

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

<b>JOHN WYATT,</b>	)	
	)	
Employee/Grievant,	)	
	)	<b>DOCKET No. 18-11-706</b>
v.	)	
	)	<b>DECISION AND ORDER</b>
<b>DELAWARE DEPARTMENT OF CORRECTION,</b>	)	
	)	
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 7, 2019, at the Delaware Public Service Commission, 861 Silver Lake Boulevard, Dover, DE 19904.

**BEFORE** W. Michael Tupman, Chair; Paul Houck, Jacqueline Jenkins, Victoria Cairns, and Sheldon Sandler, Esq., 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.  
O'Donoghue & O'Donoghue  
on behalf of the Employee/Grievant

Kevin Slattery  
Deputy Attorney General  
on behalf of the Delaware  
Department of Correction

**BRIEF SUMMARY OF THE EVIDENCE**

The Board heard legal argument on the motion by the Department of Correction (“Agency”) to dismiss the grievance for lack of jurisdiction.

The Agency submitted three exhibits, marked A through C, in support of its motion. The Grievant, John Wyatt (“Wyatt”), submitted two exhibits, marked 1 and 2. The Board did not hear testimony from any witnesses.

**FINDINGS OF FACT**

Wyatt is employed by the Agency as a Correctional Officer, Pay Grade 7. He has held this position over thirty years. He is assigned to the Sussex Correctional Institution where he works the midnight to 8:00 a.m. shift. He has worked this shift for over twenty years. His position is represented for purposes of collective bargaining by the Correctional Officers Association of Delaware.

The State of Delaware Department of Correction and the Correctional Officers Association of Delaware (“union”) are parties to a collective bargaining agreement with a term of July 1, 2017 through June 30, 2019. Included within that agreement are salary tables for wages to be paid to bargaining unit employees in Fiscal Year 2018 (7/1/17 – 6/30/18) and Fiscal Year 2019 (7/1/18 – 6/30/19). The FY 2019 negotiated scale for Correctional Officers, Pay Grade 7, is:

Job Classification	0 – 9.5 weeks	9.5 weeks – 2 years	2 – 5 years	5 – 10 years	10 – 15 years	15 – 20 years	20+ years
CO I PG 7 (Correctional Officer, CO/Laundry Operator, CO/Storekeeper I)							
Total Entry Base or Minimum Salary	\$38,380.00	\$43,000.00	\$43,488.80	\$44,479.66	\$46,180.64	\$48,681.09	\$52,120.99

The Correctional Officer Series Job Description (with a latest revision date of 7/1/2018) lists the salary levels for a Correctional Officer (#MBDB01) as: “\$43,000.00 Yearly Min/

\$46,822.00 Yearly Mid/ \$57, 778.00 Yearly Max”.

For FY 2019, Department of Human Resources (“DHR”) created a salary scale<sup>1</sup> which provides, in relevant part:

Title 40.0 hr.	PG	75%	100%	125%	BiWkly	Hrly	5%	BiWkly	Hrly	HRP
Officer	7	43,000.00	46,822.00	57,778.00	1,653.85	20.673077	2341.10	90.04	1.125529	9.00

Because he works the midnight to 8:00 a.m. shift, Wyatt is eligible for and receives a shift differential. The shift differential pay he receives is equal to five percent (5%) of the “Yearly Mid” or “100%”, which DHR determined in the scale it provided to DOC to be \$46,882.00. Pay stubs were submitted for two pay periods in FY 2019, which each indicate Wyatt received a bi-weekly shift differential equal to \$90.04, consistent with DHR’s directive.

### CONCLUSIONS OF LAW

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 midpoint.**

In his grievance, Wyatt asserts the Agency has paid him shift differential based on 5% of a midpoint which was “arbitrarily” determined by DHR and which is not based in any manner on his current wage rate. He notes MR 4.15.2 refers to “5% of their paygrade midpoint”, which he argues should be based on the negotiated wage rate for Correctional Officers. He asserts this violation has been ongoing.

The Agency asserts it has strictly adhered to the requirements of MR 4.15.2, and has paid Wyatt 5% of the midpoint determined by DHR, as communicated to DOC. It argues Wyatt is

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<sup>1</sup> Agency Exhibit C.

asserting the existing MR 4.15.2 is no longer valid as it relates to him because his wage rate is now determined by a negotiated agreement, and not by the rates of pay in the classification system unilaterally established by DHR.

It is clear from reviewing the salary scale for CO Pay Grade 7 created by DHR that what is identified as the midpoint or 100% (\$46,822) is not midway between what purports to be 75% (\$43,000) and 125% (\$57,778). Nor are these numbers consistent with the negotiated wage rates for FY 2019 in the collective bargaining agreement.

Merit Rule 18.2 specifically requires that shift differential compensation be based on the “midpoint” of the “paygrade”. Although the method of determining the wage rate for Correctional Officers may have changed (i.e., wage rates are now negotiated by the State and the union), the merit rule has not changed.

The Board cannot, through adjudication of a grievance, change the merit rule itself. Merit Rule 18.2 states, “...A grievance shall not deal with the substantive policies embodied in the Merit System law.” A grievance is further limited in the grievance definition found in MR 19.0, “...A grievance may not deal with the content of the Rules or the Merit system statute.” (*emphasis added*)

In this case, there is no dispute that DOC did fairly and consistently apply the midpoint as determined and directed by DHR. Whether that midpoint was fairly or appropriately calculated is beyond the scope of this Board’s consideration because the grievance is between Wyatt and DOC.

### **ORDER**

It is this 24<sup>th</sup> day of April, 2019, by a unanimous vote of 5-0, the Decision and Order of the Board to grant the Agency’s Motion to Dismiss. Whether the Department of Human

Resources fairly and appropriately determined the midpoint on which the shift differential for the Grievant was calculated and paid in Fiscal Year 2019, pursuant to MR 4.15.2, is not subject to review by this Board in considering the merits of this grievance.



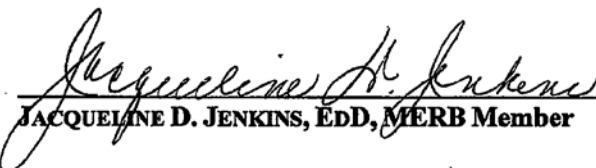
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**W. MICHAEL TUPMAN, MERB CHAIR**



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**PAUL R. HOUCK, MERB Member**



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**JACQUELINE D. JENKINS, EDD, MERB Member**



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**VICTORIA D. CAIRNS, MERB Member**



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**SHELDON N. SANDLER, ESQ., MEMBER**