

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

<b>JASON CHADICK,</b>	)	
	)	
Employee/Grievant,	)	
	)	<b>DOCKET No. 20-09-783</b>
<b>v.</b>	)	
	)	
<b>DELAWARE DEPARTMENT OF</b>	)	<b>DECISION AND ORDER</b>
<b>TRANSPORTATION,</b>	)	<b>ON MOTION TO DISMISS</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 9:30 a.m. on April 15, 2021, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904. Pursuant to Governor John Carney’s 27<sup>th</sup> Modification of a State of Emergency Declaration, the parties were provided the opportunity to participate by teleconference.

**BEFORE** W. Michael Tupman, Chair; Paul Houck (by teleconference), Jacqueline D. Jenkins, Ed.D, Victoria Cairns (by teleconference), and Sheldon N. Sandler (by teleconference), Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

Ilona Kirshon (*by teleconference*)  
Deputy State Solicitor  
Legal Counsel to the Board

Deborah L. Murray-Sheppard  
Board Administrator

Jason Chadick (*by teleconference*)  
Employee/Grievant, *pro se*

Victoria Sweeney  
Deputy Attorney General  
on behalf of the Department of Transportation

## **BRIEF SUMMARY OF THE EVIDENCE**

The Delaware Department of Transportation (“Agency” or “DOT”) filed a motion to dismiss the grievance for lack of jurisdiction on March 17, 2021, to which it attached six exhibits.

The Grievant, Jason Chadick (“Grievant”), filed written opposition to the motion on April 5, 2021.

The Board heard legal argument on the motion from both the Agency and the Grievant.

## **BACKGROUND**

Mr. Chadick is employed by DOT as a Highway Equipment Superintendent. On August 5, 2020, he filed a grievance, dated June 30, 2020, alleging that DOT had violated Merit Rules 4.15.1, 4.15.2, and 4.15.4<sup>1</sup> by improperly denying him shift differential payment “[b]eginning in the winter of 2013 into 2014 and since.”

The grievance was dismissed at Steps 1, 2, and 3 of the grievance process without a hearing based on the finding that the grievance had not been timely filed.

On appeal to the MERB the Grievant alleges DOT violated Merit Rules 4.15.1, 4.15.2, and 4.15.4 by improperly denying him shift differential payments for “instances between the years of

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<sup>1</sup> 4.15 Shift Differential Pay

4.15.1 Shift differential is pay for working inconvenient hours and schedules authorized at the agency’s discretion. Shift differential is not authorized for flexible or compressed schedules established at the request of, and for the convenience of, employees even if the requirements of 4.15.2 are met.

4.15.2 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.

4.15.4 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.

January 1, 2014 and January 31, 2020”. His MERB grievance also alleges that DOT violated Merit Rule 1.2<sup>2</sup> “by posting their own policy in regards to guidelines for shift differential”; and that he was denied due process at Steps 1, 2, and 3.

Following the issuance of the Superior Court decision in *DelDOT v. Pearson & MERB* and *DelDOT v. Kwasniewski & MERB*,<sup>3</sup> DOT began paying the shift differential premium to the Grievant on or around mid-May 2020.

### **CONCLUSIONS OF LAW**

Merit Rule 18 states, in relevant part:

- 18.4 Failure of the employing agency to comply with time limits shall automatically move the grievance to the next step unless the parties have a written agreement to delay, or grievants have opposed in writing moving the grievance automatically to the next step. Failure of the grievant to comply with time limits shall void the grievance. The parties may agree to the extension of any time limits or to waive any grievance step. Grievances about demotions for just cause, suspensions or dismissals shall start at Step 2 within 14 calendar days in the manner set forth in 18.7.**
- 18.6 Step 1: Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they could reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor. The following shall occur within 14 calendar days of receipt of the grievance: the parties shall meet and discuss the grievance and the Step 1 supervisor shall issue a written reply.**

