to be appropriate it shall order an election. If it finds to the contrary it may dismiss the petition or permit its amendment in accordance with procedures established by the board.

43 P.S. §1101.603(c).

[3] By way of background, the provisions of PERA permit employees to select an organization to serve as their exclusive representative in collective bargaining, and the process of choosing a representative is initiated by an election request by an employee, a group of public employees, or an employee organization. *Official Court Reporters v. Pennsylvania Labor Relations Board*, 467 A.2d 311, 319 (Pa. 1983) (plurality). "Following an election request [], if the [PLRB] orders an election, "other employee representatives may be placed on the ballot upon a showing of a one per cent interest. A ten per cent showing of interest is required before any other employee representative may be permitted to intervene as a party." *Id.* (citing and discussing 34 Pa.Code §95.14(10)).

[4] *See* Section 604 of PERA, 43 P.S. §1101.604.

Interns and Residents v. Albert Einstein Medical Center, 369 A.2d 711 (Pa. 1976),[5] graduate assistants were not "public employes" under PERA and, as such, could not form a bargaining unit. (Cronin's Application to Expedite, ¶¶5, 18-21.) On March 28, 2018, the PLRB's Representative issued Cronin a letter denying the Motion and explaining that, as an individual who did not request—or obtain the support necessary—to be an employee representative, he lacked standing to intervene in the representation election proceeding. *See* 34 Pa. Code §95.14(10) ("A 10% showing of interest among employes within the requested unit is required before another employe representative may be permitted to intervene as a party."); *Official Court Reporters*, 467 A.2d at 319-20 (stating that, if the PLRB orders an election, a 10% showing of interest is required before any other employee representative may be permitted to intervene as a party, and concluding that "individuals or small groups of employees which have not met the requirements for intervention cannot litigate the appropriateness of the bargaining unit or their individual status concerning inclusion or exclusion from the bargaining unit"). Also on March 28, 2018, the PLRB's Representative issued an Order and Notice of Election, directing that a secret ballot election be conducted at certain PSU campuses on various dates throughout the month of April. (PLRB's Application, at ¶¶4-6; Cronin's Answer, at ¶¶4-6.)

On April 17, 2018, Cronin filed exceptions to the decision denying his Motion and, simultaneously, a petition for review in this Court. (PLRB's Application, at ¶¶8-9; Cronin's Answer, at ¶¶8-9.)

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[5] In that case, our Supreme Court concluded that interns, residents, and clinical-fellows of hospitals associated with a public university were not public employees capable of forming a bargaining unit.

Meanwhile, on April 24, 2018, the public canvassing and tallying of ballots occurred in Harrisburg, Pennsylvania, at the conclusion of which a PLRB election officer announced that the majority of valid votes cast were for "No Representative." On May 2, 2018, the PLRB's Representative issued a Nisi Order of Dismissal, certifying the results of the election, and dismissed the Petition. Cronin did not file an exception to the Nisi Order of Dismissal and there is no pending representative proceeding or election. (PLRB's Application, at ¶¶10, 13; Cronin's Answer, at ¶¶10, 13.)

On June 11, 2018, the PLRB filed the current application to quash Cronin's petition for review (Application). In the Application, the PLRB contends that quashal is warranted because any purported interest that Cronin has in opposition to the Petition has been rendered moot by the Mary 2, 2018 order dismissing the Petition. The PLRB further argues that Cronin seeks review of an unappealable collateral order, lacks standing to appeal the March 28, 2018 decision denying him intervention, did not properly exhaust administrative remedies, and failed to preserve issues for appellate review.

After considering the parties' filings and the pertinent law, the Court will grant the Application on grounds of mootness.

Initially, the Court assumes that the March 28, 2018 decision denying Cronin intervention qualifies as an appealable order under the collateral order doctrine because "a party must appeal from an order denying intervention within 30 days of the entry of the order or it will lose its right to appeal the order entirely." *K.C. v. L.A.*, 128 A.3d 774, 778 (Pa. 2015); *see In re Barnes Foundation*, 871 A.2d 792, 794 (Pa. 2005); G. Darlington, K. McKeon, D. Schuckers & K. Brown, PENNSYLVANIA APPELLATE PRACTICE §313.19.3 (West 2017-2018 ed.).

