BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF HARRITY, ET AL Grievant, v. STATE OF DELAWARE, Department of Services for Children, Youth & Their Families Agency	**DOCKET NO. 95-10-60** **FINDING OF FACT** **CONCLUSION OF LAW** **OPINION AND ORDER**

COPY

BEFORE Robert Burns, Vice Chairperson, Walter Bowers, GaryFullman and Dallas Green, Members of the Merit Employee Relations Board, constituting a lawful quorum of the Board pursuant to 29 Del. C., § 5908(a).

AND NOW, to-wit, on this 26th day of June, 1996, the above-referenced matter being before the Board on February 15, 1996, and March 14, 1996, the Board makes the following findings and conclusions and enters the following Order:

NATURE AND STATE OF PROCEEDINGS

The grievants, Harrity, et al, filed an appeal of a Step 4 decision regarding non-payment of stand-by duty pay from 1992 through April 1, 1995, based on an alleged violation of Merit Rule No. 5.1440. The grievants' appealed from an unfavorable Step 4 decision.

SUMMARY OF EVIDENCE

1. William P. Wilson was sworn and testified that he is a Maintenance Mechanic III at the New Castle County Detention Center and has been employed by the Department since the summer of 1985. Mr. Wilson testified that he is the shop steward for the maintenance department and that the policy that was in effect prior to April 1, 1995 was as follows: that members of the maintenance staff would be on duty from Thursday at 4:00 p.m. (the end of the normal work day) and continue on until the following Thursday for a total of 108 hours that

they were on stand-by duty. Mr. Wilson testified that their names and phone numbers were given to the New Castle County Detention Center and the security offices at Ferris School, notifying them who was to be on call, their telephone number at the time or pager number and the times they would be on call. Mr. Wilson offered to the Board copies of the log books that are kept at the Control Desk at each facility, identifying 4 specific dates as examples of people who were on duty and the time period for which they were on duty. Mr. Wilson testified that in April, 1995 the program became mandatory for all maintenance personnel and the period of time was changed to a two-week period to reflect the pay cycles and that they received stand-by duty pay differential from that period on. Mr. Wilson testified further that, prior to April 1, 1995, he had notified Mr. Eryl Roth, his supervisor, requesting him to check and see if they were eligible for stand-by duty pay for they period of the program. Mr. Wilson testified that, as a result of checking, the new program was put into place.

Mr. Wilson testified further that, under the old program prior to April 1, 1995, if the mechanic wanted to be out-of-town or be away for the day he was on duty he would arrange with another mechanic to cover for him and they both would have to call the Control Desk at the two facilities and give them their names, phone numbers and the coverage time. Mr. Wilson testified further that if the person on call failed to respond to a call that they would have to justify it to Mr. O'Hanlon the next day and that they would receive an admonishment or a verbal reprimand, if appropriate. Mr. Wilson also testified about his previous inquiries to the Personnel Department and Carol Martin who responded to him that the affected employees were not eligible for stand-by duty pay. Mr. Wilson testified that this was separate from overtime pay in that when they came out they were paid pursuant to the Merit Rules for their overtime work at a rate of time and one half for the time they were called out or a minimum of four (4) hours.

2. On cross-examination, Mr. Wilson testified that they were instructed by their supervisor to be available. Mr. Wilson testified he could not recall specific situations where workers were reprimanded for not coming out to work on an emergency call when they were on-call for the period before April 1, 1995. Mr. Wilson testified further that he did not recall the actual words being used but that Mr. O'Hanlon would question the maintenance person who did not respond and that they would have to explain their actions and that they were instructed not to let it

happen again. Mr. Wilson testified that every maintenance mechanic, except one, was required to participate in the stand-by system that was in effect prior to April 1, 1995 and that a person who did not participate was excused by the supervisor due to a personal issue. Mr. Wilson testified that the difference between the former system and the current system in place effective April 1, 1995 was that everyone now has to participate and there is a written system in place and that if a person is disciplined it is done in the form of a letter placed in the employee's file. Mr. Wilson testified further that, when employees were called out for overtime work, they were paid for overtime but, prior to April 1, 1995, they were not paid for stand-by pay. Mr. Wilson testified that Mr. Joseph O'Hanlon was the one who administered the call-out program and the employees could swap a day or two among themselves without having to have Mr. O'Hanlon approve it. Mr. Wilson testified further that although they were issued beepers on August 1, 1992, that the security staff still maintained their practice of getting the home phone numbers for the call-out personnel until April 1, 1995.

