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CIVIL DIVISION

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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STATE OF DELAWARE THE DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH & THEIR FAMILIES and MERIT EMPLOYEE RELATIONS BOARD,	§	
Appellees Below, Appellants,	§	No. 64, 1997
v.	§	Court Below—Superior Court of the State of Delaware, in and for New Castle County C.A. No. 96A-07-13-HLA
ROBERT C. HARRITY, WILLIAM WILSON, LOUIS ORTIZ, WILLIAM HYNES, and CHARLES MATHOY,	§	
Appellants Below, Appellees.	§	

Submitted: June 10, 1997
Decided: June 11, 1997

Before **HOLLAND, HARTNETT**, and **BERGER**, Justices.

ORDER

This 11th day of June, 1997, the Court having considered this matter on the briefs filed by the parties, has determined that the judgment of the Superior Court should be affirmed on the basis of and for the reasons assigned by the Superior Court in its decision dated January 10, 1997.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment

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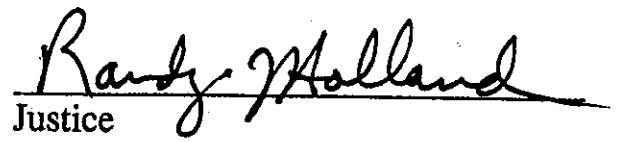
of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:



Justice

IN AND FOR NEW CASTLE COUNTY

ROBERT C. HARRITY, WILLIAM WILSON, LOUIS ORTIZ, WILLIAM HYNES, and CHARLES MATHOY Appellants, v. STATE OF DELAWARE, DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES, and MERIT EMPLOYEE RELATIONS BOARD, Appellees.	)	C.A. No. 96A-07-13-HLA

Submitted: October 7, 1996
Decided: January 10, 1997

MEMORANDUM OPINION

UPON APPEAL FROM THE MERIT EMPLOYEE RELATIONS BOARD

GRIEVANCE GRANTED

Perry F. Goldlust, Esq., Heiman, Aber & Goldlust, First Federal Plaza, Suite 600, 702 King Street, P.O. Box 1675, Wilmington, DE 19899. Attorney for Appellants.

Janice R. Tigani, Esq., Department of Justice, 802 North French Street, 8th Floor., Wilmington, DE 19801. Attorney for Appellees.

ALFORD, J.

This is the Court's decision on the appeal filed by Appellants from a decision by the Merit Employee Relations Board. For the reasons set forth below, the Court finds in favor of Appellants and orders the State of Delaware, Department of Services for Children, Youth and their Families ("Department" or "Appellee") to pay Appellants all compensation due under Merit Rule 5.1440 for the time Appellants were on stand-by duty from August 1992 to April 1, 1995.

BACKGROUND

Appellants, Robert C. Harrity, William Wilson, Louis Ortiz, William Hynes and Charles Mathoy, are employed by the Department as maintenance mechanics. Appellants are responsible for maintaining institutional life support services in the Department's facilities, the Ferris School and the New Castle County Detention Center. The maintenance supervisor assigns a mechanic to be on-call to respond to any emergency that occurs during off-duty hours. If a maintenance problem occurs during this time, it is the Department's practice to instruct the facilities to contact the designated mechanic at home and the designated mechanic is then responsible for returning to the facility to remedy the emergency. Prior to April 1, 1995, this stand-by duty procedure was not formalized in writing. After April 1, 1995, a formal stand-by duty program was implemented and discussed with the mechanics.