Nonetheless, "the mootness doctrine requires that an actual case or controversy must be extant at all stages of review," *Commonwealth v. Packer Township*, 60 A.3d 189, 192 (Pa. Cmwlth. 2012), and "[a]n issue can become moot during the pendency of an appeal due to an intervening change in the facts of the case or due to an intervening change in the applicable law." *In re Cain*, 590 A.2d 291, 292 (Pa. 1991). "A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Butler v. Indian Lake Borough*, 14 A.3d 185, 188 (Pa. Cmwlth. 2011). Stated differently, pursuant to the mootness doctrine, "an appeal will be dismissed when the occurrence of an event renders it impossible for the court to grant the requested relief." *Taylor v. Pennsylvania Board of Probation and Parole*, 746 A.2d 671, 674 (Pa. Cmwlth. 2000).[6]

Here, Cronin admits that "this case is technically moot," (Cronin's Answer, at ¶¶32, 40), and the Court agrees with his concession on this issue of law. *See Commonwealth v. Dixon*, 907 A.2d 468, 472 (Pa. 2006). To be sure, Cronin wanted to intervene in the representation election proceeding to argue that the Coalition lacks the legal authority to be a bargaining unit and requested dismissal of

[6] Somewhat relatedly, "[o]nly 'aggrieved' parties may appeal, and a party who prevails simply is not an aggrieved party and has no standing to appeal." *Hashagen v. Workers' Compensation Appeal Board*, 758 A.2d 276, 277 n.2 (Pa. Cmwlth. 2000) (internal citation omitted). When a petition for representation is dismissed or set aside, "neither individual employees nor representative organizations who have failed to meet the requirements for intervention are 'aggrieved' within the meaning of PERA." *Official Court Reporters*, 467 A.2d at 320. Moreover, although a prevailing party may disagree with the legal reasoning or findings of fact that the tribunal made in the course of the proceeding below, the prevailing party's interest is not adversely affected by the final order because the prevailing party was meritorious in the proceeding. *See Almeida v. Workers' Compensation Appeal Board (Herman Goldner Co.)*, 844 A.2d 642, 644 (Pa. Cmwlth. 2004); *ACS Enterprises. v. Norristown Borough Zoning Hearing Board*, 659 A.2d 651, 654 (Pa. Cmwlth. 1995).

the Petition. After the PLRB's Representative denied Cronin intervention, the Coalition's bid for exclusive representation as a collective bargaining unit was unsuccessful, and the PLRB dismissed the Petition.

Ultimately, the subsequent, intervening fact that the Petition was dismissed renders the intervention issue moot. Regardless of whether the PLRB's Representative committed error in denying intervention, the very result that Cronin desired to advocate for was eventually obtained, and Cronin cannot—at this point in time—be afforded intervenor status merely to disagree with the legal reasoning or basis supporting dismissal of the Petition. *See ACS Enterprises*, 659 A.2d at 654. Now that the Petition has been dismissed, "the Court cannot grant any meaningful relief," *Horsehead Resource Development Company, Inc. v. Department of Environmental Protection*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001), in this appeal, and a remand to the PLRB to permit intervention and to address Cronin's arguments would be fruitless and ineffectual. *See Small v. Horn*, 722 A.2d 664, 673 (Pa. 1998) (concluding that an inmate's petition to intervene as a plaintiff was rendered moot when this Court granted the defendant's preliminary objections and dismissed the plaintiffs' petition for review in the nature of a complaint); *see also Pennsylvania Coal Mining Association v. Department of Environmental Resources*, 444 A.2d 637, 638 (Pa. 1982). The Court is not in "the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Mistich v. Pennsylvania Board of Probation and Parole*, 863 A.2d 116, 121 (Pa. Cmwlth. 2004).

However, there are exceptions to the mootness doctrine and Cronin asserts that they are applicable. Specifically, an appellate court will address an issue that is moot "where the conduct complained of is capable of repetition yet likely to

evade review, where the case involves issues important to the public interest or where a party will suffer some detriment without the court's decision." *Public Defender's Office of Venango County v. Venango County Court of Common Pleas*, 893 A.2d 1275, 1279-80 (Pa. 2006).