The time limits of the grievance procedure are jurisdictional and when a deadline has “passed, the Board ha[s] no jurisdiction to hear [the employee’s] grievance.” *Cunningham v. DHSS*, 1996 WL 190757, at \*2 (Del. Super., Mar. 27, 1996), aff’d, 679 A.2d 462 (TABLE), 1996 WL 313503 (Del., June 3, 1996). The Board does not have jurisdiction to consider an untimely

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<sup>2</sup> Merit Rule 1.2 In the event of conflict with the Delaware Code, the Code governs. In the event of conflict with individual agency regulations, these rules take precedence. In the event of conflict with Intergovernmental Merit System Standards, the Standards govern federally funded positions subject to the provisions of the Intergovernmental Personnel Act. Federal laws supersede any conflicting state laws.

<sup>3</sup> 2020 WL 2520632 (Del. Super. Ct. May 15, 2020).

appeal. *Banner v. MERB and DHSS*, N13A-04-013 (Del. Super. Dec. 24, 2014), *aff'd*, 123 A.3d 472 (2015). Further, “[the grievant’s] pro se status does not excuse a failure to timely comply with the jurisdictional requirements of [the Merit Rules].” *Echols v. DSCYF*, MERB Docket No. 09-10-456, at p. 4 (Apr. 5, 2010) (quoting *Pinkett v. DHSS*, MERB Docket No. 08-02-415, at p. 5 (May 21, 2009)).

When the grievant fails to comply with time limits the grievance is void. MR 18.4. Merit Rule 18.6 provides that an employee shall file a grievance at Step 1 within 14 calendar days of the grievance matter or when he could reasonably have known about the grievance matter.

The Grievant argues the grievance is timely because he was not reasonably aware of his grievance matter until July 22, 2020, after the Superior Court heard cases relating to Merit system shift differential pay. However, the Court’s decision in the consolidated matters of *DelDOT v. Pearson* and *DelDOT v. Kwasniewski* does not retroactively apply to Mr. Chadick’s grievance as he was not a party in either matter. Moreover, although he filed the grievance on August 5, 2020, the grievance itself is dated June 30, 2020—nearly one month before he claims to have had knowledge of the Superior Court cases on July 22, 2020.

By his own admission, Grievant has known of this alleged shift differential pay issue since at least January 2014 but did not grieve the alleged violations for over six years. Even if the grievance had been timely filed, the claim for retroactive pay would be limited to 30 days prior to his filing the grievance on August 5, 2020<sup>4</sup>, at which time DOT had begun to pay Grievant shift differential pay commencing in May 2020, so that the claim for a retroactive remedy was moot.

The Grievant also asserts that he was denied due process during the grievance procedure because he was not provided the opportunity to meet and discuss his grievance at Steps 1, 2, and

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<sup>4</sup> Merit Rule 18.10: Retroactive remedies shall apply to the grievant only and, for a continuing claim, be limited to 30 calendar days prior to the grievance filing date...

3. Merit Rules 18.6 – 18.8 require at each step that the identified agent of the employer “... shall meet and discuss the grievance ... and shall issue a written reply.” The Board is concerned that both the Agency and DHR may have overlooked their obligations under the rules which extends the grievance process. Ultimately, however, the remedy for a failure to provide due process is to afford a grievant the due process to which he is entitled. The Grievant was afforded full opportunity to present his case before the Board, including hearing his reasons for why he believed his grievance to be timely.

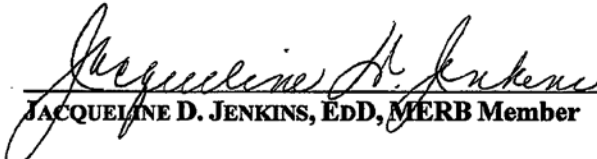
The Board’s jurisdiction is limited to considering timely grievances. In this case, because Mr. Chadick failed to file his grievance in accordance with the deadline in Merit Rule 18.6, the Board does not have jurisdiction to hear his grievance and it must be dismissed.

**ORDER**

It is this 2<sup>nd</sup> day of **June, 2021**, by a vote of 5-0, the Decision and Order of the Board to grant the Department of Transportation’s Motion to Dismiss.

  
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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