3. Upon questioning by the Board, Mr. Wilson stated that regular overtime was made available to the employees by the supervisor who permitted employees to sign up for it or volunteer. Stand-by pay was the basis for this grievance and that one employee did not participate, but all the rest did for the time prior to April 1, 1995. Mr. Wilson testified further that he could not think of any one person who was reprimanded during the time period prior to April 1, 1995 for not responding when they were on-call and requested to come out.

4. On re-direct, Mr. Wilson testified, in layman's terms, that a verbal reprimand is getting "chewed out" by the supervisor and that the one employee who did not participate in the program prior to April 1, 1995 was due to a family situation. Mr. Wilson also testified about the regular opportunities for overtime in the maintenance department which was, in part, constructing office space, painting, tearing down walls, electrical and concrete work that was done in the buildings when the majority of the staff was not present. Mr. Wilson testified that stand-by duty covers any repair work that is deemed an emergency by the staff on duty that would require the immediate presence of a maintenance staff member to repair and it could include, by way of examples, such items as a stopped-up toilet, a busted light, electrical problems or, in other words, a whole gambit of different things. Mr. Wilson testified about the lack of the overtime book that was required by the union contract and that Mr. O'Hanlon gave

the opportunities for overtime apparently equal to all employees in the shop. Mr. Wilson testified further that the change from one week to two weeks assignments was due to the type of payroll system that the State has and that it was not a change due to the fact that the program was being implemented on April 1, 1995. Upon re-examination by the Board, Mr. Wilson testified that there were 4 or 5 maintenance mechanics who were told by Mr. O'Hanlon that they would be on-call and that it was up to them to make any changes necessary if they could not cover that day.

5. Robert C. Harrity was sworn and testified that he is a Maintenance Mechanic for the Department and has been with the Department since February 1, 1991. Mr. Harrity testified that when he was interviewed by Mr. Phillips and Mr. O'Hanlon that he would be required to be on-call during certain time periods. Mr. Harrity testified that since March of 1991 he has been on-call up to and including April 1, 1995. Mr. Harrity testified that since April 1, 1995 the procedure now is that you have to give two weeks notice to Mr. O'Hanlon if you wish to have the schedule changed and this was the only substantive change between the new system that went into effect April 1, 1995 and the old system prior to that date where it was handled informally between the maintenance personnel to arrange coverage.

6. On cross-examination, Mr. Harrity described the system that was in place prior to April 1, 1995 as flexible and that, with the exception of the two weeks instead of one week, it was not quite as flexible. Mr. Harrity testified that, in the past, you had to make sure there was coverage but it was not necessary to have Mr. O'Hanlon sign off on it. Mr. Harrity testified that, since April 1, 1995 permission from Mr. Roth or Mr. O'Hanlon was necessary to change the schedule. Mr. Harrity testified that one maintenance mechanic did not participate in the old program and that was Charles Mathias but that he did not know the circumstances as to why he was not participating in the program.

7. Upon examination by the Board, Mr. Harrity said that when he was interviewed and started in March 1991 he was required to be on-call and that he never knew it wasn't allowed for him not to be able to respond during those weeks he was on-call. On re-direct examination, Mr. Harrity testified that no one ever told him that the stand-by status was not required as part of his job. Mr. Harrity testified that the new system was explained to him by the supervisor and

the superintendent but they have not received anything in writing about it and it is his understanding that he had to ask permission after April 1, 1995 to exchange a night of duty during the period.

