



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,
DEPARTMENT OF
TRANSPORTATION,

Employer-Below/Appellant,

v.

JAMES KWASNIESKI,

Employee-Below/Appellee,

MERIT EMPLOYEE RELATIONS
BOARD,

Appellee.

C.A. No. N17A-12-001 JRJ

[CONSOLIDATED APPEALS]

STATE OF DELAWARE,
DEPARTMENT OF
TRANSPORTATION,

Employer-Below/Appellant,

v.

ROBERT PEARSON,

Employee-Below/Appellee,

MERIT EMPLOYEE RELATIONS
BOARD,

Appellee.

OPINION

Date Submitted: July 9, 2018
Date Decided: August 13, 2018

Upon DelDOT's Appeal: **REVERSED and REMANDED.**

Kevin R. Slattery, Esquire of Delaware Department of Justice, 820 North French Street, Wilmington, Delaware, Deputy Attorney General, Attorney for Appellant Delaware Department of Transportation.

Lance Geren, Esquire of Freedman and Lorry, P.C., 91 Christiana Road, New Castle, Delaware, Attorney for Appellants-Below/Appellees James Kwasnieski and Robert Pearson.

Jurden, P.J.

I. INTRODUCTION

Through consolidated appeals of November 1, 2017 Merit Employee Relations Board (“MERB”) rulings, the Delaware Department of Transportation (“DelDOT”) asks the Court whether “*shift* differential pay,” which is “compensation for working inconvenient hours and schedules as authorized at the agency’s discretion,”¹ is owed only to employees who work inconvenient shifts, or all employees who work at least four night-designated hours,² by happenstance or otherwise. This is the first time the Court has been asked to interpret the word “shift.” As a question of law, this matter of first impression demands *de novo* review.³

In considering the appeal, the Court must determine whether the MERB’s decision to award shift differential pay to Appellees is supported by substantial evidence and free of legal error. The Court finds it is not. Upon *de novo* consideration of the pleadings before the Court, oral argument, and the record below, the Court finds the MERB’s interpretation of “shift” to be clearly wrong. Accordingly, the MERB decisions dated November 1, 2017 are **REVERSED and REMANDED**.

¹ Merit Rule 4.15.1.

² “Night-designated hours” are the hours between 6:00 p.m. and 8:00 a.m. the following day. *See* Merit Rule 19.0.

³ Record Tr. Dated Jan. 3, 2018, 3:17–20 (Trans. ID 61540087) (D.I. 4); Answering Br. at 7 (Trans. ID 61890874) (D.I. 19).

II. FACTS

Appellees James Kwasnieski and Robert Pearson are DelDOT employees who were awarded shift differential pay by the MERB. On October 8, 2015, Kwasnieski worked his regular daytime shift, which ended at 4:00 p.m., and continued to work until 10:15 p.m. due to unanticipated circumstances. Kwasnieski's supervisor instructed him to work overtime until a specific project was complete. He received overtime pay for the hours worked beyond his daytime shift, but DelDOT rejected his request for shift differential pay.⁴

On November 9, 2015 and November 16, 2015, Pearson worked his normal shift, which ended at 3:00 p.m., and he continued to work until 10:00 p.m. and 2:00 a.m., respectively. He received overtime pay for the hours worked beyond his daytime shift, but DelDOT rejected his request for shift differential pay.⁵

Kwasnieski and Pearson filed individual grievances regarding their shift differential pay denials. The grievances were denied at the DelDOT appeal level on December 2, 2015 for Kwasnieski and December 14, 2015 for Pearson, and by a final DelDOT decision dated February 12, 2016.⁶ Kwasnieski and Pearson appealed, and the matters were heard jointly by the Office of Management and Budget, Human

⁴ Opening Br. at 1 (Trans. ID 61866372) (D.I. 18).

⁵ *Id.*

⁶ *Id.* at 1–2.

Resources Management (“OMB”) on August 16, 2016.⁷ The OMB hearing officer denied the grievance appeals in a decision dated November 7, 2016.⁸ Thereafter, on November 22, 2016, Kwasnieski and Pearson filed their appeals to the MERB.⁹

The MERB held *de novo* evidentiary hearings on the appeals on March 16, 2017. Kwasnieski’s grievance was denied, but Pearson’s was upheld.¹⁰ On April 6, 2017, the MERB *sua sponte* moved to re-open the appeals, and sought memoranda from the parties:

[BOARD CHAIR]: [A] decision has not issued in the case with the findings of facts, the conclusions of law, and all of that. And I personally felt a little jammed that day, not from any external or anything. It’s just we heard the case, we deliberated for hours. And I just felt that, I guess, we need to decide it and whatnot. And with 20-20 hindsight, I think I would have just said let’s take it under advisement and come back and think about it some more. But what’s done is done. But it did occur to me after that that there might be a possibility of rehearing the case....¹¹

[...]

