

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

JAMES KWASNIESKI,)	
)	
Employee/Grievant,)	
)	DOCKET No. 16-11-661
v.)	
)	
DELAWARE DEPARTMENT OF TRANSPORTATION,)	DECISION AND ORDER
)	
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 August 3, 2017 in the Public Service Commission Hearing Room, Suite 100, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, 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, Esq.
Freedman & Lorry, PC
on behalf of the Grievant

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

PROCEDURAL HISTORY

The three member quorum of this Board initially heard this case on March 16, 2017, immediately before the hearing in a companion case, *Pearson v. Department of Transportation*, MERB Docket No. 16-11-662. In *Kwasnieski*, the Board (Tupman, Jenkins, Houck) voted 2-1 to deny the grievance. In *Pearson*, which involved the same legal issues but salient factual differences, the Board voted 3-0 to grant the grievance (Board Member Houck concurring in the result but not in the majority's reasoning).

Before the Board issued final written orders in either case, the Board notified the parties by letter dated March 27, 2017 that the Chair had placed a motion to re-hear the two cases on the agenda for the Board's next meeting. The letter advised counsel: "As representatives of the parties, you may attend the discussion of this motion and comment in response at that time." Counsel for both parties appeared at the meeting on April 6, 2017 and made oral arguments to the Board on the motion for re-hearing. The Board (Tupman, Sandler, Cairns, and Houck) voted 4-0 to re-hear the two cases *de novo*.¹

In *Lyons v. Delaware Liquor Commission*, 58 A.2d 869 (Del. Ct. Gen. Sess. 1948), the Court held that an administrative agency has the inherent power to vacate its order and re-hear a

¹ The agency opposed re-hearing the cases as unnecessary but also contended that only the three Board members who initially heard the cases should rule on the motion for re-hearing. Because the motion did not require the other two members to consider the merits of the grievances, the Board felt they could participate as well. In any event, even if the decision-making were confined to the original three Board members, a majority ruled in favor of re-hearing.

This case is in a different procedural posture than *Warrington v. State Personnel Commission*, C.A. No. 93A-09-002, 1994 WL 38708 (Del. Super., July 14, 1994). In *Warrington*, the State Personnel Commission split 2-2, and then allowed the absent commissioner to review the record and cast the tie-breaking vote. The Superior Court acknowledged case law allowing administrative officers to do so, but would not allow it in a case, like *Warrington*, which turned on the credibility of a key witness that could only be judged on the basis of live – not recorded – testimony. In this case, the Board members who were not present at the hearing on March 16, 2017 did not have to rely on the written record of that hearing or judge the credibility of prior witness testimony because the Board re-heard both cases *de novo*.

matter “under proper circumstances, within a limited period after rendition.” 58 A.2d at 895. “The need for an opportunity for correction of errors, change of mind, or obtaining more adequate factual grounds for a decision is no less present in the case of a decision of the Commission than in the case of a judgment of a Court.” *Id.* “However, the power does not exist after the expiration of the 10-day period for taking an appeal.” *Id.*

Under *Lyons*, the Board has the inherent power to vacate a decision and re-hear a case if: (1) the 30-day period for filing an appeal from a final order of the Board to the Superior Court has not run; (2) the Board has sufficient cause to permit the introduction of further evidence or to resolve difficult legal questions; and (3) the parties have notice and an opportunity to be heard.

All three criteria are satisfied in this case.

- (1) The Administrative Procedures Act provides that every case decision by the Board “shall be incorporated in a final order” which shall include the Board’s “findings of fact and conclusions of law authenticated by the signatures of a quorum” of the Board. 29 *Del. C.* § 10128(b). The 30-day time to appeal to the Superior Court does not begin to run until the Board’s final order is mailed to the employee. *Id.* §10142(b). In *Pearson* and *Kwasnieski*, the appeal period never began to run because the Board did not issue a final order. Because the appeal period had not expired, the Board had the inherent power to re-hear the cases.
- (2) As noted in its letter dated March 27, 2017, the Board was concerned “whether the factual record was adequately developed.” In scheduling the cases for re-hearing, the Board directed the parties to provide “the shift differential policy or rule prior to 2015” and any “predecessor policy(s).” The Board was also concerned “that the legal argument was not fully developed” and directed the parties to submit written

memoranda “with regard to the interpretation and application of Merit Rule 4.15 and the Merit Rule 19.0 definition of ‘night shift.’”