8. Charles Mathias was sworn and testified that he has been with the Department as a Maintenance Mechanic since January of 1993 and that, as a part of the interview process, he was told the hours worked per week, the days worked per week and that he would be expected to be on-call after probation period of time had expired. Mr. Mathias testified that in the fall of 1993, after his six-month probation was up, the supervisor at the time asked him if he was ready to be in the rotation to be on-call. Mr. Mathias testified that, at that time, due to family problems at home, he could not answer calls during the week in the evening, so. he told the supervisor he would be available for calls on the weekend, but not during the week as his wife was working evenings. Mr. Mathias testified that his wife was trying to get her evening work hours changed to days but her employer had not done that yet and that he had to take care of his children at night until his wife's hours were changed until later in 1994, in the spring. On cross-examination, Mr. Mathias testified that he became available for on-call duty in the spring of 1994 and was placed in the rotation at that time but that he was not forced to be on-call from the fall of 1993 to the spring of 1994 due to the family problems to which he previously testified. Mr. Mathias testified that after April 1, 1995 he understood that the on-call system was mandatory and that the supervisor sets up the schedule at the beginning of a period and that it runs for a year. Mr. Mathias testified that it is his understanding that you must give two weeks notice to his supervisor if he cannot be on-call during the scheduled time and that it is written on the schedule. Mr. Mathias testified that prior to April 1, 1995, if you could not handle the week to which you were assigned you could ask one of the other maintenance men if they would swap and, once someone agreed to swap with you, you took it to the supervisor who would make the appropriate notifications. Mr. Mathias testified further that two weeks notice was not required prior to April 1, 1995 but is required now. On re-direct, Mr. Mathias testified that the schedule he has at home, he believes says that he must give his supervisor two weeks notice if he cannot work at the scheduled time. Mr. Mathias testified that he has not seen a policy in writing yet and that if an emergency came up he would ask another maintenance person to take his calls and then inform his supervisor, but that the first thing he would do would be to get someone else to be available to be called. Upon examination by the Board, Mr.

Mathias testified that when he was interviewed in 1993 he was told that he would be on-call after his probation period ended and that he was told this by Mr. O'Hanlon and Mr. Phillips, who were the supervisor and superintendent at that time.

9. Dennis J. Bassett was sworn and testified that he is vice-president of the union that represents the maintenance engineers and that he is familiar with the case at hand. Mr. Bassett testified that he was familiar with Merit Rule 5.1440 which references stand-by duty and that the reason no grievance was filed until May of 1995 was that it was his belief that maintenance employees were already receiving stand-by pay. Mr. Bassett testified that stand-by pay meant that you would be on-call for a certain period of time and that you would have to stay in that general area in case you were needed to be called in. Mr. Bassett testified that call-back pay means that when you are called in to respond that you are paid for 4 straight hours or for time and one half, whichever is greater, as outlined in the Merit Rules in the union contract. Mr. Bassett testified that all employees are eligible for call-back pay but that only certain employees are eligible for stand-by pay. Mr. Bassett testified that he discussed filing a grievance with regard to overtime pay with the shop steward and their determination was that it could affect the availability of overtime.

10. On cross-examination, Mr. Bassett testified that he thought maintenance mechanics were receiving stand-by pay due to conversations with different management people and with the personnel office but that he did not discuss it with the affected individuals. Mr. Bassett testified that he had been a union vice-president for two years and that he was familiar with the Merit Rules and did not file the grievance in the above matter until May 5, 1995, which would have been 30 days past the date that the grievants entered into the mandatory program of April 1, 1995, although Mr. Bassett stated that he did not know the effective date of the program. On redirect, Mr. Bassett testified that he did not know whether the affected employees were paid stand-by pay since April 1, 1995 and was not familiar with the policy or program that was in place.

