

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

JAMES KWASNIESKI,)	
)	
Employee/Grievant,)	
)	
v.)	DOCKET No. 16-11-661
)	
DELAWARE DEPARTMENT OF)	DECISION AND ORDER
TRANSPORTATION,)	ON REMAND
)	
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 December 6, 2018 at the Delaware Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Suite 100, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair; Victoria D. Cairns, Member; and Sheldon N. Sandler, Esq., Member, 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.
Daniel Keenan, Esq.
on behalf of James Kwasnieski,
Employee/Grievant

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

PROCEDURAL HISTORY

On November 1, 2017, the Board issued a Decision and Order in this case and in a companion case, *Pearson v. Delaware Department of Transportation*, MERB Docket No. 16-11-662, granting the grievances and awarding the grievants shift differential pay.

The Delaware Department of Transportation (“DOT”) appealed both decisions of the Board to the Superior Court and the Court consolidated the two cases for appeal. In an Opinion dated August 13, 2018, the Court reversed and remanded to the Board “for further proceedings consistent with this Opinion.”

The Court held that the Board committed legal error in its interpretation of the undefined term “shift” in the Merit Rules. The Court looked to a dictionary definition of “shift” to mean “a scheduled period of work or duty.” Opinion at 9 (quoting *Merriam-Webster Dictionary*). “A reasonable interpretation of the Merit Rules based on this definition suggests that a shift is a period of work scheduled by the agency.” *Id.* at 9.

The Court held that “the plain meaning of shift, ‘a scheduled period of work,’ controls.” Opinion at 10. According to the Court, “the Merit Rules provide that an employee is entitled to shift differential pay” if two conditions are satisfied: first, “he or she works a period of work that is scheduled by the Agency”; and second, “that period of work includes at least four hours between 6:00 p.m. and 8:00 a.m. the following day.” Opinion at 11-12 (citing Merit Rule 4.15.2).

On remand, the Court directed that, “in addition to applying the plain meaning of ‘shift,’ the distinction between the terms ‘supervisor’ and ‘agency’ in the Merit Rules must

be considered” by the Board. Opinion at 12 (citing Merit Rule 19.0, “which 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.”).

By letter dated September 4, 2018, the Board asked counsel to address in writing the legal issues remanded by the Superior Court for further consideration by the Board. The Board received the parties’ opening memoranda on October 5, 2018 and their reply memoranda on November 5, 2018. On December 6, 2018, the Board heard legal argument on the issues remanded by the Superior Court.

BRIEF SUMMARY OF THE EVIDENCE

The Board incorporates by reference the Brief Summary of the Evidence in its prior Decision and Order in this case.

FINDINGS OF FACT

The Board incorporates by reference the Findings of Fact in its prior Decision and Order in this case.

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 4.15.4 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 will be considered separately.

Merit Rule 19.0 defines the following terms:

“Agency”: any board, department, elected office or commission which receives an appropriation in accordance with 29 *Del. C.* Chapter 59

“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 of work between the hours of 6:00 p.m. and 8:00 a.m. the following day.

“Supervisor”: a person in a position who, on a regular and continuing basis, plans, assigns, reviews, disciplines, recommends hire, termination and promotion and completes and approves performance plans of two or more classified employees excluding casual, seasonal, and contractual employees.

The Board concludes as a matter of law that Kwasnieski was not entitled to shift differential pay under the Merit Rules for the time he worked from 4:00 to 10:15 p.m. on October 8, 2015.

On that day, Kwasnieski reported for work as usual for his 8:00 a.m. to 4:00 p.m. shift in Dover. His supervisor, however, directed him to go to Wilmington to test a batch of hot mix for Diamond State Materials. When he arrived, he learned that the contractor had requested a second batch of hot mix. Kwasnieski notified his supervisor, who directed him

to remain in Wilmington to test the second batch when it was ready. The second batch was not ready until after 7:00 p.m. and Kwasnieski arrived back at his worksite in Dover at 10:15 p.m.

Under these circumstances, the Board does not believe that the overtime worked by Kwasnieski was “a period of work scheduled by the agency.”¹

The Board believes that this was not a shift assignment, pre-scheduled by the agency on a fixed or rotating basis, but rather the agency’s response to an unexpected, last-minute change in the scope of the work required by the contractor. The Board concludes as a matter of law that was not “a period of work scheduled by the agency” as contemplated by the shift differential pay provisions of the Merit Rules.

ORDER

It is this **30th** day of **May**, 2019, by a vote of 2-1, the Decision and Order of the Board to deny Kwasnieski’s grievance.

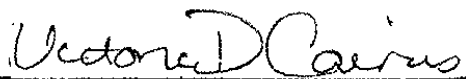


W. MICHAEL TUPMAN, MERB CHAIR



SHELDON N. SANDLER, ESQ., MEMBER

I respectfully dissent.



VICTORIA D. CAIRNS, MERB Member

¹ The Board notes the distinction in the Merit Rules between the definition of an “agency” and a “supervisor,” however, an agency can only act through its individual agents. There is nothing in the record to suggest that Kwasnieski’s immediate supervisor did not have the authority to act on behalf of the agency in assigning Kwasnieski to work overtime on October 8, 2015.