

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

ROBERT PEARSON,)	
)	
Employee/Grievant,)	DOCKET No. 16-11-662
)	
v.)	DECISION AND ORDER
)	
DELAWARE DEPARTMENT OF TRANSPORTATION,)	
)	
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 at the Delaware Public Service Commission, 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.
on behalf of Employee/Grievant
Robert Pearson

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

PROCEDURAL HISTORY

The Board initially heard this case on March 16, 2017 right after a hearing in a companion case, *Kwasnieski v. Department of Transportation*, MERB Docket No. 16-11-661. 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 matter "under proper circumstances, within a limited period after rendition." 58 A.2d at 895.

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*.

“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 parties. *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. On the day of the hearing, the Agency submitted two additional documents with no objection by the Grievant. (Exhibits D and E).

The Employee/grievant, Robert Pearson (“Pearson”), offered, and the Board admitted into evidence one document marked for identification as Exhibit 1. Pearson 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

Pearson has been employed by DOT for 20 years and currently serves as an Intelligent Transportation Systems (“ITS”) Technician IV. His primary duties include constructing and

installing traffic signals, traffic cameras and other transportation related electronic systems. Pearson's contracted regular daily hours of work are 7:00 a.m. to 3:00 p.m., Monday through Friday.

Between one and three times each month, Pearson and a second ITS Technician are assigned to a crew responsible for rebuilding traffic intersections. This work is usually scheduled two weeks in advance and is always conducted at night in order to create less disturbance to traffic through the intersection being repaired or rebuilt. There is, however, no defined "night shift" for this work unit. Although a period of time is set forth in which each rebuild project is to be completed, the crew usually arrives before the scheduled starting time to set up and prepare for the work, and the work may take longer than anticipated. At no time has Pearson been permitted to flex his schedule to do this work; he always works a full regular work day before beginning his work on a scheduled intersection rebuild. Until November 9, 2015, he had always received the 5% shift differential for any intersection rebuild work that extended to or beyond 10:00 p.m.

On November 9, 2015, Pearson was scheduled and worked his normal work hours from 7:00 a.m. through 3:00 p.m., during which he wired a signal cabinet in the DOT shop. At 3:00 p.m. he reported, as directed, to an intersection which was scheduled to be rebuilt. Although the crew (including Pearson) initiated the work as scheduled, rain made it impossible to complete the work and the job was cancelled at 10:00 p.m. As in the past, Pearson requested the 5% shift differential premium for the hours he worked between 3:00 and 10:00 p.m. He was paid for the seven hours of overtime he worked beyond his regular hours, but DOT denied him the requested shift differential premium for those seven hours of work.

The project was rescheduled for November 16, 2015. Again, Pearson worked his regular 7:00 a.m. to 3:00 p.m. shift. He then reported to the intersection where he continued to work

from 3:00 p.m. to 2:00 a.m. (on November 17, 2015) in order to complete the project. Pearson requested the 5% shift differential premium for the eleven hours he worked between 3:00 p.m. and 2:00 a.m. DOT denied him the requested shift differential premium. For the nineteen hours he worked on November 16, 2015, Pearson was paid his normal wage rate for the eight hours between 7:00 a.m. and 3:00 p.m., and was paid an overtime rate for the eleven hours worked between 3:00 p.m. to 2:00 a.m.

Because this case was heard immediately following the related hearing in *Kwasnieski*, the parties agreed to incorporate the testimony on DOT Labor Relations Manager Dina Burge into this record, without the necessity to have her testify again on the same questions. In the *Kwasnieski* decision, the Board found the following facts based on her testimony and the review of admitted documents:

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 Pearson’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.” According to the agency, “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 [Pearson’s] position [Transportation Systems Technician IV].”

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 were worked, and it is at “night” if those four or more hours were 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 does not work a regular, non-overtime night shift, but 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 then is authorized to work overtime until 10:00 p.m., that is a single night shift to which he is entitled to shift differential because the minimum four hour requirement between 6:00 p.m. and 8:00 a.m. (i.e., 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” at night. 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 Pearson, who worked twenty-three hours straight on November 16-17, 2015 (eight of them at night, i.e., after 6:00 p.m.), 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 differential pay apply whenever an employee works four or more hours between 6:00 p.m. and 8:00 a.m.

The Board concludes as a matter of law that Pearson is entitled to shift differential premium pay for the hours he worked between 3:00 p.m. and 10:00 p.m. on November 9, 2015, and between 3:00 p.m. on November 16 and 2:00 a.m. on November 17, 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 4.20.²

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 Pearson’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 3:00 p.m. and 10:00 p.m. on November 9, 2015, and between 3:00 p.m. on November 16 and 2:00 a.m. on November 17, 2015, calculated as set forth in Merit Rule 4.20.

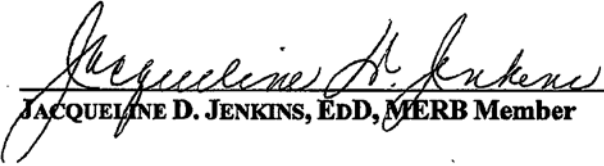


W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member

² 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.


JACQUELINE D. JENKINS, EDD, MERB Member


VICTORIA D. CAIRNS, MERB Member