11. Joe O'Hanlon was sworn and testified that he has been with the Department since January 1990 as a maintenance supervisor and he implemented a system for emergency call-outs instead of handling all calls himself. Mr. O'Hanlon testified that in 1993 he started to put

names on a calendar on a rotating basis from Friday through the following Thursday, starting with two employees and gradually escalating to four employees. Mr. O'Hanlon testified that he established the procedure to equalize the overtime, but took no punitive action if someone was unable to respond, only advised them as to the overtime opportunity that was missed. Mr. O'Hanlon testified that he distributed the overtime and call-outs equally, and that beepers were given to the employees for communication on the campus only. Mr. O'Hanlon testified that he did give the beeper number and the home number to the Ferris and New Castle County detention center office for call out purposes and that the workers were not disciplined if they did not respond during their duty week prior to the April 1, 1995 stand-by duty plan. Mr. O'Hanlon testified that he never told any of the men that they had to be at home during the week they were on the calendar. Mr. O'Hanlon testified that he spoke to the Department of Corrections in 1994 about their call-out program and found out that it was a month-long program, and, after discussing it with the workers, they did not wish to commit for a month. Mr. O'Hanlon testified that Mr. Eryl Roth was hired as the supervisor in February, 1995, and the new duty program for call outs on a bi-monthly basis matching the new lag payroll system was placed in effect on April 1, 1995, and the duty program is mandatory for all maintenance employees. Mr. O'Hanlon testified there are no exemptions for employees that want to opt out of the program, and that the program provisions are posted in the maintenance shop area.

12. Upon cross-examination, Mr. O'Hanlon testified that he was familiar with the Merit Rules, and that the program is in compliance with the Merit Rules. Mr. O'Hanlon testified that on March 28, 1995 the employees were notified of the new mandatory program. Mr. O'Hanlon testified that the men did not turn the beepers in each day, and that he turns off his beeper at 4:00 p.m. Mr. O'Hanlon testified that scheduled overtime was equally distributed to the staff but the emergency call-outs were given to the scheduled person. Mr. O'Hanlon testified on re-direct that there is a distinction between short-term and long-term sickness, and scheduled overtime and call-back pay pursuant to Merit Rule 5.1430. On re-cross-examination, Mr. O'Hanlon testified that stand-by duty pay was established pursuant to the Merit Rule 5.1440.

13. On examination by the Board, Mr. O'Hanlon testified that he created a weekly call-out list in 1993, but he wasn't sure and now, since April 1, 1995, the workers are assigned specific

two-week periods. Mr. O'Hanlon testified further that under the old system the workers knew they were the first person to be called in.

14. Eryl A. Roth was sworn and testified that he started working for DSCYF on February 1, 1995 as a maintenance supervisor, and that he sent a letter to Chuck Watkins (Grievant's Exhibit #2) that led to the stand-by pay program. Mr. Roth testified that the program was explained to the employees on March 28, 1995 and the program was implemented for April 1, 1995. The schedule was introduced at State's exhibit #1. Mr. Roth testified that it was his understanding of the old program that if the person who was on the schedule did not respond that they were asked why they did not respond but that no formal discipline was done. Mr. Roth testified now if a person doesn't respond a formal record of the discipline is maintained. Mr. Roth testified as to the interactions of Merit Rules 5.1430 and 5.1440. On cross-examination, Mr. Roth testified that he implemented a specific procedure with the institutions in July, 1995.

15. On examination by the Board, Mr. Roth testified that now pursuant to Merit Rule 5.1440 the employee receives 5% of the employee's paygrade midpoint for the two weeks that the employee is on duty along with call-back pay pursuant to Merit Rule 5.1430

THE LAW

29 Del. C. § 5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The director 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. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days. (29 Del. C. 1953, § 5931; 55 Del Laws, c. 443, §6, 69 Del. Laws, c. 436, §7.)" Effect of amendments -- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

Merit Rule No. 5.1430 Call Back Pay

An employee in a position or a class that is entitled to overtime pay under the Fair Labor Standards Act who has left his/her place of work for his/her residence and is called back for overtime service, shall be paid for such service in accordance with the provisions for overtime pay, provided that he/she shall receive a minimum total payment equivalent to four times his/her regular straight time hourly rate. However, the employee shall be paid according to this call-back provision or the overtime provision, whichever is greater, not both.