First, Cronin contends that the unionization of graduate assistants into a bargaining unit could possibly occur sometime after April 24, 2019, and, therefore, the intervention issue is capable of repetition but likely to evade review. The Court disagrees. Although the issue could theoretically arise again, it is not apt to evade review because Cronin would be able to file an immediate appeal from the denial of intervention. *See K.C.*, 128 A.3d at 776-78. Thereafter, this Court could rectify the error, if any, and remand to the PLRB for further proceedings in which Cronin would be permitted to intervene and assert the rights he would have in connection with that status. *See Horsehead Resource Development Company, Inc.*, 780 A.2d 858 (concluding that an issue was not capable of escaping review where the petitioner "has available to it a procedure for securing a reviewable determination"). In short, this case does not present one of those instances where the legal issue is prone to evade review due to time-constraints or the irreversible effects of particular conduct and/or action, such as that which occurs in certain election cases, abortion matters, short-term involuntary commitment orders, the withholding or administration of medical treatment, and the like.[7]

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[7] *See, e.g., Pilchesky v. Lackawanna County*, 88 A.3d 954, 965 (Pa. 2014) (rejecting argument that an appeal in an election case should be dismissed as moot due to the fact that the primary election was already held because "[t]he time constraints inherent in election matters often leave little time for deliberation upon challenges relevant thereto such that the courts may not always be able to render an appropriate decision in matters such as the one presented herein"); *In re Doe*, 33 A.3d 615, 622 (Pa. 2011) ("[B]ecause the questions presented herein . . . may evade review due to the condensed time frame evident in every pregnancy, and thus in every abortion case, an

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Second, Cronin contends that intervention and underlying issue of whether graduate assistants can unionize is an issue of great public importance, especially considering that graduate assistants at the University of Pittsburgh have recently filed a petition for representation.

"The great public importance exception to the mootness doctrine is rarely invoked by the appellate courts of this jurisdiction." *County Council of the County of Erie v. County Executive of the County of Erie*, 600 A.2d 257, 259 (Pa. Cmwlth. 1991). "A controlling factor in determining whether the moot questions may be appropriately reviewed under the great public importance exception is whether the legislature obviously recognized the significance of [such] questions. If the statute deals squarely with the issues, the case does not fall within the great public importance exception." *Harris v. Rendell*, 982 A.2d 1030, 1037 (Pa. Cmwlth. 2009), *aff'd*, 992 A.2d 121 (Pa. 2010) (internal citation and quotation marks omitted). Here, the regulation at 34 Pa. Code §95.14(10), which the PLRB promulgated into law pursuant to its rule-making authority,[8] limits intervention to employee representatives

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exception to the mootness doctrine applies."); *In re J.M.*, 726 A.2d 1041, 1045 n.6 (Pa. 1999) ("Although Appellee's involuntary commitment has ended, the issues raised by this appeal are not moot since they are, as both parties agree, capable of repetition and may evade review."); *In Re Fiori*, 673 A.2d 905, 909 & n.4 (Pa. 1996) (addressing whether an adult relative possesses the legal right to remove life sustaining treatment for a relative that is in a persistent vegetative state despite the fact that the relative died of pneumonia during the pendency of the appeal); *In re Estate of Dorone*, 502 A.2d 1271, 1274-75 (Pa. Super. 1985) (addressing whether a Jehovah's Witness has the right to decline a blood transfusion and determining the case was not moot because "the issues raised by this case are capable of evading review if the general rule of mootness is applied, for a transfusion ordered by a court in an emergency will always be given before the appellate process can be completed").

[8] *See* Section 502 of PERA, 43 P.S. §1101.502 ("The board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the

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who secured a 10% interest from the employees, and our Supreme Court in *Official Court Reporters* discussed, applied, and upheld the regulation. Moreover, there are sections of PERA dealing with and governing the legal requisites and procedure for the formation of a bargaining unit.[9] Therefore, because 34 Pa. Code §95.14(10) and provisions of PERA directly address these issues, Cronin's appeal does not satisfy the public importance exception. *See Harris*, 982 A.2d at 1037 ("Because the Parole Act clearly and unambiguously addresses the respective authority of the Board and the Governor in parole matters, the court does not find it necessary to address the moot issue.").