[W]e would start from square one and resubmit your papers, the State’s motion to dismiss, and the various exhibits or whatnot. When the Board administrator advises counsel of the new hearing date, we will ask that the counsel have a simultaneous exchange of letter memoranda not to exceed four pages, involving – that would be setting forth your interpretation of the application of the relevant Merit Rule, both the differential

⁷ *Id.* at 2.

⁸ *Id.*

⁹ Opening Br. at 2.

¹⁰ *Id.*

¹¹ Record Tr. Dated Jan. 3, 2018, 4:15–21.

pay rule and Merit Rule 19, which has a definition of late shift or night shift, I think it is.¹²

De novo evidentiary hearings were, for the second time, held on August 3, 2017,¹³ and by decisions dated November 1, 2017, the MERB upheld both Pearson's and Kwasnieski's grievances based upon its conclusion that time worked "is a 'shift' if four or more hours are worked...."¹⁴

DelDOT perfected its appeal of the MERB rulings and the MERB decision to rehear the cases on December 1, 2017. The Court granted a Motion to Stay the MERB's order on February 20, 2018, and a joint stipulation to consolidate the Kwasnieski and Pearson appeals was granted on March 20, 2018. Oral argument was held before the Court on July 9, 2018.

III. PARTIES' CONTENTIONS

DelDOT contends the MERB committed error of law by not adopting the plain meaning of the word "shift," and failing to consider shift differential provisions in related statutes or regulations.¹⁵ DelDOT further argues the MERB may have abused its discretion when it ordered the Kwasnieski and Pearson cases be reheard.¹⁶ Appellees argue that the MERB defined "shift" correctly, DelDOT is attempting to

¹² *Id.* at 6:6–18.

¹³ Opening Br. at 2.

¹⁴ Opening Br. Ex. A ("Pearson Final MERB Decision") at 9.

¹⁵ Opening Br. at 9–14.

¹⁶ *Id.* at 15–17.

create its own bright-line rule, they are entitled to shift differential pay, and the MERB did not abuse its discretion in rehearing the cases and, even if it did, DelDOT waived this argument.¹⁷

IV. STANDARD OF REVIEW

When considering an appeal of a MERB decision, the Court must determine whether the Board's decision is supported by substantial evidence and free from legal error.¹⁸ Statutory interpretation presents a question of law, which is reviewed *de novo*.¹⁹ The Court does not weigh evidence, determine questions of credibility, or make its own factual findings.²⁰ Though "[j]udicial deference is usually given to an administrative agency's construction of its own rules in recognition of its expertise in a given field," the Court will disturb an agency's interpretation of its rules when that interpretation is "clearly wrong."²¹

V. DISCUSSION

"Shift differential is pay for working inconvenient hours and schedules as authorized at the agency's discretion."²² Generally, employees are eligible for shift

¹⁷ Answering Br. at 8–11, 14.

¹⁸ *Avallone v. State/Dept. of Health and Social Services*, 14 A.3d 566, 570 (Del. 2011); *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981); *Unemployment Ins. Appeal Bd. of Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

¹⁹ *Ward v. Dep't of Elections*, 2009 WL 2244413, at * 1 (Del. Super. July 27, 2009).

²⁰ See *PAL of Wilmington v. Graham*, 2008 WL 2582986, at *3 (Del. Super. June 18, 2008).

²¹ *Div. of Soc. Servs. V. Burns*, 438 A.2d 1227, 1229 (Del. 1981).

²² Merit Rule 4.15.1.

differential pay when “authorized by agencies to work night shifts....”²³ “[A] night shift for these purposes shall be a shift which includes four or more hours of work between the hours of 6:00 p.m. and 8:00 a.m. the following day.”²⁴ This appeal turns on the definition of “shift.”

DelDOT argues that the MERB’s definition of “shift,” “four or more hours...worked,”²⁵ does not comport with the Merit Rules or the plain meaning of the word. Appellees ask the Court to adopt the MERB’s interpretation of shift, which is derived from the Merit Rules definition of “night shift.”²⁶ According to Appellees, any other interpretation of “shift” would yield unreasonable results.²⁷

A. The Plain Meaning of “Shift”

At the outset of a statutory interpretation case, the Court must determine whether the provision in question is ambiguous.²⁸ Ambiguity exists when a statute is susceptible of two reasonable interpretations.²⁹ If the statute is unambiguous, there is no need for judicial interpretation, and the plain meaning of the statutory language controls.³⁰ If it is ambiguous, the Court must “consider the statute as a

²³ Merit Rule 4.15.2.

