

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

JOSEPH MACCHIARELLI,)	
)	
Employee/Grievant,)	DOCKET No. 14-11-615
v.)	
)	DECISION AND ORDER
DEPARTMENT OF CORRECTION,)	
)	
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 March 19, 2015 in the Delaware Public Service Commission Hearing Room at the Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, 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

Lance Geren
on behalf of employee/grievant
Joseph Macchiarelli

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

BRIEF SUMMARY OF THE EVIDENCE

The Department of Correction (DOC) offered nine exhibits, of which the Board admitted into evidence without objection four exhibits (D, E, H, and I). The employee/grievant, Joseph Macchiarelli (Macchiarelli), did not offer any exhibits into evidence. Macchiarelli and DOC agreed to a set of stipulated facts in lieu of live testimony from witnesses and presented argument on the merits at the Board's hearing on March 19, 2015.

Prior to the hearing, DOC filed a motion to dismiss the appeal of the employee/grievant on the grounds of timeliness. The Board deferred consideration of the motion until after receiving the evidence. Upon the close of the evidentiary record, the Board denied DOC's motion to dismiss and decided the appeal on the merits.

STIPULATED FACTS

The Stipulated Facts which were jointly submitted by the parties on March 11, 2015, are set forth below, in their entirety:

1. Employee/Grievant Joseph Macchiarelli, hereinafter referred to as "Grievant," is a Correctional Officer assigned to the James T. Vaughn Correctional Center.
2. Grievant bid on, and was awarded, an alternative work schedule. As a result, he is approved to work a forty (40) hour work week schedule consisting of four (4) shifts of ten (10) hours per shift as an alternative to the usual 40 hour work week schedule of five (5) shifts of eight (8) hours per shift.
3. In circumstances when one of Grievant's regularly scheduled work days falls on a legal holiday, and pursuant to the DOC's interpretation of, and the Office of Management and Budget's policy regarding, Merit Rule 4.14.2 and Merit Rule 19's definition of "pro rata",

Grievant is compensated at a rate of one and one-half times his regular rate of pay for the actual hours he works on the holiday. In addition, Grievant receives holiday pay either as a cash payment or time off on a pro rata basis, for eight (8) hours. The DOC's interpretation of, and the Office of Management and Budget's policy regarding, Merit Rule 4.14.2 and Merit Rule 19's definition of "pro rata", are uniformly applied to all merit employees of the State of Delaware who work such an alternative work schedule.

4. In the event that Grievant elects to receive time off on a pro rata basis, in order to be compensated for an entire regularly scheduled ten (10) hour shift, he must either use two (2) additional hours of approved annual leave or make up the time elsewhere in his work schedule.

CONCLUSIONS OF LAW

Merit Rule 4.14.2 provides:

Employees eligible for holiday pay and overtime compensation who are authorized to work on a holiday shall be compensated for the hours actually worked on the holiday at 1.5 times and for the holiday on a pro-rata basis. Employees eligible for holiday pay but not normally eligible for overtime compensation required to work on a day observed as a legal holiday shall be credited for the holiday on a pro-rata basis, and may be credited for the hours actually worked on the holiday at straight time, except as otherwise approved by the Director. Employees' compensation for any additional hours, beyond those for which they are routinely compensated, which have accumulated as a result of working the holiday, may be either in cash or time off or combination of the two at agency discretion.

Merit Rule 19 provides:

Pro-rata Basis: a proportional share based on the percent of full-time at which a position is filled, with

a 100% share being the maximum allowable share. A 100% share of a day is 7.5 hours or 8 hours. The calculation of leave shall be rounded up to the nearest quarter hour.

Merit Rule 4.14.2 requires the State to compensate employees (who are eligible for holiday pay and overtime compensation) who are authorized to work on a holiday “...for the hours actually worked on the holiday at 1.5 times and for the holiday on a pro-rata basis.” There is no dispute that Macchiarelli was paid 1.5 times his wage rate for the ten hours he worked on the holiday. What is in dispute is how many hours of time off he should also receive “for the holiday on a pro-rata basis”.

The Board concludes it cannot interpret this portion of Merit Rule 4.14.2 to require the State to compensate Macchiarelli a full 10 hours (of paid time off) for a holiday on which he is required to work because Merit Rule 19 clearly defines the term “pro-rata” to mean “... a 100% share of a day as 7.5 or 8 hours.” The Board does not have unilateral authority under the statute to rewrite a Merit Rule. 29 Del.C. §5914.

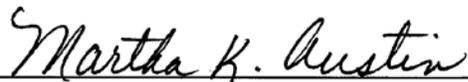
While the Board agreed there has been no violation of the Merit Rules, as alleged, it was split as to whether the Merit Rules should give consideration in its pro-rata definition to merit employees who, like Macchiarelli, work an alternative work schedule. Some members felt the pro rata definition in the Merit Rules does not consider alternative work schedules. Other members, however, concluded the pro rata definition explicitly limits the total number of hours paid for each legal holiday¹ to 7.5 or 8.0 for all merit employees, based upon what a regular

¹ Merit Rule 5.1, Holidays, defines “legal holidays” for State Merit employees to include, “...New Year's Day; Martin Luther King, Jr. Day; Good Friday; Memorial Day; Independence Day; Labor Day; Veterans' Day; General Election Day; Thanksgiving Day; Day after Thanksgiving; Christmas Day; and Return Day (the second day after the General Election), 3.75 hours for 37.5 hours work week schedule or 4 hours for 40 hour work week schedule for employees who live or work in Sussex County; and any other day or part of proclaimed by the Governor as a holiday.” There are ten paid holidays in a non-election year.

work schedule would be for those employees, irrespective of any exceptional alternative schedules individual employees may have been afforded the opportunity to work.

ORDER

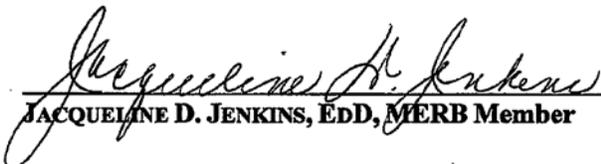
It is this **23rd** day of **April**, 2015, by a vote of 4-1, the Decision and Order of the Board to deny Macchiarelli's appeal. The Board finds there was no violation of Merit Rule 4.14.2 and Merit Rule 19 as written.



MARTHA K. AUSTIN, MERB Chairwoman



JOHN F. SCHMUTZ, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member

I respectfully dissent. I believe the intent of the rule is to provide an employee who works on a holiday to receive paid time off in an amount equivalent to hours of the shift he was required to work, in order that the employee might have the opportunity to enjoy the holiday at a later date.



PAUL R. HOUCK, MERB 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 on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **April 23**, 2015

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