Pursuant to the formal stand-by duty program implemented on April 1, 1995, every mechanic is assigned a stand-by duty rotation that is aligned with the two week pay cycle. The stand-by duty

schedule is posted in the maintenance shop and any change to the schedule must be made with the supervisor at least two weeks in advance of the change. The maintenance supervisor gives the stand-by duty mechanic's name, home phone number and beeper number to the two facilities with instructions to contact the designated mechanic to correct any off-duty hour emergency. If a mechanic does not respond to a call when he is assigned to stand-by duty, the mechanic will be reprimanded first verbally, and if necessary a written warning will be placed in his file. In compliance with Merit Rule 5.1440, the mechanic on stand-by duty receives supplemental pay in the amount of 5% of employee's paygrade midpoint.[1]

Appellants' complaint is that the system in effect prior to April 1, 1995 was not significantly different than the current program yet they were not paid stand-by duty pay. The prior system was put into place in 1991 by Mr. O'Hanlon, the maintenance

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[1] Merit Rule 5.1440 addresses stand-by duty pay and reads:

> 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 when 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 provisions of 5.1430.

supervisor at that time. When Mr. O'Hanlon was first employed with the Department, the supervisor handled all emergency calls. Mr. O'Hanlon changed this system and informally called the mechanics to assign any needed off-duty hours work. In August 1992, beepers were distributed to the mechanics and at some point in 1993, Mr. O'Hanlon scheduled mechanics to stand-by duty for one week rotations. The supervisor would telephone the facilities and provided the name of the mechanic who was on stand-by duty, and the mechanic's beeper and home telephone numbers. Mr. O'Hanlon testified before the Board that the reason for making a calendar was to distribute the overtime opportunities equally.

Mr. Wilson, Mr. Harrity and Mr. Mathias testified that it was their understanding that the stand-by duty program was a requirement of their employment. Although an exception was made for one mechanic due to personal reasons, it was expected that he would be added to the rotation as soon as his personal situation allowed. Appellants testified that if they were not available during the assigned stand-by rotation, it was their responsibility to find a replacement and notify the facilities with the replacement's name and numbers where he could be contacted. The mechanics stated that the supervisor admonished them if they were not available for a call-in when they were on stand-by duty. Although the Appellants acknowledge the prior system was more flexible, they testified it was made known to them that they were expected and required to participate in the program.

Mr. Wilson inquired of the maintenance supervisor, Mr. Eryl Roth in February 1995 as to whether the mechanics were eligible for stand-by duty pay. Mr. Roth in turn inquired of Chuck Watson, the Director of Personnel for the Division, and discovered Appellants were entitled to stand-by pay. After April 1, 1995, a formal stand-by duty procedure was implemented and the Appellants received stand-by pay. Appellants then inquired as to whether they were entitled to back pay for stand-by duty. After being informed that they were not eligible for back pay, Appellants filed a grievance alleging that the Department failed to pay stand-by duty pay from August 1992 to April 1, 1995 in violation of Merit Rule 5.1440.

At the fourth stage of the grievance procedure, a hearing with the State Personnel Director's designee, Jeffrey R. Nayda, Appellants' grievance was denied. Appellants appealed and a hearing was held before the Merit Employee Relations Board ("Board") on February 15, 1996. Four of the five members were present and the vote was evenly split. Accordingly, Appellants failed to meet their burden and the decision to deny grievance remains in effect. Appellants now ask this Court to make its own findings on the record and uphold Appellants' grievance.

DISCUSSION

Since the decision of the Board was evenly divided, there is no ruling which this Court can judicially review. Hopson v. McGinnes, Del. Supr., 391 A.2d 187, 189 (1978). The appropriate remedy is either remand for further consideration or alternatively, this Court may make its own findings based on the record before the

Board. Hopson, 391 A.2d at 189; Warrington v. State of Delaware, Personnel Commission and Department of Transportation, Del. Super., C.A. No. 93A-09-002, Balick, J. (July 14, 1994) (Opinion). Since the record is sufficient for review, the following is this Court's findings and ruling on the issue.

Pursuant to Merit Rule 5.1440, an employee is eligible for stand-by duty pay if, in addition to other requirements which both parties agree Appellants satisfy, he or she is "authorized and required" by the appointing authority to be on call. Appellee contends that Appellants were not required to be on call prior to April 1, 1995. The Department contends that the calendar system was implemented to ensure fair distribution of overtime opportunities. Additionally, the Department argues that a mechanic could opt out of the rotation and if they needed to change their assigned rotation they could make informal arrangements among themselves. If the mechanic did not respond to a call, the Department alleges that no formal discipline was issued to the mechanic.