²⁴ Merit Rule 19.0.

²⁵ Pearson Final MERB Decision at 9.

²⁶ Answering Br. at 8–10.

²⁷ See *id.* at 12; see also Pearson Final MERB Decision at 10.

²⁸ *Doroshov, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hosp., Inc.*, 36 A.3d 336, 342 (Del. 2012).

²⁹ *Id.* (citing *CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011)).

³⁰ *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999).

whole, rather than in parts, and [the Court reads] each section in light of all others to produce a harmonious whole.”³¹

As mentioned, the term “shift” is not defined in the Merit Rules. Merriam Webster’s Dictionary provides a number of definitions for “shift.”³² Three definitions are relevant to the Court’s analysis because they relate to work. Shift can be defined as “a scheduled period of work or duty.”³³ A reasonable interpretation of the Merit Rules based on this definition suggests that a shift is a period of work scheduled by the agency. Under this definition, a shift could reasonably include four or more night-designated hours.³⁴ On the other hand, shift is also defined as “a group of people who work or occupy themselves in turn with other groups,” and “a change of one group of people (such as workers) for another in regular alternation.”³⁵ These definitions imply that a group of workers, or a change of a group of workers, could comprise four or more night-designated hours.³⁶ Because the latter definitions lead to unreasonable results, the Court finds that the first definition of shift is the only reasonable interpretation of the statute. “According to the golden rule of statutory interpretation, ‘unreasonableness of the result produced by one among alternative

³¹ *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).

³² *See Doroshow*, 36 A.3d at 343.

³³ *Shift Definition*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/shift> (last visited August 2, 2018).

³⁴ *See* Merit Rule 19.0 (definition of “night shift”).

³⁵ *Shift Definition*, *supra* note 33.

³⁶ *See* Merit Rule 19.0 (definition of “night shift”).

possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.”³⁷ Thus, the plain meaning of shift, “a scheduled period of work,” controls.

Interpreting “shift” in a different way – for example, by adopting the MERB’s interpretation of “shift” – would exceed the Court’s mandate, which is to interpret the actual language of the Merit Rules and avoid rewriting them.³⁸ In other words, had the drafters of the Merit Rules intended to define “shift” as something different than its plain meaning, they would have done so in Merit Rule 19.0. The MERB’s decision to split the definition of “night shift” to define “shift” as “four or more hours...worked”³⁹ was an arbitrary decision that violated the plain meaning rule. In doing so, the MERB effectively interpreted “a shift which includes” as “a shift is.”⁴⁰ Such rewriting of the Merit Rules is impermissible.

B. The MERB’s Interpretation of “Shift” Produces Unreasonable Results

As noted above, the law favors rational and sensible construction.⁴¹ The public policy purpose of shift differential pay is to incentivize and encourage workers who work undesirable hours and schedules, such as night shifts and

³⁷ *Doroshow*, 36 A.3d at 343 (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985)).

³⁸ See *Taylor*, 14 A.3d at 542 (citing *State Farm Mut. Auto Ins. v. Patterson*, 7 A.3d 454, 465 (Del. 2010) (Steele, C.J. and Jacobs, J., dissenting)).

³⁹ Pearson Final MERB Decision at 9.

⁴⁰ Merit Rule 19.0 (definition of “night shift”).

⁴¹ See *Doroshow*, 36 A.3d at 343.

weekend shifts.⁴² The MERB's definition for "shift," four or more hours worked, produces unreasonable results when considering the Merit Rules as a whole. For instance, the MERB argues it would be unreasonable for an employee who regularly works an eight-hour shift during night-designated hours to receive shift differential pay, while another employee, who works four night-designated hours of overtime in addition to his regular daytime eight-hour shift, would not.⁴³ However, awarding shift differential pay to the latter employee effectively eliminates the incentive for the first employee to work an undesirable schedule. Moreover, the latter employee in the MERB's hypothetical would be entitled to overtime pay, while the night shift employee would not. Therefore, the MERB's interpretation of "shift" is clearly wrong. Applying the plain meaning of "shift" yields reasonable results and does not offend other Merit Rules that govern shift differential pay.⁴⁴

C. The Plain Meaning of "Shift" and "Shift Differential Pay"

When applying the plain meaning of "shift" to shift differential pay provisions, the Merit Rules provide that an employee is entitled to shift differential pay when he or she works a period of work that is scheduled by the Agency and that

⁴² Merit Rule 4.15.1.

