

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

<b>ROBERT PEARSON,</b>	)	
	)	
Employee/Grievant,	)	
	)	
v.	)	<b>DOCKET No. 16-11-662</b>
	)	
<b>DELAWARE DEPARTMENT OF</b>	)	<b>DECISION AND ORDER</b>
<b>TRANSPORTATION,</b>	)	<b>ON REMAND</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 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 Robert Pearson,  
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, *Kwasnieski v. Delaware Department of Transportation*, MERB Docket No. 16-11-661, 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 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 Pearson is entitled to shift differential pay under the Merit Rules.

On November 9, 2015, Pearson was scheduled to work his normal shift as an Intelligent Transportation Systems (“ITS”) Technician from 7:00 a.m. to 3:00 p.m. at the DelDot shop in Dover. His supervisor then directed him to report for work at a traffic intersection that was being rebuilt. Rain delayed the work, and then was cancelled at 10:00 p.m.

DOT rescheduled the project for November 16, 2015. Pearson reported to work at the intersection for his regular 7-3 shift. The work took longer than expected and Pearson

ended up working until 2:00 a.m. the following morning (November 17).

Between one and three times each month, DOT assigned Pearson and a second ITS Technician to help rebuild traffic intersections. This work is usually scheduled two weeks in advance and always conducted at night to minimize traffic disruption. The agency did not call upon Pearson to work overtime in response to unanticipated circumstances. This was a recurring, nighttime shift assignment. <sup>1</sup>

The Board concludes as a matter of law that the time Pearson worked on November 9 and November 16-17, 2015 beyond his normal work hours was a “shift” as defined by the Merit Rules, *i.e.*, a period of work scheduled by the agency. The Board concludes as a matter of law that this time constituted a “night shift” as defined by the Merit Rules because it included at least four hours between 6:00 p.m. and 8:00 a.m. the following day.

### **ORDER**

It is this **30th** day of **May**, 2019, by a unanimous vote of 3-0, the Decision and Order of the Board to grant Pearson’s grievance. The Board orders DOT to pay Pearson shift differential for the time he worked from 3:00-10:00 p.m. on November 9, 2015 and from 3:00 p.m., November 16, 2015 until 2:00 a.m. on November 17, 2015.



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W. MICHAEL TUPMAN, MERB CHAIR



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VICTORIA D. CAIRNS, MERB Member

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<sup>1</sup> The Board notes the distinction in the Merit Rules between the definition of an “agency” and a “supervisor.” Because an agency can only act through its individual agents, the Board does not believe that it matters who in Pearson’s chain-of-command scheduled his recurring nighttime shift.



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