BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF: THOMAS J. SMITH, Appellant, V. FAMILY COURT OF THE STATE OF DELAWARE, Employer/Agency.	)))))))))	DOCKET NO. 07-07-395 **DECISION AND ORDER ON MOTION TO DISMISS**

BEFORE Brenda C. Phillips, Chairperson, Joseph D. Dillon, and Martha Austin, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES:

For the Appellant:
Mark E. Belland, Esquire
O'Brien, Belland & Bushinsky, L.L.C.
2111 New Road, Suite 101
Northfield, NJ 08225

For the Agency:
Kevin R. Slattery, Esquire
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

NATURE AND STAGE OF THE PROCEEDINGS

This grievance appeal was filed with the Merit Employee Relations Board ("Board") on July 26, 2007 following a Step Three grievance decision dated July 9, 2007 adverse to the Appellant. *See* Merit Rule No. 18.0. The Appellant alleged that he is entitled to pay at the rate of time and a half under Merit Rule No. 4.14.2 for working on January 2, 2007, which was declared a holiday by the Governor, to recognize the death of President Gerald Ford.

By motion dated August 7, 2007, the Agency moved the Board to dismiss the grievance for mootness and for failure to state a claim upon which relief may be granted.

A Legal Hearing was scheduled for September 6, 2007, but continued at the Appellant's request.

The Agency's Motion to Dismiss was heard before the Board on October 11, 2007. By unanimous vote of the members hearing the argument, the Board determined to grant the Motion to Dismiss the appeal.

RELEVANT MERIT RULES

MERIT RULE NO. 4.14.2

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 a combination of the two at agency discretion.

MERIT RULE NO. 5.1.1

The following days are legal holidays for employees: New Year's Day; Martin Luther King, Jr. Day; Presidents' Day; Good Friday; Memorial Day; Independence Day; Labor Day; Columbus Day; Veterans' Day; General Election Day: Thanksgiving Day; Day after Thanksgivng; 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.

SUMMARY OF ARGUMENT

Based upon its Motion to Dismiss, the Agency argued the grievance was moot and failed to state a claim upon which relief can be granted. On Friday, December 29, 2006, the Governor of Delaware issued Executive Order No. 94, which gave Executive Branch merit employees the day off on January 2, 2007 as a State holiday to mourn Pres. Ford's death. The Judicial Branch did not receive this notice until 3:35 p.m. on Friday, December 29, 2006 and therefore, did not have sufficient time to contact court officials, employees, litigants, and parties to inform the various courts would be closed January 2nd. The Chief Justice of the Delaware Supreme Court, who heads the Judicial Branch, chose alternatively to designate President Ford's birthday as the compensating day-off for

judiciary employees; this day-off was held on Friday, July 13, 2007. A copy of the Chief Justice's Administrative Directive No. 161 was admitted as Agency Exhibit #1. The Agency argued that the Governor's declaration of a State holiday did not necessarily require the other branches of government, the Judicial and Legislative Branches, to follow the Governor's orders or directives. Because an alternative compensating day-off was afforded, the Appellant no longer had a cause of action as he received the holiday other State employees received, albeit on a different date. Granting the Appellant's requested relief would amount to a windfall and lead to an unreasonable and absurd result. Executive Order No. 94 was expressly limited to State facilities subject to Executive Branch authority, and the Judicial Branch is not subject to the Governor's authority. The Administrative Directive also indicated that the proclamation resulted from unique and unusual circumstances that were unlikely to reoccur.

The Appellant, through counsel, argued that there are no factual disputes here, but requested that the motion be denied. Mr. Smith is a classified, non-exempt employee. A copy of the Executive Order issued by the Governor, admitted as Appellant Exhibit #1, stated that it was made pursuant to Merit Rule No. 5.1.1. The Appellant believed it was a separate issue as to whether or not the Governor had control over the Judicial Branch, and did not believe it was necessary for the Board to decide that issue, as part of its consideration. Administrative Directive No. 161, from Chief Justice Steele, was an acknowledgement of the Governor's Executive Order No. 94. Under the Merit Rules, if an employee works on a scheduled holiday, which includes a holiday proclaimed by the Governor as a legal holiday, they receive time and a half as provided in Merit Rule No. 4.14.2. The Appellant argued that Rule Nos. 4.14.2 and 5.1.1 are unambiguous and his interpretation and requested relief would not lead to an absurd result.