- (3) By letter dated March 27, 2017, the parties received written notice of the Board’s intent to consider a motion for re-hearing and the opportunity to be heard at the April 6, 2017 meeting.

This decision results from the record created during the hearing conducted in this matter on August 3, 2017.

BRIEF SUMMARY OF THE EVIDENCE

The Department of Transportation (“DOT”) offered three documents, and the Board admitted into evidence two documents marked for identification as Exhibits A – B (Exhibit C was excluded at prehearing). DOT called one witness, Dina Burge (“Burge”), Labor Relations Manager, DOT.

The Employee/grievant, James Kwasnieski (“Kwasnieski”), offered, and the Board admitted into evidence one document marked for identification as Exhibit 1. Kwasnieski testified on his own behalf.

Prior to the hearing, both parties submitted written memoranda as requested by the Board setting forth their arguments with respect to interpretation and application of Merit Rule 4.15 and the Merit Rule definition of “night shift”.

FINDINGS OF FACT

Kwasnieski has been employed by DOT for 27 years and at all times relevant to the grievance held the position of Engineering/Planning/Survey (“EPS”) Technician III. His primary

duty is performing inspections of hot-mix materials used in road construction at contractors' sites statewide. Kwasnieski's contracted regular daily hours of work are 8:00 a.m. to 4:00 p.m., Monday through Friday.

Each workday, the supervisor for the DOT Materials and Research section schedules inspections and assigns staff based on orders received from a contractors' hotline. Assignments are made daily; some may be scheduled to begin during the day and others after regular hours of work, depending upon the road work being conducted and when the hot mix is prepared and ready to be tested. Contractors often experience delays due to weather and traffic constraints, and the schedule of inspections may change without notice due to unforeseen circumstances. In the past, Kwasnieski received shift differential pay as part of his base pay for any hours he worked after his regular daily work hours when they included at least four hours between 6:00 p.m. and 8:00 a.m. the next morning.

On October 8, 2015, Kwasnieski reported to the DOT lab in Dover at 8:00 a.m., where his supervisor directed him to go to Wilmington. After receiving the assignment, Kwasnieski left Dover and reported to Diamond State Materials to conduct a single test which he expected would be completed by 1:30 p.m., at which time he would return to the lab in Dover. When he arrived at Diamond State Materials, a technician told him that a second batch of hot mix had been requested by a contractor to be ready at 5:30 p.m. that evening. Kwasnieski called his supervisor to report the facility would need a second test later that day. His supervisor directed Kwasnieski to remain at the facility and to test the second batch when it was ready. The production was delayed and the hot mix was not ready for testing until after 7:00 p.m. Kwasnieski remained at the facility, as directed, conducted the second test, reported the results, and then returned to Dover. He arrived back at the lab at 10:15 p.m. As in the past, Kwasnieski requested the 5% shift

differential premium for the hours he worked between 4:00 and 10:15 p.m. on October 8, 2015. He was paid for the 6 ¼ hours he worked beyond his regular hours of work at his straight time rate for the first 2 ½ hours he worked (4:00 – 6:30 p.m.) and at the overtime rate of 1.5 times his straight time rate for the 3 ¾ hours he worked between 6:30 and 10:15 p.m.² DOT denied him the requested shift differential premium for those hours.

Within the DOT Materials and Research section, the EPS employees agreed to two-week rotational assignments based on seniority for scheduled night-work projects. Employees must work at least one night shift during each of the two weeks and each eligible employee in the section usually serves in the rotational night work slot 2 – 3 times each year. The two weeks may not be contiguous and it is never clear when the night-work will be scheduled in response to orders by contractors. Due to weather conditions, road construction work may cease (or be significantly reduced) for three months out of the year. When weather or other conditions halt construction, employees work their daily 7.5 hours in the lab.