Merit Rule No. 5.1440 Stand-by Duty

An employee in a position or a class that is entitled to overtime pay under the Fair Labor Standards Act who is assigned to institutional life support system service or critical public service as approved by the Director, and authorized and required by the appointing authority to be on-call regularly for emergency services for an average of 64 off-duty hours or more per week, shall receive supplemental pay equal to 5% of the employee's paygrade midpoint while so assigned. Such increased pay shall continue during absences only for paid holidays and sick leave of five successive work days or less occurring during the period of assignment. Any call-back work required during on-call periods shall also be compensated in accordance with the call-back periods shall also be compensated in accordance with the call-back provisions of 5.1430.

Merit Rule No. 20.0310

Step 1. The employee shall, within ten (10) working days of the date of the occurrence of events leading to the grievance or within ten (10) working days of the date an employee could reasonably be expected to have knowledge of the circumstances leading to the grievance, present the grievance in writing to his immediate supervisor setting forth the details of the grievance and relief sought. The supervisor, shall within five (5) working days of receipt of such grievance, meet and discuss the grievance with the employee and his/her representative, if any, and reply to the employee in writing within five (5) working days of said meeting.

Merit Rule No. 20.0371

If an employee's grievance is upheld through the procedure described above, retroactive corrective action shall apply to the grievant only and in the event of a continuing claim, shall be limited to thirty (30) calendar days prior to the date the grievance was filed. Any financial settlement will be reduced by the amount of an employee's earnings during the period covered by the settlement regardless of source, excluding part-time income which was being received prior to separation.

Merit Rule No. 21.0251

The costs of any transcript of record required by the Superior Court on review of a decision of the Commission shall be borne by the party taking the appeal to Superior Court. Such appellant shall be responsible for the costs of any transcript(s) required by the Court, plus a copy for the appellee.

In the event a Court is called upon to make its own findings due to a tie vote within the Commission, the costs of producing the transcript(s) required by the Court, plus one copy for each party shall be borne equally by the appealing and appellant sides.

If the appellant in Superior Court is successful, he is entitled to be reimbursed for the costs of the transcript, with all appellees sharing the expense equally.

FINDING OF FACT

The matter was timely filed at the first step in accord with the Merit Rules as it was initially filed within ten (10) working days of the occurrence of the events that gave rise to the grievance, in accord with Merit Rule 20.0310.

CONCLUSION OF LAW

Having found that the matter was timely filed, giving the Board jurisdiction to hear the case, and the Board finding authority for granting relief in the order dated March 14, 1996, the burden was on the employees (grievants) to persuade the Board to rule in its favor regarding the issue of the supplemental pay owed. The Board, by a vote of 2-2 which was a tie vote, failed to uphold the grievance. Grievant's failure to meet its burden means the decision above remains in effect. Accord, Hopson v. McGinnes, Del. Supr., 391 A.2d 187 (1978).

ORDER

The grievance fails by a 2-2 tie vote.

IT IS SO ORDERED

Robert Burns, Vice Chairperson

Dallas Green, Member

Walter Bowers, Member

Gary Fullman, Member

OPINION ON REQUEST FOR CHAIR TO LISTEN TO TAPES AND VOTE TO BREAK TIE

On March 22, 1996, the grievants requested by letter that Katy Woo, Chair of the Board, listen to the tapes of the hearing and then cast a tie-breaking vote. This procedure was recently reviewed by the Superior Court in Warrington v. State Personnel Commission, CA93A-09-002, Balick, J (July 14, 1994) in which the Court held that such a procedure was not proper, as the person reviewing the tapes did not have the opportunity to view the witnesses in order to make a determination of credibility. As such, the request is denied.

The prior tie vote of the Board is affirmed.

Robert Burns, Vice Chairperson

Dallas Green, Member

Walter Bowers, Member

Gary Fullman, 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 of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

Mailing Date: July 2, 1996

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