DISCUSSION AND CONCLUSION

This matter involves an interpretation and application of the Merit Rules to the facts presented. The principles and process of construing a regulatory provision follows the same principles as those for statutory interpretation. *Univ. of Delaware v. New Castle*

County Dept. of Land Use, 2003 WL 220509, at *6 (Del. Super.); *New Castle County v. Chrysler Corp.*, 681 A.2d 1077, 1081 (Del. Super. 1995).

Under principles of statutory construction, the basic rule is that when a statute as a whole is unambiguous, there is no reasonable doubt as to the meaning of the words used and the Court's role is then limited to an application of the literal meaning of the words. *Delaware Solid Waste Authority v. The News Journal Co.*, 480 A.2d 628, 634 (Del. 1984). However, when a statute is ambiguous and its meaning may not be clearly ascertained, the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant. *Carper v. New Castle County Bd. of Education*, 432 A.2d 1202, 1205 (Del. (1981).

Ambiguity can be found where a statute is reasonably susceptible of different conclusions or interpretations, or where giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature. *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985). As the Delaware Supreme Court stated:

> The golden rule of statutory interpretation to which we refer is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.

Id. at 1247.

Applying these principles to the rules at issue and the undisputed facts, Merit Rule 4.14.2, by its terms, looks to the determination of time and a half for holiday pay entitlements. In this instance, the issue concerns the entitlement of this pay rate where an alternative day was provided for being off work, with pay.

Executive Order No. 94 (Appellant Exhibit #1) indicated that January 2, 2007 was proclaimed by the Governor to be a holiday and that public facilities of the State subject to the Governor's authority were to be closed Tuesday, January 2, 2007. Appellant relies upon this Executive Order to argue that because January 2, 2007 was declared to be a

holiday, and he worked that day, he should be paid time and a half. This argument is based upon a limited reading of the Executive Order, narrowed to the provision stated in the paragraph numbered 1.[1] Also, inherent with this argument is the reasoning that this Executive Order applied to Appellant as an employee of the Judicial Branch. This reasoning overlooks the language that the Governor's proclamation applied to State public facilities that were "*subject to the Governor's authority.*" (emphasis added). Based upon the record presented, it was undisputed that the Governor's authority applies to the Executive Branch, and that the Appellant was an employee of the Judicial Branch.[2]

In addition, the Appellant received a comparable day off work on July 13, 2007. By Administrative Directive No. 161, employees of the Judicial Branch who worked January 2, 2007 received a day off on July 13, 2007. There was no allegation presented that the Appellant was required to work on July 13th or take annual leave that day. The Appellant suffered no loss as a result of the circumstances here.

Applying principles of construction and based upon the arguments and documents presented, the Board concludes that following Appellant's interpretation here would lead to an unreasonable result, and therefore, reject that interpretation in favor of one that does produce a reasonable conclusion. *Coastal Barge Corp., supra,* at 1247.

---

[1] The paragraph states, "1. Tuesday, January 2, 2007 is declared a State holiday pursuant to Merit Rule 5.1.1."

[2] The Appellant argued that it was a separate issue as to whether or not the Governor had control over the Judicial Branch and did not believe it was necessary for the Board to decide that issue, as part of its consideration. The Board does not decide this issue or any issue concerning the separation of powers, given the Board's statutory authority, functions and duties. 29 *Del.C.* Ch. 59.

ORDER

It is this 22nd day of April, 2009, the Decision and Order of the Board that the Department's Motion to Dismiss is granted and the grievance appeal is dismissed.

BY ORDER OF THE BOARD:

Brenda C. Phillips, Chairperson

Joseph D. Dillon, Member

Martha Austin, 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.

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: May 1, 2009

Distribution:
Original: File
Copies: Appellant
Agency's Representative