⁴³ Pearson Final MERB Decision at 10.

⁴⁴ Employees on fixed shifts, rotating shifts, single shift assignments, recurring shift assignments can still be eligible for shift differential pay. *See* Merit Rule 4.15. The Court notes there was confusion regarding the purpose of Merit Rule 4.15.4 at oral argument. Applying the plain meaning of "shift," Merit Rule 4.15.4 clarifies that an employee who is temporarily assigned to a fixed shift can be eligible for shift differential pay. It was made clear at oral argument that an employee can be assigned a single shift and not be on a fixed or rotating shift.

period of work includes at least four hours between 6:00 p.m. and 8:00 a.m. the following day.⁴⁵ On remand, in addition to applying the plain meaning of “shift,” the distinction between the terms “supervisor” and “agency” in the Merit Rules must be considered.⁴⁶

D. The MERB Did Not Abuse Its Discretion in Rehearing the Matters

The Court does not find that the MERB abused its discretion in rehearing the instant matters, although the circumstances were somewhat unusual. Despite apparent “remorse” for initially denying Kwasnieski’s appeal while upholding Pearson’s appeal,⁴⁷ the MERB pushed forward based on a need “to clean it up somehow.”⁴⁸ The record suggests the MERB’s decision to rehear the Kwasnieski and Pearson appeals was made notwithstanding confusion about the applicable standard of review.⁴⁹

⁴⁵ See Merit Rule 4.15.2.

⁴⁶ Compare Merit Rule 5.3.6 (“Upon supervisory approval...”), with Merit Rule 5.2.2 (“subject to agency approval...”). Furthermore, Merit Rule 19.0 provides two distinct definitions for “Agency” and “Supervisor.” This is significant for deciding whether an employee, whose “supervisor directed him” to work overtime, is eligible to receive shift differential pay. See Final MERB Decision at 5.

⁴⁷ Record Tr. Dated Jan. 3, 2018, 9:7–10.

⁴⁸ *Id.*, 8:16–18. Appellant also alleges a MERB member compared the State of Delaware to bank robbers during a hearing on these matters.

⁴⁹ *Id.*, 19:9–14. The transcript provides the following:

[MERB member]: Motion to rehear the two cases in question.

[Chairperson]: Rehear *de novo*? Rehear *de novo*?

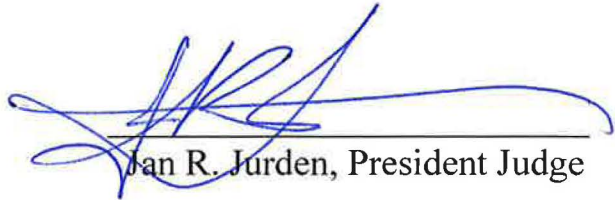
[MERB member]: Yeah. Whatever that means.

Nevertheless, administrative bodies are governed by both the requirements of due process and the Administrative Procedures Act.⁵⁰ “In the exercise of quasi-judicial or adjudicatory administrative power, administrative hearings, like judicial proceedings, are governed by fundamental requirements of fairness which are the essence of due process, including fair notice of the scope of the proceedings and adherence of the agency to the stated scope of the proceedings.”⁵¹ Here, the MERB decided a rehearing was necessary for fairness and due process, and the Court will not second guess the MERB on this issue.

VI. CONCLUSION

For all these reasons, the MERB decisions dated November 1, 2017 regarding James Kwasnieski and Robert Pearson are hereby **REVERSED**. The cases are **REMANDED** to the MERB for further proceedings consistent with this Opinion.

IT IS SO ORDERED.



Jan R. Jurden, President Judge

Original to Prothonotary

cc: Kevin Slattery, Esq.
Lance Geren, Esq.

⁵⁰ 29 Del. C. § 10101 et seq.; see also 29 Del. C. § 10161(a)(12).

⁵¹ *Phillips v. Delhaize America, Inc.*, 2007 WL 2122139, at *2 (Del. Super. July 20, 2007). Boards are also required to maintain a record, and file the entire record with the Court upon appeal. See 29 Del. C. § 10127. Here, Appellant claims the entirety of the records on appeal were not filed with the Court. If true, it would indeed concern the Court, however, Appellant’s counsel agreed at oral argument that it was not the primary question before the Court. The primary issue on appeal was a question of law which was resolved by applying the plain meaning of the word “shift.”