The second mix Kwasnieski was assigned to test on October 8, 2015 was requested due to unforeseen circumstances. It had not been ordered using the normal procedure, and constituted an “add-on” job which required the test to be performed outside of regular work hours. Because a test normally takes two to three hours to complete, in order to complete the assigned work, Kwasnieski worked from 4:00 – 10:15 p.m., a period of time which included four hours between 6:00 p.m. and 8:00 a.m. the following morning. Prior to October 8, 2015, DOT had not rejected

² HS1 for HB 225, An Act making Appropriations for the Expense of the State Government for the Fiscal Year ending June 30, 2016, §8 (j), Overtime, states: “(1) Merit Rule Chapter 4 notwithstanding, overtime at the rate of time and one-half will commence after the employee has accrued 40 compensable hours that week...” Merit Rule 4.13 Pay for Overtime Service, states, “4.13.1 FLSA-covered employees with a standard work week of 37.5 hours who are authorized to perform overtime service shall be paid at 1.5 times their regular rate for each hour worked after 37.5 hours per week...”

a request for shift differential premium for hours worked after regular work hours.

Dina Burge is the current DOT Labor Relations Manager; she has held that position for approximately two years. She testified on June 21, 2012, Mary Beth Palermo (“Palermo”), DOT Director of Human Resources, sent an email to Joseph Wright (DOT Director of Maintenance and Operations) and Natalie Barnhart, (DOT Chief Engineer, who was responsible for Kwasnieski’s work section). In the email, Palermo provided guidance on the non-recurring shift differential for night-work assignments based on questions she had received from employees. The email stated three requirements must be met for the payment of the shift differential premium rate in non-24/7 operations: (1) employee’s work hours must change from day shift to night shift; (2) employees must be placed on a scheduled and defined night shift and (3) employee’s night shift must include four hours between 6:00 p.m. and 8:00 a.m. The email stated the change would be effective immediately and directed that its content be shared immediately with managers and timekeepers.

Burge stated that although the policy concerning the circumstances under which the shift differential premium would be applied was effective on June 21, 2012, it was not consistently applied throughout DOT sections. On November 4, 2015, DOT Deputy Secretary Nicole Majeski sent an email to Mark Alexander (the then DOT Director of Maintenance and Operations) and Robert McCleary (the then Chief Engineer) stating it had come to her attention the shift differential premium for employees assigned to work during evening hours had been inconsistently applied. Majeski’s email reiterated the three requirements for the payment of the wage premium and had appended to it the 2012 Palermo email. Burge testified the 2015 email resulted from the Office of Management and Budget (“OMB”) questioning why certain employees were receiving the shift differential premium. OMB and DOT collaborated on the 2015 email to provide the

second interpretation of the conditions necessary to receive shift differential premium pay. She testified DOT has consistently enforced the policy since November 4, 2015, the date of the email.

CONCLUSIONS OF LAW

Merit Rule 4.15.1 provides:

Shift differential is pay for working inconvenient hours and schedules authorized at the agency's discretion. . . .

Merit Rule 4.15.2 provides:

Employees authorized by agencies to work night shifts which include four or more hours of work between the hours of 6:00 p.m. and 8:00 a.m. the following day shall receive supplemental pay for the entire shift equal to 5% of their paygrade mid-point.

Merit Rule 4.15.4 provides:

Shift differential is payable for single shift assignments as well as recurring shift assignments. Employees on fixed night or rotating shifts receive shift differential for all periods of overtime service. For employees not on fixed or rotating shifts, shift differential is payable for entire periods of overtime service once the minimum four hour requirement of 4.15.2 are met. For purposes of shift differential eligibility, each period of work during employees' regular schedule and each period of overtime service shall be considered separately.

Merit Rule 19.0, Definitions provides:

“Shift Differential Pay”: compensation for working inconvenient hours and schedules as authorized at the agency's discretion and described below:

“Night Shift”: a shift which includes four or more hours between the hours of 6:00 p.m. and 8:00 a.m. the following day.

According to the Agency “Merit Rule 4.15 is entitled [*sic*] ‘Shift Differential Pay,’ and, by

definition, it applies to shift work. It is not an overtime ‘bonus’ which is what the appellants want the MERB to interpret it to be.” The Agency concludes “there must be a defined night shift” to which the employee is assigned, but “there was no designated night shift as of November, 2015 for [Kwasnieski’s Engineering Planning Survey Technician III] position.”

The Merit Rules, however, do not define what constitutes a “shift,” much less require that it be “defined” or “designated.” The Board will not graft those terms onto the Merit Rules. Rather, the Board will engage in a close textual analysis of the plain language of the Merit Rules as written.