Finally, Cronin argues that he will suffer some detriment if the appeal is not reviewed on the merits. He asserts that if there is another union election in the future, he will be "without meaningful guidance as to how he can intervene, participate, or appeal the denial of such requests to the PLRB or this Court." (Cronin's Answer, at ¶32c.) However, Cronin's allegations do not demonstrate that he is currently suffering, or will suffer in the future, some form of residual or collateral detrimental effect as a result of the election representation proceeding.[10]

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provisions of this act."); *Bayada Nurses, Inc. v. Department of Labor and Industry*, 958 A.2d 1050, 1056-57 (Pa. Cmwlth. 2008) ("Regulations adopted under legislative rulemaking power have the force of law and are binding on reviewing courts as part of a statute.").

[9] *See* Sections 601-605 of PERA, 43 P.S. §§1101.601 (Right to select representatives), 602 (Recognition; jointly requested certification), 603 (Election request; petition), 604 (Appropriateness of public employer unit; determination), 605 (Conduct of election).

[10] *Cf. Department of Environmental Protection v. Township of Cromwell*, 32 A.3d 639, 652 (Pa. 2012) (concluding that the detriment exception applied: "We have held that even where a contemnor's terms of imprisonment have expired, an appeal is not moot, since the contemnor remains subject to the underlying order, and a failure to comply may result in additional contempt

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Indeed, Cronin stands in the same place today as he stood prior to the representation election proceeding and was and is unaffected by the outcome of the proceeding. In essence, Cronin seeks an advisory opinion from this Court declaring how he should proceed in the future, in an unknown hypothetical factual situation, in the event that another petition for representation is filed. However, it is well-settled that the courts do not offer purely advisory opinions. *Harris*, 982 A.2d at 1035; *see Crystal Lake Camps v. Alford*, 923 A.2d 482, 489 (Pa. Super. 2007) (declining to address an issue that was posed as a hypothetical question dependent on a non-existent set of future circumstances because "this Court cannot and will not issue an advisory opinion"). Consequently, this exception to the mootness doctrine is not implicated.

As desirable as a decision on the merits might be, the Court concludes that the issues Cronin advances on appeal are indeed moot and that no exception is applicable. *See Pennsylvania Public Utility Commission v. County of Allegheny*, 203 A.2d 544, 546 (Pa. 1964).

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sanctions."); *Commonwealth v. Sal-Mar Amusements, Inc.*, 630 A.2d 1269, 1272 (Pa. Super. 1993) (concluding that the detriment exception to mootness applied where the trial court's order adjudicated a licensed bar a nuisance, which had an adverse effect and impact on the bar and its liquor license, the bar's record with the Pennsylvania Liquor Control Board, and its future "efforts to apply for, extend, and/or maintain a new or existing liquor license"); *Commonwealth* ex rel. *Finken v. Roop*, 339 A.2d 764, 767-68 n.4 (Pa. Super. 1975) ("The mootness doctrine would not apply [because] the collateral consequences and stigma of being adjudged mentally ill remain to plague appellant throughout his life."); *BCJ Management, L.P. v. Cotton* (Pa. Cmwlth., No. 1168 C.D. 2016, filed July 10, 2017) (unreported), slip op. at 6-7 (concluding that tenant's breach of subsidized housing lease causes future detriment as exception to mootness doctrine because public housing authority can deny admission or terminate assistance based upon a conviction in the past five years); *see* Commonwealth Court Internal Operating Procedure Section 414(a), 210 Pa. Code §69.414(a) (stating that this Court may cite to unreported opinions as persuasive authority).

Accordingly, this **31st day of July, 2018**, the Court grants PLRB's Application. However, rather than quashing the appeal, the Court will dismiss the appeal as this is the legally correct form of disposition. *Darlington*, §1972:10; *cf. Sahutsky v. H.H. Knoebel Sons*, 782 A.2d 996, 1001 n.3 (Pa. 2001).

Patricia A. McCullough

PATRICIA A. McCULLOUGH, Judge

Certified from the Record

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