Regardless of these assertions, this Court finds that Appellants are eligible for back pay for the time they were assigned stand-by duty from August 1992 until April 1, 1996. The system employed prior to April 1, 1995 did not differ significantly from the formal stand-by duty procedure now in place. Since the Department has conceded that Appellants are currently eligible for stand-by duty pay, it is logical that Appellants were also eligible for stand-by duty pay under the less formal system.

When Mr. O'Hanlon became the maintenance supervisor in 1991, he changed the system from handling the calls himself to assigning the off-duty hours emergency calls to his staff. He instituted a calendar system where each mechanic was assigned a time to be on call. Although Mr. O'Hanlon asserts that he never disciplined a mechanic for not answering a call, he also stated that he "never disciplined the men, any of my men, since I've been employed. Never." The decision to not discipline the staff was not necessarily an indication that stand-by duty was voluntary, but perhaps more an indication that the stand-by system worked and calls were being answered in a satisfactory manner. Although the mechanics understood that it was a requirement that they be available, apparently, an informal system satisfied the operational needs of management and it was this informal system in which the supervisor chose to operate. Simply because the stand-by duty system was informal, does not necessarily indicate that it was not required.

Perhaps the best indication of the nature of the stand-by duty program prior to April 1, 1995 was the letter written by the maintenance supervisor to the Personnel Department dated February 27, 1995 inquiring about stand-by duty pay. The letter reads in pertinent part:

> According to the Merit Rules copy I have in my possession the issue of stand-by duty pay, section 5.1440 states Personnel on call more than sixty-four (64) off duty hours per week are eligible to receive supplemental pay equal to five (5)% of their paygrade midpoint while on call. **My employees are required to respond to calls an average of 1 to 2**

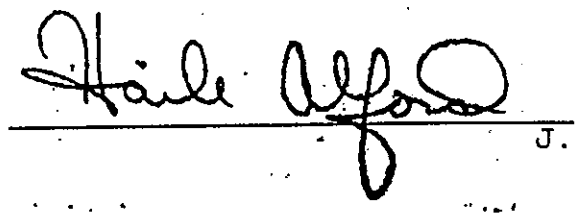
> **times per week** for emergency services and are paid in accordance with the call back provisions of section 5.1430 of the merit rules. I am requesting documented confirmation on this section as to whether or not my employees are or are not eligible for this provision under the Merit Rules. If there are any other requirements that need to be met to qualify for this supplemental pay I would be grateful for this information.

Although the record did not include a response to this letter, a letter dated May 2, 1995 from Department Personnel Officer III, Carol Martin, stated in part, "I researched the issue and found that indeed maintenance was eligible for stand by pay with the agreement of staff to be scheduled in a manner acceptable and in line with management's operational needs." These letters were based on the system that was in place prior to April 1, 1995. Every indication is that before the issue of back pay liability surfaced, the Department recognized that the mechanics were eligible for supplemental stand-by duty pay.

It appears that the difference in the two stand-by systems is minimal and the new level of formality is required to bring the program into strict compliance with the Merit Rules. However, as the supervisor noted in February of 1995, Appellees were required to respond to emergency calls. The mechanics provided stand-by duty service as required before April 1, 1995 in much of the same manner as they do under the current system. In reality, the stand-by systems are the same although a level of formality has been instituted. This new level of formality does not negate the fact that the mechanics were "authorized and required" to respond to emergency calls from August 1992 to April 1, 1995.

For the foregoing reasons, Appellants grievance is **GRANTED** and this Court orders the Department to pay Appellants back pay for the time Appellants were on stand-by duty under Merit Rule 5.1440 from August 1992 to April 1, 1995.

IT IS SO ORDERED.



J.