The definition of “Night Shift” in Merit Rule 19.0 requires that the employee work “four or more hours of work between the hours of 6:00 p.m. and 8:00 a.m. the following day.” Merit Rule 19.0 defines “night shift” by reference to only two criteria: it is a “shift” if four or more hours are worked, and it is at “night” if those four or more hours are worked between 6:00 p.m. and 8:00 a.m. the following day.

The language of Merit Rule 4.15.4 supports this construction. Merit Rule 4.15.4 distinguishes between: (1) employees who work a “fixed night” shift and are entitled to differential pay “for all periods of overtime service”; and (2) employees who are not on a fixed night shift and are entitled to differential pay only “for entire periods of overtime service once the minimum four hour requirement of 4.15.2 are met.” Merit Rule 4.15.4 applies both to a “single” shift assignment as well as to a “recurring” shift assignment, not just to a “fixed” or regular, non-overtime night shift.

The Merit Rules therefore provide for differential pay for an employee who works a single night shift. “For purposes of shift differential eligibility, each period of work during employees’ regular schedule and each period of overtime service will be considered separately.” Merit Rule 4.15.4

For example, if an employee works a regular day shift (8 a.m.– 4:00 p.m.), but is then authorized to work overtime until 10:00 p.m., that is a single night shift for which he is entitled to a shift differential because the minimum four hour requirement (6:00 – 10:00 p.m.) is met. The period of overtime service must be considered separately from the employee’s regular day shift for purposes of shift differential eligibility.

The Merit Rules provide for differential pay for “working inconvenient hours and schedules”. It is undoubtedly inconvenient for an employee, who works a day shift, to work four or more hours at night on top of that, often with short notice. As a matter of public policy, the Board believes that it is to the benefit of the parties, and to the Merit System of Personnel Administration, to interpret the Board’s own rules in a case of first impression to provide a “bright line” to determine when a classified employee is entitled to differential pay for night work. The Board believes the plain language of Merit Rule 19.0 provides such a “bright line”: a “night shift” is four or more hours worked between 6:00 p.m. and 8:00 a.m. the following day.

A different interpretation would lead to unreasonable results. For example, an employee who works a regularly scheduled shift of 11 p.m. to 7 a.m. (eight non-overtime hours) would receive the shift differential premium, but an employee like Kwasnieski, who worked fourteen hours straight on October 8, 2015 (four of them during the period defined as a “night shift”), would not. The Merit Rules “must be interpreted to achieve a common sense result and to avoid a construction that would lead to unreasonable or absurd results.” *Bramsfield v. State*, No. 79, 2008, at p. 7 (Del., July 1, 2008).

The Board concludes as a matter of law that, read together, the Merit Rules governing shift differential premium pay apply whenever an employee works four or more hours between 6:00 p.m. and 8:00 a.m. Merit Rule 4.15.2 makes it clear that once this four hour criteria is met, the

employee “shall receive supplemental pay for the entire shift equal to 5% of their paygrade mid-point.”

The Board concludes as a matter of law that Kwasnieski is entitled to shift differential premium pay for the hours worked between 4:00 p.m. and 10:15 p.m. on October 8, 2015. For any overtime worked during those hours, Merit Rule 4.20 provides that the “hourly rate of pay for overtime . . . includes shift differential.” Merit Rule 4.20.³

ORDER

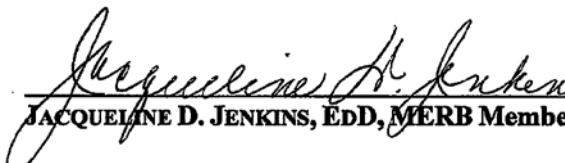
It is this 1st day of **November, 2017**, by a unanimous vote of 4-0, the Decision and Order of the Board to grant Kwasnieski’s grievance. The Board finds the Grievant met his burden to establish DOT violated Merit Rules 4.15.1, 4.15.2, and 4.15.4 and therefore he should be paid shift differential for the hours worked between 4:00 p.m. and 10:15 p.m. on October 8, 2015, calculated as set forth in Merit Rule 4.20.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Membe



VICTORIA D. CAIRNS, MERB Member

³ Merit Rule 4.20: Computing Overtime Pay. The hourly rate of pay for overtime, holiday and call-back payment purposes includes shift differential, stand-by and hazardous duty pay.